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ADDISON'S

TREATISE

ON THE

LAW OF CONTRACTS.

ELEVENTH EDITION.

A Treatise on the Law of Torts; or Wrongs and their Remedies.

By C. G. ADDISON,

Author of "The Law of Contracts."

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"The eighth edition is the most important that has been issued of late years, mainly because it supplies a want that has been widely felt in regard to negligence and illegal distress."—*Law Times.*

A

TREATISE

ON THE

LAW OF CONTRACTS

BY

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LATE OF THE INNER TEMPLE, BARRISTER-AT-LAW,
AUTHOR OF "THE LAW OF TORTS."

ELEVENTH EDITION.

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PREFACE

TO THE ELEVENTH EDITION.

In preparing the present edition the Editors have aimed at making the work in all respects complete and up-to-date, while avoiding any unnecessary departure from its general plan.

During the period of eight years which has elapsed since the publication of the last edition several statutes of great importance have been passed, and numerous cases have been decided, bearing more or less directly upon the subject of Contracts, and to the incorporation of these new materials the distinctive features of the present edition are mainly owing. The passing of the Marine Insurance Act, 1906, has necessitated the entire recasting of the section dealing with "Marine Insurance" on the lines of that Act. In the chapter on "Parties to Contracts," the sections of the Companies (Consolidation) Act, 1908, relating to contracts with registered companies have been substituted for the corresponding provisions of the previous Companies Acts; and the Limited Partnership Act, 1907, which has brought into existence a new legal entity, possessing full contractual powers, has been briefly set out. In the chapter on "Contracts for Services," the material provisions of the Workmen's Compensation Act, 1906 (replacing those of the earlier Act of 1897), and of the Trade Disputes Act, 1906, have been included; as have also those of the Prevention of Corruption Act, 1906, rendering criminal transactions of a corrupt nature between agents and third parties. The more important clauses of the Agricultural Holdings Act, 1908, are fully dealt with in the section on "Landlord and Tenant." Amongst other important statutes the following have also been duly dealt with: The Assurance Companies Act, 1909; the Marine Insurance (Gambling Policies) Act, 1909; and the Finance (1909—1910) Act, 1910.

It is believed that all the relevant cases which have been

decided within the period above referred to have been noticed in the course of the work; while a considerable number of older cases which would seem to have acquired a fresh significance in view of recent enactments or decisions have also been added.

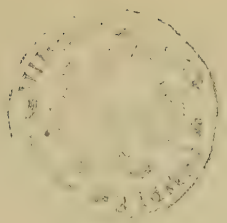
On the other hand, a considerable amount of matter, consisting chiefly of repealed statutes and cases rendered obsolete by recent legislation, has been excluded from the work; while many passages which seemed to state the effect of earlier cases at unnecessary length have been materially abridged. Certain portions in the last edition dealing with the law relating to illegal and excessive distress, which is more properly dealt with at length in the companion treatise on Torts, have also been eliminated. It has thus been possible to insert the new matter above referred to without unduly increasing the bulk of the present volume.

The Editors desire to express their great indebtedness to Mr. John R. McIlraith and to Mr. J. E. R. Stephens, both of the Middle Temple, for very valuable assistance rendered during the progress of the work. The chapter on "Transfer of Contracts" and the important and lengthy sections entitled "Master and Servant" and "Contracts for Carriage," as well as several smaller sections, are in their present form entirely due to the former; whilst the latter is responsible for other sections, and in particular for the important re-written section on "Marine Insurance."

The general index has been considerably enlarged and more information given under the main headings.

W. E. G.
J. R.

Temple,
March, 1911.



CONTENTS.

BOOK I.

LAW OF CONTRACTS IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

PAGE

SECT. 1.—*Nature of contracts.*

Definition of a contract 1
Parol or simple contracts 2
The consideration 2
Absence of consideration 2
Fraudulent consideration 5
Sufficient consideration 5
Work and services 5
A consideration of loss or inconvenience . . 6
Work and services rendered to third party . 7
Past consideration 7
Failure of consideration 8
Written promises without consideration . . . 9
Moral obligations 9
Forbearance of legal or equitable rights . . . 10
Adequacy of consideration 12
Bilateral contracts 13
Assent of the parties 14
Biddings at an auction 17
Acceptance of offers by post 17
Contracts by telegram 18
Contracts by deed 18
Requisites of deeds 19
Delivery of deeds 20
Delivery as escrow 21
Deeds *inter partes* and deeds poll 21
Contracts by matter of record 21

SECT. 2.—*Of the authentication of contracts.*

Contracts requiring authentication by signed writing . . 22
Contracts for the sale of interests in land 22
Contracts for furnished houses and lodgings . . 24
Agreements for the sale of a milk walk 25
Agreements to make alterations and repairs in buildings 25
Contracts for services in connection with the transfer of an interest in land 25

SECT. 2.—*Of the authentication of contracts—continued.* PAGE
Agreements concerning landmarks and boundaries . 26
Contracts respecting growing crops, grass, timber, &c. 26
Executory contracts for sale of goods or chattels . . . 28
Contracts for sale of fixtures and shares 28
Promises by executors and administrators 29
Promises to answer for debt, default, or miscarriage of another 29
Agreements in consideration of marriage 33
Agreements not to be performed within a year 34
Requisites of written memorandum of contract 36
Signature to memorandum 39
Signature by agents 41
Unconscientious use of Statute of Frauds 42
Executory promises requiring authentication by deed . . . 42
Authentication of leases, &c. 42
Confirmation of promises by infants 44

CHAPTER II.

OF THE INTERPRETATION OF CONTRACTS.

SECT. 1.—*General principles of interpretation.*
Construction of contracts 45
Evidence of surrounding circumstances 46
Latent ambiguity 46
Patent ambiguity 47
Figures and words at length 48
Repugnant and void limitations of liability 48
Limitation of liability to particular fund 49
Words amounting to a covenant 50
Words of proviso and condition may be construed as an express covenant 51
Covenants by implication of law 52
Bonds and obligations 53
Dependent and independent covenants 53
Conditions precedent 53
Waiver of conditions precedent 55
Independent covenants and promises 55
Covenants founded on a mutuality of obligation and liability 56
Implied stipulations 56
Usual covenants 57
Computation of time 57
Contracts made in one country and enforced in another . 58
Foreign bonds, bills, and notes—Conflict of laws . 60
Foreign purchases—Affreightments 63
What determines the *locus contractus* 63

SECT. 2.—*Of the admissibility of oral evidence in written contracts.*
Inadmissibility of oral evidence to add to, alter, or contradict a written contract 64
Proof of contracts partly by writing and partly by oral testimony 67
Annexation of agricultural and mercantile customs . . 69
Customary meaning of particular words 70
Terms of art—Trade acceptations 71
Oral evidence of conditional assent 71
Estoppel by deed 72
Estoppel in pais 72
Mistaken or untrue averments in written contracts not under seal 73

CHAPTER III.

OF THE AVOIDANCE OF CONTRACTS.

PAGE

SECT. 1.—*Void contracts.*

Distinction between void and voidable contracts . . . 75
Immoral contracts 75
Contracts tending to promote fornication and prostitution . 76
Contracts against public policy 77
Contracts for future separation of husband and wife . . 78
Contracts in restraint of marriage 78
Maintenance 79
Champerty 80
Contracts obstructing or interfering with administration of public justice 81
Contracts in contravention of policy of Act of Parliament . 83
Contracts for evasion of licensing and excise Acts . 85
Parish indemnities 85
Sale of letters of recommendation and public offices of trust . 86
Contracts in fraud of masters and employers 86
Fraud on creditors 87
Contracts made illegal by statutes 88
Illegal partnership 89
Illegal contract as to ground game 89
Illegal contract as to compensation under Agricultural Holdings Act 90
Illegal contract to pay tithe rent-charge 90
Illegal contract as to stamp duty 90
Illegal sale of offices 91
Sale of or charge on pensions 92
Simoniacal contracts 93
Resigning and charging benefices 94
Contracts in general restraint of industry and trade . . 95
Trade unions 96
Contracts restraining exercise of trade or profession in particular localities 97
Contracts creating monopolies 102
Contracts with foreign enemies 103
Gaming contracts and wagers 103
Lotteries 107
Betting-house keepers 107
Lawful games 107
Notes, bills, and mortgages given to secure money won at or lent for play 108
Money knowingly lent for gaming 108
Sale by illegal weights and measures 108
Coinage 109
Illegal sale of coals 110
Illegal sale of game 110
Illegal sale of spirituous liquors 110
Illegal sale of poison and adulterated food 111
Illegal sale of explosive substances 111
Chain-cables and anchors 111
Smuggling 112
Illegal sale of excisable articles 112
Sunday sales and trading 113
Contracts for prohibited services 114
Unauthorized medical practitioners 115
Unstamped contract notes 116
Unauthorized sea insurance transactions 116
Uncertificated solicitors 116
Contracts by rural district councillors 117
Contracts for payment of work otherwise than in current coin—
The truck system 117

SECT. 1.—*Void contracts—continued.* PAGE
Divisible contracts, part being good and part bad . . . 120
Indivisible contracts 121
Void foreign contracts 122
Effect of avoidance 122
Money in hands of depositaries and stakeholders . . 123

SECT 2.—*Voidable contracts.*
Avoidance of contracts on ground of fraud and unfair dealing . 124
False representations 126
Fraudulent concealment 126
Fraud by means of agents 127
Fraudulent misrepresentations by directors of companies 127
Fraudulent misreading of a deed 129
The effect of fraud 129
Determination of power of avoidance 130
Constructive fraud 131
Duress 133
Mistake 133
Rectification 134
Failure of consideration 136
Partial failure of consideration 137
Irregular allotment of shares 137

CHAPTER IV.

THE DISCHARGE OF CONTRACTS.

SECT. 1.—*Discharge by performance.*
Mode of performance 138
Cumulative and alternative stipulations 139
Time of performance 140
Conditions precedent to performance 142
Demand of performance, when necessary 143
Waiver of demand of performance 144
Dispensation of performance of conditions precedent . . 145
Tender of performance 146
Prevention of performance 146
Impossibility of performance 147
Payment and acceptance of part of admitted simple contract debt 151
Payment and acceptance before action 152
Payment according to direction of creditor 152
Payment by bill or note 153
Acceptance of renewed bills 154
Actions for debts secured by dishonoured bills or notes . . 155
Payment by cheque 156
Payment by stolen bank note 156
Payment by delivery of goods 157
Payment by legacy 157
Payment by stranger 157
Proof of payment 157
Presumption of payment 157
Payment to agent in ordinary course of business 158
Mode of payment to agents 159
Payment by agent 161
Payment to creditor of creditor 162
Payments to joint creditors, trustees, &c. 163
Payments made to bankrupt 164
Payment to one of several joint creditors 164
Appropriation of payments 164

SECT. 1.—*Discharge by performance—continued.* PAGE
Appropriation by debtor 165
Appropriation by creditor 165
Separate accounts and one entire running account . . 166
Avoidance of payment 167
Tender of payment 167
Offers of payment not amounting to tender 169
Conditional tenders 169
Apportionment of periodical payments 170

SECT. 2.—*Discharge by consent of the parties.*
Dispensation of performance 171
Renunciation of contract amounting to dispensation of performance 171
Powers of revocation and defeasance of contracts 173
Release and discharge of covenants before breach 174
Release and discharge of causes of action *ex contractu* . . . 174
Oral renunciation of claims on bills and notes 175
Release of one of several joint, or joint and several contractors 175
General releases 176
Conditional releases 177
Fraudulent releases 177
Composition in bankruptcy 177
Covenants not to sue 177
Covenants not to sue for limited time 178
Release by novation and substitution 179
Substitution of new contract in place of original contract . 179
Drafts and orders for money operating by way of novation 180
Novation in case of Life Assurance Companies . . . 182
Substituted performance of something different from what was stipulated to be done 183
Discharge by accord and satisfaction 183
Accord executory 184
Delivery and acceptance of securities in satisfaction and discharge of simple contract debts and causes of action . . . 185
Composition deeds and agreements 186
Transfer of property by way of accord and satisfaction . . 188
Accord and satisfaction with one of several joint plaintiffs . 188

SECT. 3.—*Discharge by operation of law.*
Alteration of contracts in writing 189
Immaterial alterations 190
Alteration of deeds 191
Evidence to explain alterations 191
Cancellation by mistake 191
Merger of simple contract in contract under seal 192
Judgment recovered 192
Foreign and colonial judgments 194
Discharge by death 194
Discharge by bankruptcy 195
Operation of payment of dividend 197
Composition with creditors 198
Effect of discharge on debts contracted abroad . . . 199
The statutes of limitation 199
Limitation of actions for recovery of money charged on lands 199
Limitation of actions for recovery of rent, and specialty and simple contract debts 202
What are specialty debts 203
Exception in favour of persons under temporary disabilities 203
Commencement of time of limitation 205
Contingent and conditional liabilities 207

SECT. 3.—*Discharge by operation of law—continued.* PAGE
Unknown and undiscovered breaches of contract . 209
Acknowledgments of deeds and specialities extending period of limitation 210
Acknowledgments of simple contract debts . . . 211
Form and requisites of acknowledgment. . . . 211
Lost acknowledgments 213
Acknowledgment by one of several joint contractors . 213
Acknowledgment by executor or devisee for life . . 214
Party to whom acknowledgment is to be made . . 214
Exemption of promise or acknowledgment from stamp duty 214
Part payment of principal debt, or payment of interest thereon 215
Part payment by bill or note 216
Part payment by performance of service or by delivery of goods 216
Part payment by adjustment and settlement of accounts 216
Payment of interest 217
Part payment by one of several joint and several debtors or co-contractors 218
Payment by strangers and agents 218
Payment to strangers and agents 219
Limitation of actions in respect of contracts made abroad . 219
Suspension of statute 220
No limitation in cases of express trust 220

CHAPTER V.

THE TRANSFER OF CONTRACTS.

SECT. 1.—*Transfer by assignment.*
Assignment of personal contracts 221
What is an assignment 224
Notice of assignment 225
When assignment of a *chose in action* may be made foundation of new contract 227

SUB-SECT. 1.—*Covenants running with the land.*
Covenants running with land 227
Privity of estate and privity of contract 227
Covenants between landlord and tenant, or reversioner and lessee 229
Covenants real annexed to reversionary estates . . . 231
Assignees of grantees of a licence 234
Requisites of covenant 234
Parties entitled to sue – Continuing breaches 237
Implied covenants 238
Covenants annexed to estate of joint tenants and tenants in common 238
Assignment of rents and annuities 239

SECT. 2.—*Transfer by death.*
Transfer of real estate 241
Descent of real and personal covenants and simple contracts . 241
Right of action in respect of breach of covenant . . . 242
Transfer of trust and mortgage estates on death 243
Transfer of covenants annexed to estates *pur autre vie* . . . 243
Transfer of covenants annexed to leasehold estates and interests 244
Bonds and personal covenants, and simple contracts . . 244
Executory contracts of a deceased person 245

SECT. 2.—*Transfer by death—continued.* PAGE
Liability of real estate for debts of deceased 246
Liability of personal representative on covenant for payment of rent 247
Covenants to repair 248
Effect of assignment of lease 248
Liabilities of personal representatives upon personal contracts . 249
Administration of assets 249
Liability of personal representatives on executory contracts of deceased 253
Joint liability of executors and administrators 254
Executor *de son tort* 254
Feme covert executrix 255
Death of personal representative—Continuation of chain of representation 256
Administration *de bonis non* 256
Survivorship of liability 257
Appointment of debtor as executor or administrator . . . 258
Appointment of creditor as executor 258
Civil death 259
Felons 259
Survivorship of joint contractors 260

SECT. 3.—*Transfer by marriage.*
Rights of husband upon wife's contracts before marriage at common law 261
Rights of husband upon wife's contracts by statute . . . 262
Liability of husband upon wife's contracts made before coverture 263
Liabilities of surviving wife 267

SECT. 4.—*Transfer by bankruptcy.*
Effect of receiving order 267
Executory contracts 269
Equitable interests not vesting in trustee 269
Money in the hands of bankrupt clothed with a specific trust 270
Personal rights of action 271
Sale of bankrupt's book-debts, good-will, &c. 271
Contracts in which bankrupt is interested in right of his wife 271
Contracts made with bankrupt during bankruptcy 272
Rights of undischarged bankrupts 274
Liability of trustee upon bankrupt's covenants and executory contracts 275
Set-off in bankruptcy 275
Effect of annulling adjudication 276

CHAPTER VI.

OF REMEDIES FOR BREACH OF CONTRACT.

SECT. 1.—*Damages.*
Compensation in damages for breach of contract 277
Nominal damages 277
General and special damages 278
Recovery of interest generally 279
Special damages 281
Recovery of cost of previous legal proceedings as part of damages 283
Pecuniary liabilities swelling amount of damages . . 284

SECT. 1.—*Damages—continued.* PAGE
Reduction of damages 284
Excessive damages 285
Penal obligations 285
Penalties for breach of contract 286
Liquidated damages 287
Penalties under the denomination of liquidated damages 290
Parties to be made plaintiffs in actions for damages for tort founded on contract 290

SECT. 2.—*Specific performance.*
Specific performance of contracts 292
Performance *sub modo* 300
Specific performance of statements and representations forming foundation of contract 300
Orders for specific delivery of chattels wrongfully detained 300
Injunction to compel performance or to restrain a breach of contract 300
Enforcement of covenants and agreements not to build, plant, or inclose, &c. 303
Injunction and specific performance to compel parties to abide by their own statements and representations . . 306
Foreign contracts 307
Injunction where option to take liquidated damages . . 307

CHAPTER VII.

OF THE PARTIES TO CONTRACTS.

Parties entitled to enforce simple contracts—Strangers to contract . 308
Parties entitled to enforce contracts under seal 311
Trustee and *cestui que trust* 312
Covenantees omitting to execute deed 313
Parties liable upon simple contracts 313
Parties liable upon deeds 315
Covenants in feigned names—Estoppel 315
Covenants and obligations by one person on behalf of another . 315
Agreements and promises, whether joint or separate 315
Joint or separate interests of covenantees 316
Rights of tenants in common 317
Rights of joint tenants 317
Joint or separate interests in the case of implied contracts . . 318
Joint and several liabilities *ex contractu* 319
Joint or several promises 320
Joint and several purchases 321
Contracts with agents—Rights of principal 321
Principals contracting as agents 322
Concealment of agency—Rights of undisclosed principals . . 322
Proof of agency where the contract is in writing . . . 324
Purchases in name of one of several joint adventurers . . . 324
Recovery of principal's money paid away by agent . . . 325
Rights of principal upon deeds made by agent 325
Liability of undisclosed principals upon simple contracts . . 326
Agent's authority to sign writings for principal 327
Special authority 329
Contracts by infant agents 330
Subsequent ratification by the principal 330
Limitation of authority 332
Publication of revocation of authority 333
Misrepresentation and fraudulent concealment by agents . . 333

Contracts with agents—*continued.* PAGE
Agent acting in his own interest 334
Liabilities of principals on contracts under seal 334
Warranties by agents 334
Representations not amounting to a warranty 336
Representations forming no part of contract with principal 336
Purchases by servant in name of master 337
Authority of foremen and managers 338
Of telegraph clerks 339
Of shipmasters 339
Limitation of authority of shipmasters 339
Of ship's husband 343
Of brokers 343
Of ship brokers 343
Of counsel 343
Of solicitors 344
Rights of agents on simple contracts 344
Right of action of factors, auctioneers, and policy brokers . 345
Repudiation of contract by principal 346
Pretended assumption of agency 346
Right of action of agents on contracts under seal 346
Liabilities of agents on simple contracts 347
Contracts by agents on behalf of foreign principals . . . 348
Undisclosed agencies—Oral evidence 348
Notoriety of agency—Public officers 350
Assumed or pretended agencies 351
Contracts by agents of irresponsible principals—Government agents 353
Money received by agent for principal 354
Money wrongfully and illegally received by agent . 355
Receipt of money by agents to be paid over to stranger 355
Liability of agent on contracts under seal 356
Exemption of public officers 356
Execution of deeds by agents not rendering them personally liable 356
Rights of partners upon contracts with third parties . . . 357
Implied contracts with firms in partnership 358
Trust services by partners 358
Contracts with trustees or directors of co-partnership . 358
Liabilities of partners—Power of partner to bind firm . . . 359
Admission by one partner 360
Notice to one partner 360
Partnership for particular purpose 360
Inchoate and incomplete partnerships 361
Execution for separate debt of one partner 361
Dealings by one partner in fraud of co-partnership . . 362
Transactions out of ordinary course of business 362
Bills and notes in name of firm, given by one partner to secure his private debt 363
Liabilities of dormant and secret partners 363
Private agreements exempting dormant partners from liability 364
Persons suffering themselves to be held out to the world as partners 364
Liabilities of incoming and retiring partners—Novation . 365
Assignment of share in partnership 367
Dissolution of partnership 367
Notice of retirement of partners, and of dissolution of partnership 367
Rights of partners on dissolution 368
Retirement of dormant partners 369
Directors of trading associations 369
Authority of committeemen 369

Contracts with agents—*continued.* PAGE
Liabilities of partners upon deeds 370
Limited partnerships 371
Corporations aggregate 372
Contracts with corporations 373
Want of mutuality of obligation 373
Incapacity 373
Contracts not under seal—Implied contracts 374
Contracts with trading corporations 378
Registered joint-stock companies 379
Requisites of contracts with joint-stock companies . . . 380
Provisional contracts 381
Contracts by agents 381
Contracts in violation of provisions of articles of association . 381
Debentures and floating charges 383
Liability of company and its officers 384
Effect of winding-up order 385
Power of liquidators to accept shares on sale of company's property 386
Contracts with railway companies 386
Contracts by promoters of railway made before incorporation . 387
Contracts by directors and committees of directors . . . 387
Informal contracts for services by railway companies . . 388
Contracts with co-partnerships and associations authorised to sue and be sued in name of secretary, treasurer, or public officer 388
Liability of public officer 389
Contracts with managers and shareholders of mining companies . 389
Who is a shareholder 390
Insurance companies 390
Contracts with banking co-partnerships 391
Banking co-partnerships under 7 Geo. 4, c. 46 392
Liabilities of provisional directors and committeemen 393
Powers and responsibilities of provisional committeemen . . 394
Contracts with committees of clubs and eleemosynary institutions . 395
Contracts with trustees and commissioners of public works . . 397
Salaries of public officers 398
Contracts with Metropolitan Borough Councils 398
Contracts with parish councils 399
Contracts with district councils 399
Contracts with parish officers 400
Friendly societies 400
Loans to friendly societies 401
Industrial and provident societies 401
Contracts with benefit building societies 402
Contracts with freehold land societies 403
Salaries of officers of friendly societies 403
Contracts with infants 404
Rights *ex contractu* of infants 407
Contracts binding upon infants 407
Contracts by infants for necessaries 408
What are necessaries 408
Things held not to be necessaries 409
Things which may, or may not, be necessaries according to circumstances 410
Infant purchasers of estates and railway shares . . 411
Avoidance of contracts made during infancy 411
Extortionate contracts with expectant heirs 412
Contracts with young persons—Undue influence 413
Obligation of parents to provide for their children . . . 413
Contracts with executors 414
Interest of executors or administrators 415
Liabilities of executors and administrators on their own contracts 416
Liability of executors and administrators for the acts of each other 417

PAGE
Rights of husband upon contracts made with wife during coverture . 418
Rights and liabilities of married women—Contracts during coverture 420
Inability of married women to bind themselves or their husbands by deed 423
Authority of wife to sign writings for husband 424
Loans of money to wife 424
Sale of goods to married women 425
Proof of assent of husband to wife's contracts 426
Non-liability of husband upon wife's contracts after separation . 427
Desertion of husband by wife 428
Desertion of wife by husband 428
What amounts to expulsion of wife by husband 430
Liability of husband for necessaries supplied to wife during separation by mutual consent 430
Effect of decree for judicial separation 431
Orders for protection of property and earnings of deserted wife . 431
Imprisonment of husband for term of years 432
Death of husband—Rights and liabilities of surviving wife . . 432
Death of wife—Husband's right by survivorship . . . 433
Liabilities resulting from reputed marriages 433
Contracts with bankrupts 434
Liabilities of trustee in bankruptcy 435
Contribution between trustees in bankruptcy 435
Contracts with drunkards 435
Contracts with lunatics 435
Contracts with aliens 437
Disabilities of convicts 438
Disabilities of outlaws 438
Parties privileged from actions and suits 439
Mandamus to parties to contracts 439
to public companies to make calls 440
to local boards, &c., to discharge pecuniary obligations . 440
Actions in which claim for mandamus maintainable . . . 441
not maintainable . . 443
Declaration in an action for a mandamus 443

CHAPTER VIII.

KINDS OF CONTRACTS.

SECT. 1.—*Express contracts* 445

SECT. 2.—*Implied contracts* 446
SUB-SECT. 1.—*General principles.*
Implied contracts 446
Implied covenants 448
Implied promises 449
Part execution of special contract 453
Implied contracts for sale 454
Implied contracts of indemnity 454
Foreign judgments 454
Statutes 455

SUB-SECT. 2.—*Implied promises in respect of money paid for another.*
Implied promise in respect of money paid for another . . 455
Money paid by mistake 456
Implied request to pay 456

SECT. 2.—*Implied contracts—continued.* PAGE
SUB-SECT. 3.—*Implied promises in respect of money received for use of another.*
Implied promises in respect of money received for use of another 460
When money paid by mistake cannot be recovered . 462
Money improperly received and wrongfully detained . 463
Money received without consideration 465
Money received under illegal contract 467
Money received by agents 468
Receipt of foreign money 470

SUB-SECT. 4.—*Implied promises in respect of accounts stated.*
Implied promise in respect of account stated 470
Account stated with trustees 471
Settlement of mutual accounts 472
Mistakes in accounts 473

BOOK II.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF SALE.

SECT. 1.—*Contracts for the sale of lands.*
Contracts of sale in general 474
Sale of lands and corporeal hereditaments 474
Signature of the writing 475
Sales by auction 476
Oral contracts for sale and purchase of estates . . . 479
Transfer of estate before execution of conveyance . . . 481
Registration of title 483
Production and proof of vendor's title 484
Title to realty 487
Period for which title ought to be shown . . . 488
Title to leaseholds 489
Waiver of proof of title and of objections to title . . . 491
Production of title deeds 493
Loss of title deeds after delivery of abstract . . . 494
Effect of misdescription 494
Alterations in condition of property 502
Time and mode of performance 502
Enlargement of time of performance 505
Non-performance by vendor 506
Non-performance by purchaser—Forfeiture of deposit . . . 509
Deposits in hands of auctioneers and third parties . . 509
Rights of the vendor 510
Damages for breach of contract 512
Damages for non-performance by vendor 513
Specific performance 514
Payment of purchase-money into Court 519
Assignment of contract to purchase land 520
Invalid sales Want of title in vendor Eviction of purchaser . 520

SECT. 1.—*Contracts for the sale of lands—continued.* PAGE
Qualified covenants for title 521
Damages for breach of covenants for title 523
Non-payment of purchase-money after execution of conveyance 524
Sale of pretenced titles 525
Avoiding sales on the ground of fraudulent concealment . 525
Sale subject to any defect or error 526

SECT. 2.—*Ordinary contracts for sale of goods.*
Preliminary 526
Sale and agreement to sell 527
Capacity to buy and sell 528
Contract of sale, how made 528
Contract of sale for 10*l.* and upwards 528
Memorandum—requisites 529
Brokers' bought and sold notes 531
Signature 532
Acceptance and actual receipt of goods 532
Receipt for inspection and approval 534
Acceptance and receipt where goods purchased by bailee . 534
Constructive acceptance 535
Constructive possession by purchaser and extinction of right of lien 535
Acceptance of bills of lading, delivery orders, and dock warrants 536
Acceptance and receipt of goods by carriers, forwarding agents, and agents for custody 537
Part acceptance and actual receipt binding the contract . 537
Earnest and part payment 539
Subject-matter of contract—Existing or future goods . . 539
The price 540
Increased customs duty on goods warehoused added to price 541
Conditions and warranties as to time 542
Enlargement of time of performance 544
Conditions and warranties—Express 545
Warranties made pending negotiation for sale of property . 545
Private representations made prior to sale by auction . . 545
Representations amounting to warranty 546
Warranty on sales of horses 547
Evidence of breach of warranty—What constitutes unsoundness 548
Proof of manifest defects not covered by warranty . . 549
Proof of vice 549
Representations not amounting to warranty 549
Representations of matters of opinion and belief . . 550
Proof of warranties 551
Reliance on representations and not on plaintiff's own judgment 552
Construction of express warranties 553
Warranties by agents 554
Distinction between condition and warranty 554
When condition to be treated as warranty 554
Conditional and defeasible sales 555
Effect of a breach of warranty by the vendor 557
Rejection and non-acceptance of goods sold 558
Conditions and warranties—Implied undertaking as to title, &c. 559
Sale by description 562
Implied conditions as to quality or fitness 564
Implied warranty where nothing said respecting quantity or quality—*Caveat emptor* 565
Where article sold for specific purpose 566
Warranty of merchantable quality 568
Implied warranties on sales of provisions 569
Implied warranty by seller that goods are his own manufacture 569

SECT. 2.—*Ordinary contracts for sale of goods—continued.* PAGE
Warranty as to genuineness of articles with trade-marks . 569
Warranty of description as to country 570
Sale by sample 570
Sales voidable on ground of fraudulent misrepresentation . 572
False representation through third party 573
Fraudulent breach of warranty 574
Marked goods—Fraudulent use of trade-marks . . 574
Fraudulent concealment 575
Sale "with all faults" 577
Purchaser electing to avoid contract 578
Transfer of property—Intention of party 579
Rules for ascertaining intention 579
Imperfect sales—Unascertained price. 583
Sale or return 585
Imperfect sales of unascertained chattels 585
Contracts for sale and manufacture of goods 585
Selection and appropriation of goods to use of purchaser . 587
Reservation of right of disposal 588
Delivery under bill of lading 589
Risk *prima facie* passes with property 591
Undivided shares. 591
Sale by person not the owner. 592
Market overt 593
Sale under voidable title 594
Re-vesting of property in stolen goods on conviction of offender 594
Seller or buyer in possession after sale 595
Purchaser having notice of writ of execution 596
Duties of seller and buyer 596
Actual and constructive delivery of goods 597
Proof of delivery 597
Payment and delivery, concurrent conditions 598
Rules as to delivery 599
Delivery of wrong quantity 600
Delivery by instalments 602
Delivery to carrier 604
Deterioration to goods in transit 605
Buyer's right to examine goods 605
Acceptance 606
Liability of buyers—Neglect or refusal to take delivery—Risk . 606
Unpaid seller's rights 607
Unpaid seller's lien 608
Lien for price of goods sold 608
Insolvency of purchaser 608
Countermand of delivery orders 609
Shares and undivided quantities sold as such . . 611
Part delivery 611
Termination of seller's lien 611
Intervention of rights of sub-purchasers . . . 611
Stoppage *in transitu* 612
Duration of transit Carriers and forwarding agents . . 613
Delivery on buyer's ship 616
Mode of stopping *in transitu* 618
Re-sale by buyer—Rights of sub-purchasers . . . 618
Effect on sale of lien or stoppage *in transitu* 620
When vendor may re-sell 621
Actions for breach of the contract—Remedies of seller—Action for price 622
Non-payment of price—Goods bargained and sold . . 622
Goods sold and delivered. 623
Goods sold on credit 624
Damages for non-acceptance 625
Remedies of buyer—Damages for non-delivery . . . 626
Specific performance 628

SECT. 2.—*Ordinary contracts for sale of goods—continued.* PAGE
Remedy for breach of warranty 629
Damages for breach of warranty 630
Special damages—Re-sale with warranty—Costs of legal proceedings 631
Interest and special damages 632
Sale by auction 632
Sale and transfer of tenant's fixtures and trade fixtures . . 633
Authentication of contracts for the sale of fixtures . . 633

SECT. 3.—*Of contracts for the sale of incorporeals.*
Grants and transfers of incorporeal rights and incorporeal hereditaments 634
Nature of shares in limited company 636
Title to shares in mining companies 637
Title to shares, scrip, and letters of allotment 638
Executory contracts for the sale of shares 639
Agreements for transfer of shares 640
Mode of performance 641
Time of performance 644
Implied undertakings and indemnities annexed to contracts for sale of shares—Payment of calls . . . 644
Rights of scripholders 645
Transfer deeds 646
Share certificates 647
Registration of forged transfers 648
Specific performance of contracts for purchase and sale of stock and shares 649

CHAPTER II.

THE CONTRACT OF LETTING.

SECT. 1.—*Landlord and tenant.*
Leases 651
Agreements for leases 651
Present demises 652
Proof of terms of holding 653
Lease by estoppel 654
Demises by agents 655
Ascertainment and identification of subject-matter of demise 656
Things appurtenant 656
Commencement and duration of leases 657
Leases from year to year 659
Half-yearly, quarterly, monthly, and weekly hirings . . 661
Tenancy at will 661
Tenancy by sufferance 663
Leases under powers 664
Rights and liabilities of lessor and lessee 664
Covenants for quiet enjoyment 665
Covenants for payment of rent 667
Covenants not to "let, set, or demise" 668
Non-execution of lease by lessee 670
Non-execution of lease by lessor 671
Concealment of latent defects 672
Demises of houses unfit for habitation 673
Payment of rent 674
Exception of damage by fire 674
Extinction and suspension of rent by eviction . . . 674
Eviction by railway companies under statutory powers 676
Assignment of reversion 676

SECT. 1.—*Landlord and tenant—continued.* PAGE
Payment of ground rent by tenant—Deduction thereof from tenant's rent 676
Deduction of income-tax, land-tax, sewers-rate, and other outgoings from rent 677
Right to distrain for rent 680
Extinguishment of right to distrain by assignment of reversion 681
Apportionment of rent and conditions 681
Compensation for use and occupation of land . . . 681
Constructive occupation 682
Use and occupation by one of several joint tenants or tenants-in-common 684
Covenants and agreements to repair 685
Tenant's liability for damage to demised premises . . . 689
Permissive waste by lessees for terms of years . . . 689
Commissive waste by lessees for terms of years . . . 690
Waste by tenant from year to year 692
Timber trees 693
Duty of tenant to preserve landlord's landmarks and boundaries 693
Fences 693
Restrictive covenants as to user of premises . . . 694
Fixtures 695
Landlord's fixtures 696
Tenant's fixtures 696
Agricultural tenant's fixtures removable by statute . 697
Ornamental fixtures 699
Domestic and trade fixtures 699
Fixtures removable by local custom and usage . . 700
Abandonment of right to remove ornamental and trade fixtures 700
Inability of tenant to remove fixtures after expiration of term 701
Right of purchasers or mortgagees to remove fixtures. 702
Abandonment of right to remove fixtures . . . 703
Licence to commit waste 704
Right of reversioners to enter to inspect waste . . . 704
Injuries from fire 704
Damages for waste 705
Damages for obstructing reversioner inspecting waste . 706
Injunction to restrain waste 706
Effect of acquiescence in commission of waste . . . 707
Right of property in trees and bushes 707
Defeasible leases 707
Disclaimer and forfeiture 708
Provisoes for re-entry 709
Effect of re-entry on lessee's liability on his covenants . 712
Waiver of forfeiture—Lessor's right of election . . . 713
Relief against forfeiture—Breach of covenants or conditions respecting insurance or payment of rent 714
Assignment after forfeiture 715
Costs 716
Surrender—Deeds and agreements of surrender 716
Surrenders by act and operation of law 717
Substitution of new tenant in place of original tenant . 718
Surrender and acceptance of surrender by joint tenants . 719
Non-extinguishment by surrender of derivative estates . 720
Effect of surrender on existing breaches of covenant . . 720
Notice to quit, when necessary 720
Mode of giving notice 721
Form and effect of notice—Alternative and peremptory notices 723
Length of notice 724

SECT. 1.—*Landlord and tenant—continued.* PAGE
Time of quitting specified in notice 725
Application of notice to current term of hiring 726
Commencement of current year of tenancy 727
Calculation of current year from one of usual feast days 728
Admission by tenant at commencement of term . . 728
Different periods of entry 729
Service of notice to quit 730
Service of notice through post-office 731
Acceptance of informal notice—Proof of notice . . . 731
Waiver of notice to quit 731
Proof and effect of holding over 732
Double yearly value for holding over 733
Double rent for holding over 734
Determination of tenancies by railway notices . . . 735
Recovery of possession 735
Licence to eject 736
Recovery of land under provisoes for re-entry . . . 736
Where there is no sufficient distress 737
Recovery of possession of deserted demised premises . . 738
Recovery of possession of houses and small tenements . 739
Rights of outgoing and incoming tenants Away-going crops, allowance for tillage, manure, &c. 740
Sale of hay, straw, or manure off land 746
Non-payment of tithe-rent charge by tenant . . . 747
Inclosures of waste land by tenants 748
Leases obtained by misrepresentation 748
Cancellation of a lease 749
Assignment 749
Breach of contract to grant lease 749
Actions by landlords for use and occupation of premises . . 750
Damages for breach of covenants for quiet enjoyment . 750
Breach of covenant not to assign 751
Breach of covenant to repair 751
Breach of covenant to consume hay and straw on farm 753
Damages for holding over 754
Mortgagor becoming tenant to mortgagee 754
When mortgaged premises are in occupation of lessees . 755
Leases by mortgagor and mortgagee after mortgage . . 757
Notice of mortgage to lessee 759
Contracts for letting and hiring of furnished houses and lodgings 760
Implied warranties on part of lessor of furnished apartments 760
Rights and liabilities of lodging-house keepers and lodgers 761
Destruction of buildings by fire 762
Proof of duration of term of hiring 762
Notice to quit 763
Letting and hiring places of stowage and deposit . . . 764
Room or standing places in factories 764
Innkeepers—Who is a common innkeeper 764
Duty to receive guests 765
Extent of obligation 766
Protection of guest from loss of goods 766
Limitation by statute of liability of innkeepers . . . 769
Who is a guest and traveller 769
Innkeepers' lien 771

SUB-SECT. 1.—*Distress for rent.*
Distress for rent in arrear 772
No right to distrain where no certain ascertained rent . . 775

SECT. 1.—*Landlord and tenant—continued.*
SUB-SECT. 1.—*Distress for rent—continued.* PAGE
Conditions precedent to the right to distrain 776
Agreements not to distrain 776
Acceptance of bill or note by way of payment 777
Distress for rent payable in advance—Several demises . . 777
Distress after termination of term 778
Distress by agents Joint tenants Tenants in common, &c. . 779
By executors and administrators 781
Tender of rent before distress 781
Time, mode, and place of distraining 781
Things not distrainable 783
Perishable articles—Growing crops, fruit, money, &c. . 785
Property of strangers 786
Wearing apparel, bedding, tools and implements of trade 786
Goods of under-tenant and lodger 787
Livestock and machinery 788
Railway rolling stock 789
Other statutory exemptions 789
Materials to be manufactured or worked upon . . . 790
Property of guests at a common inn 791
Chattels in custody of law 791
Foreign ambassadors 791
Companies in liquidation 792
Things distrainable 792
Chattels of traders left in possession of tenant . . . 792
Chattels mortgaged by tenant 793
Under licence to distrain 794
Seizure of goods fraudulently removed 794
What amounts to distress for rent 796
Distress for more rent than due 796
Repeated distresses for same rent 797
Impounding goods 797
Abandonment of distress 800
Statutory power of sale 800
Tender of rent before sale 801
Parties to whom tender may be made 801
Notice of distress 801
Sale 802
Costs and expenses 803
Effect of non-compliance with statutes authorizing sale . . 804
Keeping distress without selling 804

SECT. 2.—*The letting of chattels.*
Bailments for hire 805
Duties and responsibilities of hirers of chattels . . . 807
Use of chattels let to hire—Losses from negligence . . 807
Losses from piracy, robbery, theft, disease and accident . 807
Determination of bailment 808
Loans of money to be used for hire 808
Money-lenders 809
Liabilities of borrower—Care to be taken of things borrowed—Negligence and misconduct of borrower 810
Losses from ordinary casualties 812
Misuser by borrower—Want of skill 812
Restoration of thing borrowed, or its equivalent—Loss by robbery, fire, or accident 813
Adverse claimants—Eviction by title paramount 814
Implied obligations and duties of lender 814
Loans of money to one of several partners 814
Loans to registered companies 815
Damages in actions for not replacing stock 815

CHAPTER III.

CONTRACTS OF SECURITY.

SECT. 1.—*General Principles.* PAGE
The contract of mortgage 817
The contract of pledge 817

SECT. 2.—*Mortgage, &c., of chattels.*
Mortgages of goods and chattels 818
Pledges of goods and chattels—What may be given in pledge . 820
Who may pledge 820
Implied warranty of title by pledgor 821
Pledgor's right of redemption 825
Sale of pledgor's right of redemption 825
Forfeiture of pledge 826
Foreclosure of right of redemption—Pledgee's power of sale 826
Accounts between pledgor and pledgee 827
Custody and safe keeping of pledge 827
Use of things pledged 827
Statutory rights and liabilities of pawnbrokers 828
Who are to be deemed pawnbrokers 828
Sale of unredeemed pledges 829
Warranties on sales of unredeemed pledges . . . 829
Imperfect hypothecation—Licences to seize in case of non-payment of debt 829
Revocation of licence by act of bankruptcy . . . 831
Mortgages of ships and shares in ships 831
Maritime lien—Bottomry 834
Power of ship-master to hypothecate 835
Lien on vessels causing damage 837
Priority of maritime liens 838
Hypothecation of cargo and merchandize 838
Illegal pledges 839
Mortgage of fixtures 839
Right to fixtures as between mortgagor and mortgagee . 840

SECT. 3.—*Mortgage, &c., of incorporeals.*
Mortgages of shares and stock 841
Mortgages of stock and shares void by reason of reputed ownership 841
Lien upon shares and stock 842

CHAPTER IV.

CONTRACTS FOR SERVICES.

SECT. 1.—*Work and labour.*
Deposit or simple bailment 844
Requisites of deposit—Executory and executed promises . 844
Liabilities of depositary—Negligent keeping Ordinary casualties 844
Carelessness on part of depositor in selecting person notoriously unfit to be trusted 845
Theft by servant of depositary 846
Use and enjoyment by depositary of subject-matter of deposit 846
Transfer of deposit to stranger—Remedy of depositor . . 847

SECT. 1.—*Work and labour—continued.* PAGE

Restoration of deposit 847
Joint and several deposits 848
Transfers of subject-matter of bailment—Adverse claimants 848
Eviction by title paramount 848
Stakes in hands of stakeholders to abide event of lawful game or money deposited on condition 849
Power of depositary to compel rival claimants to establish their title by interpleader 850
Liabilities of depositary holding possession wrongfully . 850
Liabilities resulting from the taking possession of goods by finding 850
Liabilities of depositor—Lien of depository 850
Deposits of money with one of several partners . . . 850
Deposits of money with bankers 852
Deposit of bills, notes, and securities with bankers . 853
Receipt of cheques by bankers for customers . . 853
Duty of bankers to honour drafts of customers—Payment of cheques 854
Joints accounts and joint deposits with bankers . . 855
Deposits and accounts with bankers in names of trustees, agents, and receivers 855
Separate accounts opened by same person in different capacities 856
Loss of trust money in hands of bankers . . . 856
Payment of forged cheques, drafts, and orders on bankers—Negligence of banker and of customer . 857
Forged indorsements 858
Cheques paid by mistake 859
Payment of cheques at branch banks 859
Crossed cheques 860
Lien of bankers 860
Damages for non-payment of cheques by bankers . 860
Mandate or gratuitous commission—Non-feazance and misfeazance 860
Bailment of money and chattels to be carried gratuitously—Loss or damage from negligence 861
Bailments of chattels to be repaired gratuitously—Employment of unskilled persons 861
Custody and safe keeping of the chattel 862
Bailment of money for investment 862
Bailments of living animals—Negligent management . 862
Bailments of perishable commodities 863
Use of subject-matter of mandate 863
Theft and negligence by servants of bailee 864
Payment of expenses 864
Warehousing of chattels for reward 864
Negligent keeping of goods by warehousemen and depositaries for hire 865
Loss of chattels by wharfingers 865
Passenger's luggage deposited in cloak-rooms . . . 865
Loss of cattle—Liabilities of agisters of cattle . . . 866
Distinction between contracts for work and services and contracts of sale 867
Executory and executed contracts for work 868
Work and services in preserving lost chattel, and restoring it to owner 868
Salvage services 869
Services by trustees 872
Promises of presents in return for services 873
Honorary and gratuitous services 873
Rights and liabilities of employer and workman . . . 874
Defeasible contracts for work and services 874
Time of performance 875

SECT. 1.—*Work and labour—continued.* PAGE
Entire performance of contract condition precedent to payment 876
Divisible and apportionable work 876
Building contracts 876
Work to be approved of before payment 877
By architect or surveyor 878
Relief against biassed or corrupt decisions of architects and surveyors 878
Actions for wrongfully withholding certificate . . 879
Architect's property in plans 879
Effect of employer's taking possession and making use of unfinished work 879
Defective work accepted by employer 880
Substantial performance of building contracts . . 880
Abatement of contract price 882
Effect of non-performance of building contracts by time specified 883
Penalties for non-performance of building contracts by time specified 883
Security for due performance of contract 884
Destruction of work before payment—Loss of materials, and loss of price of work 884
Deviations from building contracts—Extras . . 886
Prevention of performance of building contracts . . 887
Right of lien of workmen and artificers 887
Liabilities of taskworkmen 888
Implied obligation to do work well—Skilled workmen . 889
Work rendered useless by negligence or incompetence of workman 889
Useless and unskilful professional services 890
Actions on account of negligence of solicitors . . . 890
Of barristers 895
Of surveyors or valuers 896
Of bankers 896
Of public officers 897
Of surgeons 897
Wilful selection of unqualified persons 898
Arbitrators 899
Bailment of materials to workmen to be manufactured or repaired for hire 899
Theft by servants 900
Distinction between robbery and theft 900
Liability of bailee for negligence of servant . . . 901
Losses occasioned by negligence of bailor 901
Fraudulent concealment of dangerous nature of articles 901
Deposit of goods under special contract 902
Detention of chattels by bailees under claim of lien . . 902
Right of lien 902
at variance with terms of bailment . . . 904
Parties against whom lien may be claimed . . . 905
General lien 907
Notice that goods will be held subject to general lien 907
General lien by custom of trade—Warehouse-keepers—Wharfingers 908
Extinguishment of lien by abandonment of possession 908
Statutory power of sale in discharge of right of lien . 909
Tender of debt in extinguishment of right of lien . 910
Transfer of the bailment 910
Joint and separate rights of action 913
Re-delivery of materials furnished by employer . . . 913
Contracts for performance of work Building contracts—Prevention of performance—Damages 913

SECT 2.—*Master and servant.* PAGE

Contracts of hiring and service 915
Authentication and proof of contract 917
Yearly hirings 918
Defeasible yearly hirings—Domestic service—Month's warning or a month's wages 919
Monthly or weekly hiring 920
Service at will 921
Rights and liabilities of master and servant 921
Dangerous employments 924
Injuries to servant from negligence of fellow-servant . . 926
Workmen's Compensation 928
Duties of servant 929
Termination of the contract of hiring and service . . 930
Warning—Notice to leave 931
Dismissal for incompetency or misconduct 931
Disability from sickness 933
Wrongful dismissal 933
Damages for wrongful dissolution of contract—Wages *pro ratâ* 934
Amount of wages recoverable—Deductions . . . 935
Jurisdiction of the County Court and of justices . . 936
Breach of contract involving injury to others . . . 936
Seamen's wages 936
Contracts of apprenticeship 937
Rights and liabilities of parties to indentures of apprenticeship 938
Dissolution of the contract of apprenticeship . . . 939
Discharge by Court of Summary Jurisdiction . . . 940
Damages for refusing to employ, and for wrongful dismissal 940
Servant's character 941
Title to clothes by hiring and service 941

SECT. 3.—*Principal and Agent.*

Agencies and commissions 942
Punishment of corrupt transactions with agents 944
Revocation of authority 945
When agent's authority is irrevocable 946
Accounts 946
Liabilities of brokers, factors, and commission agents to their principals 947
Of principals to brokers, factors and agents 948
Del credere commissions 948
Liabilities of insurance brokers to their principals . . 949
Share-brokers and stock-brokers 950
Solicitors 952
Sheriff's officers 953
Estate and house agents 953
Receipt of money and goods by agents on account of their principals 954
Receipt of money by sub-agents 955
Payment by one agent to another 956
Purchases by agent with money of principal 956
Frauds by agents on their principals 957
Payment of commission 957
Extra work by agents 958
Commission of ship-brokers 958
Commission of policy-brokers 959
Commission of travellers for orders 959
Commission of house agents, estate agents, and auctioneers 959
Right of agent to be re-imbursed upon revocation of authority 960
Lien of factors and brokers 961
Of packers 962

SECT. 3.—*Principal and agent—continued.* PAGE
Of insurance brokers 962
Of solicitors 963
Of shipmasters 966
Of ship's husband 966
Of shipwrights 967
Indemnification of agents 967
Breach of warranty of authority by agents 968
Damages for breach of warranty of authority Costs of previous legal proceedings 968
Negligence of bank managers 969

SECT. 4.—*Contracts for carriage.*
Contracts for carriage of merchandise 969
Contracts of affreightment—Charter-parties 970
Possession of ship 971
Parties to charter-parties 971
Performance of terms and conditions of contract . . . 973
Representations in charter-parties 975
Substantial performance of conditions precedent . . . 976
Time of performance 976
Mode of performance—Complete cargo 978
Impossibility of performance 979
Authority of agents of ship-charterers 980
Carriage of merchandise under bills of lading 980
Countermand of the shipment—Re-delivery to consignor . 982
Loss or damage by the way 982
Implied promise to carry safely 984
Limitation of liability by special contract . . . 985
Loss by act of God, dangers and accidents of seas, rivers, and navigation 986
Loss occasioned by negligence or misconduct . . . 987
Loss by fire—Limitation of responsibility of shipowners by statute 990
Losses occasioned by negligence of licensed pilots . . 991
Delivery of goods by shipowners 992
Losses on board lighters conveying goods from ship to shore 992
Payment of freight or hire 993
Calculation of freight 996
Payment *pro ratâ* 997
Time freight 997
Shipowner's lien for freight—Payment of freight by consignee 998
Liability for freight resulting from acceptance of goods under bills of lading 999
Payments in lieu of freight extinguishing right of lien 1002
Time for discharge of cargo 1002
Payment of demurrage on charter-parties and bills of lading 1003
Primage and average 1008
General average 1008
Transfer of bills of lading 1013
Damages for breach of charter-parties 1014
Carriage of dangerous goods 1014
Carriage of passengers and merchandise by land—Injuries to passengers and goods 1015
Primâ facie evidence of negligence 1018
Loss of goods or money by the way 1019
Who is to be deemed a common carrier 1019
Duties of common carrier 1021
Representations by railway companies' time tables . 1023
Implied undertaking of railway companies to forward passengers or goods without unnecessary delay . . . 1024

SECT. 4.—*Contracts for carriage—continued.* PAGE
Negligence of common carriers 1025
Loss of goods by common carriers 1026
Contributory negligence 1029
Limitation of liability by public notice Carriage of valuables, &c. 1030
Statutory notice of increased rate of charge 1031
Common carriers may protect themselves by special contract against fire and sea risks . . . 1033
Special contracts exempting from responsibility for damage to certain classes and descriptions of goods 1033
Void limitations of liability 1035
Loss of passengers' luggage by railway companies . 1036
Application of Carriers Act 1038
Person to make declaration of value and pay increased rate of carriage 1039
Articles to which Act extends 1040
Losses covered by the statute 1041
Losses through theft by common carrier's servants 1041
Liabilities of common carrier's servants 1042
Losses occasioned by consignor's defective packing . . 1043
Railway and Canal Traffic Act Liability of railway, canal and steamboat companies for neglect, default and breach of duty 1043
Special contracts with railway and canal companies for carriage of goods and chattels 1045
Unjust and unreasonable conditions in special contracts 1046
Just and reasonable conditions 1048
Liability of railway company during sea transit . . 1049
Implied authority of railway servants to bind company by special contract 1050
Commencement and duration of liability—Loss or damage in warehouses 1050
Delivery of goods at place of destination . . . 1051
Delivery of luggage at railway stations . . . 1052
Acceptance of goods and passengers to be carried beyond limits of ordinary destination 1053
Refusal of consignee to receive goods –Carrier as bailee 1055
Payment of fare or hire—Carrier's lien 1056
Common carrier's charges Railway charges 1058
Duty of railway and canal companies to afford reasonable facilities for carriage of passengers, merchandise and chattels 1059
Carriage of packed parcels 1062
Injunction to enforce compliance with Railway and Canal Traffic Act 1063
Passenger fares Right of passenger to alight at intermediate station 1065
Season-ticket—Conditions—Forfeiture of deposit 1065
Dangerous railway bridges, viaducts, and embankments . . 1066
Duties and responsibilities of common ferrymen 1066
Notice of action to railway companies 1067
Parties to be made plaintiffs in actions against carriers . . 1067
Joint bailment to common carrier 1069
Parties to be made defendants 1069
Carriage of goods and passengers over distinct lines of railway 1070
Measure of damages 1071
In respect of delay in delivery 1074
In case of personal injuries 1075
Claims against a common carrier for refusing to carry . . 1075
Defences to actions 1076

SECT. 4.—*Contracts for carriage—continued.* PAGE
Evidence at trial—Proof of bailment 1076
Proof of special contract 1077
Proof of *jus tertii* by common carrier 1078

CHAPTER V.

OF CONTRACTS OF INDEMNITY.

SECT. 1.—*Principal and surety.*
Contract of suretyship 1079
Authentication of guarantees 1080
Primary and secondary liabilities 1081
Consideration stated on face of guarantee 1082
Incomplete contract of guarantee 1083
Conditions precedent 1083
Fidelity bonds 1084
Duration and extent of surety's liability 1085
Release of surety 1085
Discharge of surety by change in employment of principal 1086
Bonds and guarantees under seal to partnerships and associations 1087
Limitation of surety's liability 1088
Continuing liabilities 1088
Guarantees not importing continuing liability . . 1090
Conditions precedent to surety's liability 1090
Duty of person guaranteed 1091
Alteration of principal obligation discharging surety . . 1092
Extension of time of payment 1093
Suretyship where relation does not appear upon face of contract 1095
Effect of giving time to principal debtor reserving remedies against surety 1095
Effect of release of principal debt 1096
Release of principal obligation reserving remedies against surety. 1096
Release of one of several co-sureties 1097
Payment by principal debtor 1097
Fraud on sureties 1098
Discharge of surety by death of principal 1099
Death of surety 1099
Indemnification of sureties 1100
Contribution between co-sureties 1100
Death of co-sureties 1102
Assignment of judgments and securities for surety's indemnification 1102
Judgment against principal does not bind sureties . . . 1103
Breach of contracts of indemnity—Bankruptcy of principal debtor 1104
Recovery of interest on money paid by sureties 1104
Guarantees in firm's name by one of several partners . . 1105

SECT. 2.—*Of marine insurance.*
Contracts of insurance 1105
Mutual insurance 1106
Policies of insurance 1107
Marine Insurance—Definition 1107
Insurable interest—Definition 1108
Wagering or gaming policies 1109
When it must attach 1111
Quantum of interest 1112

SECT. 2.—*Of marine insurance—continued.* PAGE
Assignment of interest 1113
Assignment of marine policy 1114
Insurable value—Measure of value 1115
Disclosure and concealment by the assured—Insurance is *uberrimæ fidei* 1116
Disclosure and concealment by agent effecting insurance . 1121
Representations pending negotiation of contract . . 1122
Fraudulent misrepresentation 1123
When contract is deemed to be concluded 1124
The policy—Contract must be embodied in policy . . . 1124
What it must specify 1125
Signature of insurer 1126
Designation of subject-matter 1126
General insurance on goods and merchandise—Deck cargoes . 1128
Deck cargoes 1129
Risks covered by policy—Custom and usage 1130
Intermediate voyages—Custom and usage 1130
Voyage and time policies 1131
Valued policy 1132
Unvalued policy 1132
Floating policy by ship or ships 1132
Form and construction of policy 1133
Rules for construction—Usage 1135
Commencement of risk—"Lost or not lost" claim . . 1137
"At and from" 1137
Insurance on freight 1141
On passage money 1143
On profits 1143
On bottomry and respondentia loans 1144
Commencement of risk on goods 1145
Duration and termination of risk on goods 1148
Of risk on vessel 1151
Arrival at port of destination—Mooring in safety . 1153
Premium 1155
Policy effected through broker 1156
Return of premium. 1157
Void policy—Return of premium 1159
Double insurance—Over insurance—Right of contribution . 1160
Warranties 1161
Implied warranty of seaworthiness of ship 1162
No implied warranty that goods are seaworthy . . . 1165
Warranty as to nationality 1165
Warranty as to lawful adventure 1165
Express warranties 1165
"Well" and "in good safety" 1166
Time of sailing 1166
Sailing with convoy 1167
Neutrality 1167
Deviation from voyage insured 1168
When excused 1170
Delay in voyage 1171
Insurances on voyages to several ports and places . . . 1172
Licences to touch at different ports and places . . . 1172
Included and excluded losses 1173
Loss by perils of the sea—Negligence and misconduct of master and mariners 1174
Losses from old age and decay and other causes—Sea perils . 1176
Perils of fire and jettison 1177
Loss by capture and seizure 1178
Arrests, restraints and detainments of kings, princes, and people 1180
Loss by pirates, rovers, and thieves 1182
Peril of barratry of master and crew 1182

SECT. 2.—*Of marine insurance—continued.* PAGE
Perils, losses, and misfortunes generally 1183
Total and partial losses—Constructive and actual—Distinctions between 1184
Constructive total loss 1185
Notice of abandonment 1186
Party to give notice of abandonment 1188
Form of notice of abandonment 1188
Effect of notice of abandonment 1188
Insurance on freight 1189
When insured may abandon—Total losses 1190
Capture and re-capture and abandonment—Embargo—*Spes recuperandi* 1193
Unreasonable abandonment 1194
Partial loss—Exception of partial losses 1194
General and particular average—Policies warranted free from average 1196
General average loss 1197
Measure of indemnity for partial losses 1197
Insurance on separate bales or packages—Average and total losses 1199
Exceptions of general average losses and stranding of vessel . 1201
Suing and labouring clause 1203
Measure of indemnity for loss—Extent of liability of insurer . 1203
Signed adjustments 1206
Loss of freight 1207
Partial loss of freight 1207
Partial loss of goods, merchandise, &c.—Standard of value and measure of depreciation 1208
General average contributions and salvage charges 1210
Liabilities to third parties 1211
General provisions as to measure of indemnity 1211
Successive losses 1211
Rights of insurer on payment 1211

SECT. 3.—*Of fire insurance.*
Insurance against peril by fire 1212
Parties entitled to benefit of insurance 1213
Things covered by policy 1214
Warranties 1214
Alteration of premises increasing risk 1215
Notice of alterations 1215
Misdescription of insured premises 1216
Fraudulent concealment of facts materially affecting risk . 1216
Risks covered by policy 1216
Fires caused by negligence—Extraordinary risks . . 1218
Notice of loss—Partial losses 1218
Forfeiture of policy—Non-payment of premium—Days of grace 1218
Divers insurances on same property 1219
Insurances by warehousemen and bailees of customer's goods . 1220
Inability of insured to sue when no damage sustained . . . 1221
Rights of insurer and insured as against wrongdoers causing the loss 1221
Laying out insurance money in rebuilding 1221

SECT. 4.—*Of life insurance.*
Contracts of life assurance 1222
Contracts with *de facto* directors 1223
Interest of insured 1223
Warranties—Conditions 1226
Fraudulent misrepresentation and fraudulent concealment . 1226
Principal and agent 1227
Indisputable policies 1228
Risks covered by life policies 1228

SECT. 4.—*Of life insurance—continued.* PAGE
Forfeiture of policies—Non-payment of premium—Days of grace 1229
Non-inception of risk—Return of premium 1231
Waiver of forfeiture 1231
Assignment of life policies 1232
Right of party interested in policy to recover insurance money 1233
Industrial assurance companies—Disputes 1234
Separation of funds of assurance company 1234
Winding-up of insurance companies 1235
Insurance against injury by accident 1236
Railway accidents—Damages 1236
Breach of covenants to insure 1237
Loss of life policy—Payment into court 1237

SECT. 5.—*Insurance against burglary.*
Burglary 1237

CHAPTER VI.

MERCANTILE INSTRUMENTS.

Bills, notes, and cheques.
Negotiable instruments 1241
Bills of exchange—Definition 1241
Drawing of a bill 1243
Bills, when payable 1244
Dating of bills 1245
Sum payable 1245
Negotiability and transfer of bills 1246
Inchoate bills 1249
Negotiation of bill to party already liable thereon . 1250
Payment in due course 1250
Restrictive indorsements 1251
Completion of contract by delivery 1252
Holder in due course 1255
Intermediate infirmities of title 1255
Rights of holder 1256
When holder bound to prove he gave value for bill 1256
What is valuable consideration 1257
Proof of want of consideration 1258
Fraudulent transfers and indorsements 1258
Forged indorsement 1259
Accommodation bills 1260
Indorsement of bills overdue 1260
Presentment for acceptance 1261
General and qualified acceptances 1261
When presentment for acceptance is necessary . . 1262
Rules as to presentment for acceptance 1262
Excuses for non-presentment for acceptance . . . 1263
Non-acceptance after customary time for consideration 1263
Qualified acceptances 1263
Liability of the acceptor—Failure of consideration . . 1264
Liability of drawer and indorser 1266
Giving time for payment 1267
Presentment for payment 1268
Non-presentment for payment when excused . . . 1269
Days of grace—Calculation of time 1271
Notice of dishonour 1272
Rules as to 1273
What amounts to 1275
Posting the notice 1275

Bills, notes, and cheques—continued. PAGE
Foreign bill — Protest — Noting — Damages — Re-exchange 1276
Proof of notice of dishonour 1278
Excuses for delay in giving notice of dishonour . . 1278
Dispensation of notice of dishonour 1278
Transfer by delivery without indorsement 1280
Bills taken up *supra protest* 1281
When the acceptor is holder at maturity 1282
Renunciation of bills—Express waiver 1283
Rules as to sets 1283
Promissory notes 1284
Liability of maker 1285
Transfer of promissory notes 1286
Note payable on demand 1287
Presentment of note for payment 1287
Indorsement of notes and bills overdue 1288
Days of grace 1288
Bills and notes for payment of sums under £1 1288
Dividend warrants 1289
Foreign scrip 1289
Bankers' cheques 1289
Presentment of cheque for payment 1289
Revocation of banker's authority 1291
Crossed cheques 1291
Duties of banker as to crossed cheque 1292
Cancellation of bills and notes 1293
Alterations in bill or note avoiding the contract . . . 1294
Immaterial alterations 1295
Lost instruments 1298
Damages recoverable on the dishonour of bills 1298
Damages for not meeting bills at maturity . . . 1291
Specific appropriation of securities 1291
Parties to bills and notes —Capacity and authority of parties . 1300
Signature essential to liability 1301
Forged or unauthorised signature on bill 1301
Signature by procuration 1301
Stranger signing bill liable as indorser 1301
General principles 1302
Bills and notes by trustees or directors of co-partnerships . 1306
By corporations 1306
By registered companies 1306
Conversion of bills and notes 1308
Of lost or stolen bank notes or negotiable securities . . 1308

CHAPTER VII.

CONTRACTS OF ASSOCIATION.

Of marriage.
Contracts in restraint of marriage 1310
Marriage brokerage contracts 1310
Bonds and unilateral covenants to marry 1311
Contracts of betrothment 1312
Authentication of contract 1312
Time of performance 1313
Excuses for non-performance 1313
Conditional promises of marriage 1314
Fraudulent concealment of material circumstances—Misrepresentation and deceit 1314
Accidents and mishaps altering condition of either of parties 1315
Abandonment of contract 1315

Of marriage—continued. PAGE
Damages for breach of promise of marriage 1315
Promises of portions and settlements 1316
Contracts in fraud of settlements and promises of marriage portions 1317
Marriage settlements 1318
Marriage contract, its nature and requisites 1318
Age of consent 1319
Presumption of marriage 1319
Void marriages 1319
Publication of banns and celebration of marriage in false name 1321
Marriage by licence in false name 1321
Marriage before registrar 1322
Fraudulent celebration of sham marriage 1322
Test of validity of marriage—Conflict of laws 1322
Release by marriage 1323
Deeds of separation 1324
Subsequent reconciliation 1326

APPENDIX ON STAMPS.

CHAPTER I.

GENERAL PRINCIPLES.

PAGE
The Stamp Act, 1891 1327
Interpretation of terms. 1327
Instruments relating to Crown property 1328
How instruments are to be written and stamped 1328
Stamping of instruments after execution 1328
Instruments to be charged with more than one duty 1330
Several deeds on one sheet of paper, vellum, &c. 1330
Appropriated stamps 1333
Facts affecting duty to be set forth 1333
Valuation of foreign or colonial money or stock and marketable securities 1333
Effect of statement of value 1333
Denoting stamp 1333
Reception in evidence of unstamped instruments 1334
Use of adhesive stamps 1335
Cancellation of adhesive stamps 1335
Re-stamping altered contracts 1335
Admissibility in evidence for collateral purposes of unstamped or wrongly stamped documents 1337
Stamp duties on contracts executed abroad 1338

CHAPTER II.

OF THE STAMPS APPROPRIATE TO PARTICULAR CONTRACTS

Stamp duties on deeds 1339
Progressive duty 1339
Attested copies—Duplicates and counterparts 1339
Purchase of property under authority of statute 1340
Conveyances or transfer on sale 1341
Contracts not operating as transfers and conveyances . . . 1345
Mortgages 1346
Marketable securities and foreign and colonial share certificates . 1349
Covenants 1353
Exchanges, partitions, &c. 1353
Settlements 1353
Revocations 1355
Releases or renunciations 1355
Contract for the sale of vesture, and herbage, and growing grass . 1358
Agreements for leases 1358
Assignments and surrenders of leases—Agreements to surrender . 1358
Contracts of apprenticeship 1358
Charter-parties 1360
Transfers of ships 1360

PAGE
Agreements 1360
Exemptions 1362
Agreements relating to the sale of goods and chattels . 1363
Guarantees and indemnities—Exemption of guarantees for payment of goods 1365
Export bonds and delivery orders 1365
Warrants for goods 1365
Transfer of government stock 1366
Share warrants 1366
Stock certificates to bearer 1366
Orders or authorities for the transfer of mining shares . . 1367
Scrip certificates 1367
Contracts for the sale and purchase of land and interests in land 1368
Contracts for the sale of fixtures 1368
Contracts of hiring and service 1368
Contracts for the letting and hiring of taskwork . . . 1368
Calculation of the value of an agreement 1369
Contracts of uncertain value 1370
Bare offers and proposals 1370
Bare admissions and acknowledgments 1370
Acknowledgments of debt in writing 1372
Bare licences and authorities 1372
Simple contracts of deposit and pledge 1373
Bank notes 1373
Bills of exchange and promissory notes 1374
Post-dated cheques 1378
What instruments are bills of exchange within Stamp Act . . 1378
Bills of lading 1379
Contracts of insurance 1380
Legal alterations in policy 1381
Penalty unless policy duly stamped 1382
Contracts of insurance against accidents or sickness or damage to property 1382
Contracts of insurance upon any life or lives 1384
Receipts 1385

GENERAL INDEX 1389

TABLE OF CASES.

PAGE

Aaltje Willemina (The) . . 339
Aaron's Reefs *v.* Twiss . . . 128
Abbot *v.* Blofield 418
Abbott *v.* Douglas 1264
— *v.* Parfitt 415
— *v.* Wolsey . . 533, 535
Abbotts *v.* Barry 454
Abdy, *In re* 1326
Aberaman Iron Works *v.* Wickens . 494, 496
Aberdeen Glen Line *v.* Macken (ss. Gairloch) . . . 1003, 1005
Aberdeen Ry. *v.* Blaikie . . 872
Abouloff *v.* Oppenheimer & Co. . 455
Abraham *v.* Reynolds . . . 926
Abrahams, *In re* 252
— *v.* Abrahams . . . 252
Abrey *v.* Crux 65
Abrokerri (Ashanti) Mines *v.* Economic Bank . . . 1291
Absolom *v.* Gething . . . 144
Absolon *v.* Marks 1285
Acatos *v.* Burns . 838, 983, 997, 1165
Accidental Death Ins. Co., *In re* . 165
Accomac (The) . . . 975, 986
Acebal *v.* Levy 529
Acey *v.* Fernie 1230
Ackerman *v.* Lockhart . . . 966
Ackland *v.* Lutley . . . 58
Ackroyd *v.* Smith 228
Acocks *v.* Phillips 737
A'Court *v.* Cross 212
Acraman *v.* Morrice . . 535, 588
Adam *v.* Newbiggin . . . 131
— *v.* Richards 559
Adams, *Ex parte* 965
— *v.* Buckland . . . 257
— *v.* Clutterbuck . . . 58
— *v.* Dansey 31
— *v.* Grane 790
— *v.* Haggar 652
— *v.* Lindsell 18
— *v.* London & York Ry. . 1025, 1030
— *v.* Mackenzie . . . 1188
— *v.* Royal Mail St. P. Co. . 977
— *v.* Wordley 65
Adamson *v.* Jarvis . 454, 546, 560, 967
Adderley *v.* Dixon 294
Addinell's Case 17
Addis *v.* Gramophone Co. . . 940
Addison *v.* Cox . . . 182, 226
— *v.* Gibson 320
— *v.* Preston (Mayor) . . 398
— *v.* Shepherd . . 785, 787
Addlestone Linoleum Co., *In re* . 129
Adlard *v.* Booth 885

PAGE

Adnam *v.* Sandwich (Earl) . . 202
Adsetts *v.* Hives 191
African Assocn. and Allen, *In re* 933
Afrika (The) 871
Agacio *v.* Forbes 324
Agar *v.* Athenæum Life Assur. Soc. . . . 382, 815
— *v.* Macklew 517
Agenoria S.S. Co. *v.* Merchants' Mar. Ins. Co. . . . 1206
Aggs *v.* Nicholson . . 1302, 1307
Agius *v.* G. W. Colliery Co. . . 284
Agra Bank *v.* Hoffmann . 450, 854
— *v.* Leighton . . . 1256
— and Masterman's Bank, *Ex parte* . . . 223, 386
Agricult. Cattle Ins. Co. *v.* Fitzgerald 190
Ahearn *v.* Bellman . . . 724
Aiken *v.* Short 462
Aiksham (The) . . 1139, 1151
Aitchison *v.* Lohre . 1195, 1203, 1206
Aitken, Lilburn & Co. *v.* Ernsthausen . . . 995, 1014
Ajello *v.* Worsley 540
Ajum Goolam Hossen & Co. *v.* Univ. Mar. Ins. Co. . . . 1109
Akerblom *v.* Price 870
Akerman, *In re* 252
Aktieselskab Helios *v.* Ekmann . 1005
Aktieselskabat Lina *v.* Turnbull & Co. 995
Alabaster *v.* Harness . . . 79
Albert Assur. Co., *In re* . . 1231
Albion Fire Ins. Co. *v.* Mills . 63
— Life Assur. Soc., *In re* . 1236
Albrecht *v.* Sussman . . . 438
Alchin *v.* Hopkins . . . 95
Alchorne *v.* Gomme . . . 773
Alciator *v.* Smith 438
Alcock *v.* Smith . . . 61, 1260
Alder *v.* Boyle 957
Alderson *v.* Langdale . . . 1297
— *v.* Maddison . . 24, 480
— *v.* Pope 365
Aldous *v.* Cornwell . . 189, 190, 1295, 1296
Aldridge *v.* Ferne 679
— *v.* G. W. Ry. . . 1045, 1053
— *v.* Johnson 587
Aleberry *v.* Walby . . . 261
Alexander *v.* Barker . . 357, 358
— *v.* Brown 167
— *v.* Dowie 339
— *v.* Gardner 146
— *v.* Gibson 334

PAGE

Alexander *v.* Mackenzie . . 392
— *v.* Owen . . . 122
— *v.* Sizer . . 1303, 1307
— *v.* Steinhardt & Co. . 225, 226
— *v.* Vane . . . 455
— *v.* Worman . . 314, 398, 404, 868
Alexander's Timber Co., *In re* 35, 38
Alford *v.* Vickery . . 722, 730, 773
Aline (The) 838
Alison, *In re* 201
Allan *v.* Gripper . . . 613, 615
— *v.* Kenning 1090
— *v.* Lake 564
— *v.* Sundius 69
Allanson *v.* Atkinson . . . 463
Allard, *Ex parte* 199
— *v.* Bourne 383
Allcock *v.* Moorhouse . 676, 684, 756
Allday *v.* G. W. Ry. . 1045, 1046
Allen *v.* Allen 407
— *v.* Bennet . . . 37, 529
— *v.* Bryan 240
— *v.* Cameron 629
— *v.* Clark 891
— *v.* Coltart 1005
— *v.* Dundas 164
— *v.* Edmunson . . 1278, 1279
— *v.* Hayward 442
— *v.* Hopkins 559
— *v.* Kemble 61
— *v.* Mawson 1242
— *v.* Milner 194
— *v.* Minor 405
— *v.* Morrison 1333
— *v.* Pink 65
— *v.* Rescous 76
— *v.* Sea, &c., Ins. Co. . . 1307
— *v.* Seckham 303
— *v.* Smith 772
— *v.* Sugrue 1187
— *v.* Waldegrave . 315, 356, 397
— & Sons, *In re* . . . 840
Alley *v.* Deschamps . . . 515
Allhusen *v.* Brooking . . . 660
Alliance Bank *v.* Broom . . 10
— *v.* Kearsley . 363, 815
— of Simla *v.* Carey . 203
Allison *v.* Bristol Mar. Ins. Co. . 994, 995, 1126, 1142, 1190
Allkins *v.* Jupe 1109
Allnutt *v.* Ashenden . . . 1082
Allsopp *v.* Wheatcroft . . . 95
Allum *v.* Dickinson . . . 679
Alner *v.* George 222
Alnholme (The) 1005
Alps (The) 1207
Alsace Lorraine (The) . . . 1202
Alsager *v.* Close 1308
— *v.* Spalding . 84, 87, 468
— *v.* St. Kath. Dock Co. . 998
Alsbury, *In re* 170
Alston *v.* Herring 1028
Alt *v.* Alt 1316
Alton *v.* Mid. Ry. . . 308, 970, 1017
Alvarez de la Rosa *v.* Prieto . . 115
Amalia (The) 990
Ambler, *In re* . . . 252, 423

PAGE

Amery *v.* Rogers 1204
Ames *v.* Hill . . . 1370, 1371
Amicable Society *v.* Bolland . . 1229
Amies *v.* Stevens . . . 990, 1066
Amor *v.* Fearon 932
Amos *v.* Smith . . . 216, 218
— *v.* Temperley . . 348, 1001
Amott *v.* Holden 205
Ancher *v.* Bank of England . . 325
Ancona *v.* Marks . . . 332, 1255
Anctil *v.* Manufacturers' Life Ins. Co. 1228
Andalusian (The) 990
Anders Knape (The) . . . 870
Anderson *v.* Beard . . . 951
— *v.* Buckton . . . 577
— *v.* Butler's Wharf Co. . 833
— *v.* Edie . . . 1223, 1224
— *v.* Fitzgerald . . 1214, 1227, 1231
— *v.* Hayman . . . 314
— *v.* Hillies . . . 161
— *v.* Marten . . . 1178
— *v.* Martindale . . 260
— *v.* Midland Ry. . 773, 775
— *v.* Morice . . 592, 1109, 1111
— *v.* Oppenheimer . . 666
— *v.* Pitcher . . . 1167
— *v.* Radcliffe . . . 81
— *v.* Thornton . . 1084, 1231
— *v.* Wallis . . . 1193
Anderton & Milner's Contract, *In re* 57
Andrew, *In re* . . . 964, 965
— *v.* Aitken 229
— *v.* Boughey . . . 184
— *v.* Bridgman . . . 670
— *v.* Hancock . . . 677
— *v.* Moorhouse . . . 994
— *v.* Ramsay . . . 943
— *v.* St. Olave's Board of Works 459
Andrews *v.* Belfield . . 588, 877, 878
— *v.* Dally . . . 314, 398
— *v.* Ellison . . . 391
— *v.* Hailes . . . 748
— *v.* Mellish . . . 1172
— *v.* Paradise . . . 666
— *v.* Smith 32
Angel *v.* Merchants Mar. Ins. Co. 1185, 1191
Angell *v.* Duke . . . 25, 66
Angerstein *v.* Bell . . . 1155
Anglesey (Marquis), *In re* . . 279
Anglo-Argentine Live Stock Agency *v.* Temperley . . 1011
Anglo-Californian Bank *v.* London & Prov. M. & G. Ins. Co. 1134
Angus *v.* McLachlan . . 771, 772, 905
Ankerstein *v.* Clarke . . 255, 418
Annandale *v.* Harris . . . 76
— *v.* Pattison . . . 1331
Annen *v.* Woodman . . . 1139
Annesley *v.* Muggeridge . . 510
Anon. (1 Campb. 398) . . . 355

PAGE

Anon. (2 Ch. C. 19) . . . 521
— (Cro. Eliz. 78) . . . 164
— (2 Dick. 802) . . . 965
— (Dyer, 56) . . . 183
— (1 Esp. 349) . . . 169
— (1 Freem. 288) . . . 256
— (Lofft. 146) . . . 574
— (12 Mod. 415) . . . 939
— (12 Mod. 564) . . 328, 827
— (Moore, 70) . . . 334
— (Salk. 162) . . . 1331
— (Salk. 280) . . . 35
— (Skin. 367) . . . 237
— (1 Str. 407) . . . 466
— (4 Taunt. 785) . . . 526
— (Ventr. 361) . . . 22
Ansell *v.* Baker . . . 192
Anspach (Margravine) *v.* Noel . 492
Anstey *v.* Marden . . . 182
Antoine *v.* Morshead . . . 438
Antram *v.* Chace . . . 56, 313
Anworth *v.* Johnson . . . 690
Apollinaris Co. *v.* Nord Deutsche Ins. Co. . . . 1107, 1129
Appleby *v.* Johnston . . . 14
— *v.* Myers . . . 149, 884, 885
Applegarth *v.* Colley . . . 849
Appleton *v.* Binks . . . 356
— *v.* Campbell . . . 77
Arbouin *v.* Anderson . . . 1309
Arcangelo *v.* Thompson . . 1179
Arcedeckne, *In re* . . . 1102
Archbold *v.* Scully . . 199, 200
Archer *v.* Baynes . . . 531
— *v.* James . . . 118
— *v.* Marsh . . . 98
Ardan S.S. Co. *v.* Andrew Weir & Co. . . . 148, 978, 979
Arden *v.* Pullen . . . 673, 674
— *v.* Sullivan . . . 43, 232, 671, 732
— *v.* Tucker . . . 358
Arding *v.* Lomax . . . 932
Ards *v.* Watkin . . . 240
Argentina (The) . . . 619
Argoll *v.* Cheney . . . 191
Arlington *v.* Merricke . 1084, 1086
Armfield *v.* Allport . . . 1245
Armistead *v.* White . . . 767
— *v.* Wilde . . . 767
Armitage, *In re* . . 170, 176, 1097, 1105
— *v.* Lanc. & Y. Ry. . 928
Armory *v.* Delamirie . . 335, 912
Armstrong, *In re* . . . 422
— *v.* Armstrong . . 829
— *v.* Lewis . . . 829
— *v.* Stokes . . 162, 327
— *v.* Turquand . . 1232
Armsworth *v.* S. E. Ry. . . 1075
Arne (The) . . . 974, 1004
Arnison, *Ex parte* . . . 794, 803
Arnold, *In re* . . . 495
— *v.* Blencowe . . . 256
— *v.* Cheque Bank . . 858
— *v.* Garner . . . 958
— *v.* Poole (Mayor) . 14, 166, 377

PAGE

Arnold *v.* Revoult . . . 418
Aronegary *v.* Sambonade . . 1319
Arris *v.* Stukeley . . . 464
Arrowsmith, *Ex parte* . . 95
Arthur, *In re* . . . 148
— *v.* Barton . . . 339
— *v.* Dale . . . 361
— *v.* Wynne . . . 148
Artizans' Land and Mortgage Corp., *In re* . . . 203
Arundel (Lady) *v.* Phipps . . 629
— *v.* Trevillian . . 1311
Ascherson *v.* Tredegar Dry Dock Co. . . . 1100
Asfar *v.* Blundell . . . 994, 1120, 1144
Ashbee *v.* Pidduck and Neame . 261
Ashbury Carriage Co. *v.* Riche . 382
— *v.* Watson . . . 382
Ashby *v.* Ashby . . . 470
— *v.* Child . . . 258
— *v.* James . . . 216
— *v.* White . . . 277
— *v.* Wilson . . . 694
Ashcroft *v.* Bourne . . . 739
— *v.* Crow Orchard Coll. Co. . . 148, 977, 1004
v. Morrin . . . 529
Ashdown *v.* Ingamells . . . 268
Ashendon *v.* L. B. & S. C. Ry. . 1047
Ashersmith *v.* Drury . . . 118
Ashfield *v.* Ashfield . . . 408
Ashley's Case . . . 128
Ashley *v.* Pratt . . . 1172
Ashling *v.* Boon . 215, 1333, 1334, 1377
Ashmole *v.* Wainwright . . 463
Ashmore *v.* Cox . . . 147
Ashpitel *v.* Bryan . . . 73, 1213
Ashton, *In re* . . . 435
— *v.* Lanc. & Y. Ry. . . 1065
Ashworth *v.* Mounsey . . . 507
— *v.* Outram . . . 421
— *v.* Stanwix . 922, 923, 924, 927
Asiatic Banking Corp., *Ex parte* . 223
Aspdin *v.* Austin . . . 51, 449, 915
Aspinall *v.* Wake . . . 415
Assicurazioni Generali *v.* Bessie Morris S.S. Co. . 980
— *v.* Empress Assur. Corp. . . 1123
Associated Portland Cement Manufacturers *v.* Tolhurst . 223
Assop *v.* Yates . . . 923
Assunta (The) . . . 983, 1067
Astbury, *Ex parte* . . 697, 702
— *v.* Astbury . . . 219
Astey *v.* Emery . . . 537
Astle *v.* Wright . . . 137
Astley *v.* Johnson . . . 1265
— *v.* Reynolds . . . 463
— *v.* Weldon . . . 288, 290
Aston *v.* Heaven . . . 1015
Astry *v.* Ballard . . . 657
Athenæum Soc., *Ex parte* . . 391
Atherstone *v.* Bostock . . . 763
Atkin *v.* Acton . . . 932

PAGE

Atkin *v.* Barwick 309
Atkins *v.* Banwell 400
— *v.* Curwood 426
— *v.* Farr 1311
— *v.* Humphrey . . . 683
— *v.* Owen 1308
— *v.* Wardle 385
Atkinson *v.* Bell . . . 586, 587, 622
— *v.* Cotesworth . . 999
— *v.* Denby . 87, 123, 458, 465, 468
— *v.* Hawdon . . . 1297
— *v.* Littlewood . . 157
— *v.* Mackreth . . . 851
— *v.* Settree . . . 9
— *v.* Smith . . . 608
— *v.* Stephens . . . 1014
— *v.* Woodall . . . 470
Atkyns *v.* Amber 345
— *v.* Kinnier . . . 99, 289
— *v.* Pearce . . . 425, 428
Atlantic Mutual Ins. Co. *v.* Huth 983
Atlas (The) 869, 870
Atlee *v.* Backhouse . . . 465
Attack *v.* Bramwell . . 797, 804
Attenborough, *In re* . . . 1373
— *v.* Clarke . . 1253
— *v.* Mackenzie . . 1250
— *v.* St. Katharine's Docks Co. . 594, 850
Attersol *v.* Stevens . . . 704
Attorney-General *v.* Bailey . . 110
— *v.* Brown . . 1345
— *v.* Carlton Bank . . 1386
— *v.* Cox . . 720
— *v.* Day . 481, 498
— *v.* Felixstowe Gas Light and Coke Co. . . 1340
— *v.* Gaskill . . 399
— *v.* G. E. Ry. . 387
— *v.* G. N. Ry. . 387
— *v.* Mersey Ry. . 387
— *v.* Regent's Canal and Dock Co. 1347
— *v.* R. C. of Physicians . 873
— *v.* Stephens . 693
— *v.* Tomline . 135, 748
Attwood *v.* Emery . . 141, 544
— *v.* Griffin . . . 1294
— *v.* Munnings . . . 328
— *v.* Rattenbury . . 1248
— *v.* Small . . . 497, 550, 573
Atty *v.* Lindo . . 1143, 1148
Atwood *v.* Ernest . . . 848, 913
— *v.* Sellar 1011
Aubert *v.* Gray 1180, 1182
Aubrey *v.* Fisher 502
Augero *v.* Keen 1085
August (The) . . . 63, 341

PAGE

Augusta (The) 837
Auguste Legembre (The) . . 870
August Korff (The) . . 869, 870
Austen *v.* Baker 314
— *v.* Ward 459
Austerberry *v.* Oldham Corporation 228, 304
Austin, *In re* 964
— *v.* Bethnal Green Guardians 377
— *v.* Bunyard . . 1293, 1378
— *v.* Drewe 1217
— *v.* Gwinnell . . . 91
— *v.* G. W. Ry. . 291, 970, 1017, 1025
— *v.* Manchester, &c., Ry. . 1022, 1048
— *v.* Mills 192
— *v.* Newham . . 173, 658
Austin Friars S.S. Co. *v.* Strack . 936
Australasian R. M. Steam N. Co. *v.* Marzetti 374
Australasian Steam Nav. Co. *v.* Morse 838, 983
Australian Agricultural Co. *v.* Saunders 1150
Autey *v.* Hutchinson . . . 354
Aveline *v.* Whisson . . . 22
Avery *v.* Cheslyn 699
Aveson *v.* Kinnaird (Lord) . . 1226
Axford *v.* Reid 264
Ayles *v.* S. E. Ry. . . 1018, 1030
Aylesford (Earl) *v.* Morris . . 413
Ayloffe *v.* Scrimpshire . . . 178
Ayrey *v.* Davenport . . . 193
Azemar *v.* Casella . . . 136, 563

Babbage *v.* Coulburn . . . 82
Babcock *v.* Lawson . . . 124
Bach *v.* Meats 796
— *v.* Owen . . . 143, 539
Bache *v.* Proctor 47
Bachelor *v.* Gage 236
Backhouse *v.* Charlton . . 1291
— *v.* Hall . . . 1087, 1088
— *v.* Harrison . . . 1309
Bacon *v.* Simpson 1337
Badcock *v.* Hunt 678
Badeley *v.* Vigurs 233
Badische Anilin, &c., Fabrik *v.* Isler 636
Badische Anilin, &c., Fabrik *v.* Schott 96
Baerselman *v.* Bailey . . . 986
Bagel *v.* Miller 360
Bagge *v.* Mawby 797
Baglehole *v.* Walters . . . 578
Bagot *v.* Williams 192
Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co. . . . 393, 749
Bagster *v.* Portsmouth (Earl) . 436
Bagueley *v.* Hawley . . . 560
Bahia and San Francisco Ry., *In re* 649
Baildon *v.* Walton . . . 215, 217

PAGE

Baile *v.* Baile 963
Bailey *v.* Bidwell . . . 1308, 1309
— *v.* Bodenham . . 1269, 1290
— *v.* Croft 6
— *v.* Edwards . . 1093, 1094, 1095
— *v.* Finch 856
— *v.* Harris 110
— *v.* Johnston . . . 276
— *v.* Macaulay . . 393, 395
— *v.* Porter 1275
— *v.* Sweeting . . 38, 529, 1040
— *v.* Thurston . . . 274
Baillie *v.* Kell 932
Baily, *Ex parte* 17
— *v.* De Crespigny . . 148, 150, 151, 540
— *v.* Merrell . . . 125, 550
Bain *v.* Assets Co. . . . 199
— *v.* Fothergill . . . 513, 749
— *v.* Kirk 50
Bainbridge *v.* Firmstone . . 12
— *v.* Neilson . . 1193, 1194
— *v.* Pickering . . 408
— *v.* Wade . . . 1082
Bainbrigge *v.* Browne . . . 413
Baines *v.* Ewing 332
— *v.* Geary . . 95, 98, 121
— *v.* Woodfall . . . 17
Baker, *Ex parte* 1276
— *v.* Brook 239
— *v.* Cartwright . . . 1314
— *v.* Courage & Co. . 103, 205, 209, 463
— *v.* Gray 831
— *v.* Greenhill . . . 457
— *v.* Heard 177
— *v.* Hedgecock . . . 121
— *v.* Holtzapffel . . . 682
— *v.* Lipton 152
— *v.* Monk 516
— *v.* Nottingham Banking Co. 821
— *v.* Sampson 430
— *v.* White 1310
— *v.* Williams . . . 520
Balch *v.* Symes 964
Baldey *v.* Parker . . . 534, 538
Baldwin *v.* Alsager . . . 1369
Baldwyn *v.* Smith 437
Balfe *v.* West 860
Balfour *v.* Crace . . 1085, 1089, 1099
— *v.* Ernest . . 381, 1307
— *v.* Sea Assur. Co. . . 1257
Balkis Consolidated Co. *v.* Tomkinson 638, 649
Ball, *Ex parte* 272
— *v.* Cullimore 662
— *v.* Dunsterville . 19, 43, 334, 370
— *v.* Gordon 1305
Ballantyne *v.* Mackinnon . 1165, 1174
Ballard *v.* Shutt 483
— *v.* Way 499
Bally *v.* Wells 230
Balmoral S.S. Co. *v.* Marten . 1132, 1203, 1210
Bamberger *v.* Commercial Credit . 191

PAGE

Bamfield *v.* Goole and Sheffield Transport Co. . . 1023
— *v.* Tupper . . . 217
Bamford *v.* Iles 1084
— *v.* Shuttleworth . . 849
Bampton *v.* Paulin . . . 33
Banco de Portugal *v.* Waddell . 269
Bandy *v.* Cartwright . . 449, 666
Bangor, &c., Mut. Mar. Protection Assoc. *v.* Jenkins, Bird's Case . 1106
Banister, *In re* 499
Bank of Africa *v.* Cohen . . 1098
Bank of Australasia *v.* Bank of Australia. 392
— *v.* Flower . 367
— *v.* Harding . 194
— *v.* Nias . 455
Bank of China, Japan and the Straits *v.* American Trading Co. 142
Bank of England *v.* Cutler . . 649
Bank of Ireland *v.* Evans' Trustees 649, 897
Bank of Montreal *v.* Exhibit and Trading Co. . 1295
— *v.* Stuart . . 133
Bank of New South Wales *v.* O'Connor 910
Bank of New Zealand *v.* Simpson 68
Bank of Upper Canada *v.* Bradshaw 969
Bankart *v.* Tennant . . . 635
Bannatyne *v.* MacIver . . . 329
Banner, *Ex parte* 1300
— *v.* Johnson . . . 1299
Bannerman *v.* White . . . 556
Bannister *v.* Breslauer . . . 1007
— *v.* Hyde . . . 800
Barber *v.* Brown 460
— *v.* Butcher 455
— *v.* Dennis 939
— *v.* Fleming 1142
— *v.* Fletcher 1124
— *v.* Fox 3, 31
— *v.* Lamb 194
— *v.* Meyerstein . . . 591
— *v.* Richards . . . 1254
Barclay *v.* Bank of New South Wales . . . 185
— *v.* Cousins . . . 1144
— *v.* Lucas 1087
— *v.* Pearson . . . 107
— *v.* Stirling . . . 1147
— & Co. *v.* Poole . . . 832
Bardwell *v.* Lydall . . 165, 1104
Barff *v.* Probyn 702
Barfoot *v.* Freswell . . 51, 522
— *v.* Goodall . . . 368
Barford *v.* Stuckey . . . 312
Bargate *v.* Shortridge . . . 302
Baring *v.* Clagett . . . 1168
— *v.* London and S. W. Bank . 1245
— *v.* Stanton 943
Barker *v.* Birt 33
— *v.* Blakes 1194
— *v.* Cox 293
— *v.* Greenwood . . . 159
— *v.* Hodgson . . 148, 979
— *v.* Ivimey 251

PAGE

Barker *v.* Janson . . . 1132, 1211
— *v.* M'Andrew . . . 973
— *v.* Parker . . . 1086
— *v.* Richardson . . . 177
— *v.* Stead . . . 395
— *v.* Talcot . . . 257
— *v.* Windle . . . 975, 996
Barkworth *v.* Young . . . 150
Barlow *v.* Bishop . . . 330
— *v.* Teal . . . 725
Barnard *v.* Godscall . . . 231
— *v.* Pumfret . . . 416
Barnardo *v.* McHugh . . . 77
Barned's Banking Co., *In re* . 1300
Barnes *v.* Glenton . . . 203
— *v.* London, Edin. and Glas. Assur. Co. . . 1225
— *v.* Pinkney . . . 226
— *v.* Richards . . . 133
— *v.* Toye . . . 409, 410
— *v.* Wood . . . 498, 515
Barnett *v.* Brown . . . 960
— *v.* Eastman . . 170, 681
— *v.* Howard . . 420, 422
— *v.* Lambert . . . 393
Barnewall *v.* Sutherland . . 389
Baron *v.* Husband . . . 309
Barque Quilpué, Ld. *v.* Brown . 974, 977, 1003
Barr *v.* Carter . . . 255
— *v.* Gibson . . . 540, 565
Barrass *v.* London Assur. Co. . 1155
Barrell, *Ex parte* . . . 509
— *v.* Trussell . . . 33
Barret *v.* Blagrave . . . 301
Barrett *v.* Deere . . . 159, 168
— *v.* Dutton . . . 1003
— *v.* Hartley . . . 872
— *v.* Jermy . . . 1215
Barrie *v.* Peruvian Corporation . 990
Barrow, *Ex parte* . . 197, 616, 1051, 1056
— *v.* Arnaud . . . 626
— *v.* Bell . . . 1202
— *v.* Coles . . . 590
— *v.* Dyster . . . 532
— *v.* Isaacs . . . 715
Barrow's Case . . . 280
Barry *v.* Goodman . . . 1371
Barter, *Ex parte* . . . 84
Bartholomew *v.* Markwick . 453, 623, 625
Bartlett, *In re* . . . 477
— *v.* Baker . . . 660
— *v.* Holmes . . . 597
— *v.* Pentland . . . 70
— *v.* Purnell . . 42, 478
— *v.* Wells . . . 406
Barton *v.* Gainer . . . 820
— *v.* Hanson . . . 361
— *v.* L. & N. W. Ry . . 418, 639
— *v.* N. Staff. Ry. . . 209, 418, 639, 648
Bartonshill Coal Co. *v.* McGuire . 926
— *v.* Reid . . 923, 925
Barwick *v.* English Joint Stock Bank 131

PAGE

Baskcomb *v.* Beckwith . . 134, 516
Basset *v.* Nosworthy . . . 414
Bastable, *In re* . . . 275
— *v.* Poole . . . 325
Basten *v.* Butter . . . 889
— *v.* Carew . . . 738
Baster *v.* London & County Printing Works . . . 932
Bastifell *v.* Lloyd . . . 1006
Bastin *v.* Bidwell . . . 294
Bastow *v.* Bennett . . . 1089
Batchellor *v.* Lawrence . . 1103
Bate *v.* Payne . . . 457
Bateman *v.* Hunt . . . 225
— *v.* Joseph . . . 1279
— *v.* Mid-Wales Ry. . . 387
— *v.* Phillips . . . 324
— *v.* Pinder . . . 214
— *v.* Ross . . . 1326
Bates *v.* Cort . . . 9
— *v.* Hewitt . . . 1120
— *v.* Hudson . . . 876
— *v.* Townley . . . 471
Bateson *v.* Gosling . . 175, 1096
Batey, *In re* . . . 271
Bath's Case . . . 373, 658
Bathe *v.* Taylor . . . 1336
Bather *v.* Day . . . 770
Batson *v.* Donovan . . 902, 1029
— *v.* King . . . 31
— *v.* Newman . . . 105
— *v.* Spearman . . . 1088
Batten Pooll *v.* Kennedy . 73, 655
Batterbury *v.* Vyse . . 878, 879
Battersby *v.* Lawrence . . 898
Battley *v.* Faulkner . . 206, 209
Batut *v.* Hartley . . . 847
Baumann *v.* James . . . 36
Baumwoll Manufactur *v.* Furness 342
Bawden *v.* London, Edin. & Glasg. Assur. Co. . 1227, 1228
Baxendale *v.* Bennett . . . 73
— *v.* Bristol & Exeter Ry. 1063
— *v.* East Counties Ry. . 1061, 1062
— *v.* G. E. Ry. . 1031, 1032, 1038, 1043, 1046
— *v.* G. W. Ry. . 463, 1061, 1063, 1064
— *v.* Harding . . . 1214
— *v.* Hart . . . 1039
— *v.* Harvey . . . 1214
— *v.* L. & S. W. Ry. . . 1061, 1062
— *v.* L. C. & D. Ry. . . 284
— *v.* N. Devon Ry. . . 1063
Baxter, *Ex parte* . . . 46
— *v.* Burfield . . 195, 246, 940
— *v.* Nurse . . . 918, 920
Baxter's Leather Co. *v.* Royal Mail Steam Packet Co. . . 985
Bayley *v.* Fitzmaurice . . 38, 661
— *v.* Homan . . . 4, 184
— *v.* Rimmell . . . 935
— *v.* Wilkins . . . 457, 951
Bayliffe *v.* Butterworth . 644, 951
Baylis, *In re* 895
— *v.* Church 47

PAGE

Baylis *v.* Dinely . . . 405, 412
— *v.* Jiggens 679
— Le Gros 711
Bayne *v.* Walker 674
Baynes *v.* Lloyd . . 238, 449, 667
Baynon *v.* Batley 1326
Baynton *v.* Morgan . . . 681
Bazeley *v.* Forder . . . 413, 429
Bazett *v.* Meyer 1181
Beachey *v.* Brown 1314
Beadell *v.* East Counties Ry. . 1063
Beal *v.* S. Devon Ry. 861, 1034, 1046, 1048
Beale *v.* Mouls 393
— *v.* Sanders . . . 688, 732
Bealy *v.* Greenslade . . . 217
Beardman *v.* Wilson . . . 651
Beasley *v.* Roney 421
Beatfield *v.* Barlow . . . 965
Beattie *v.* Ebury (Lord) . 127, 351
Beaty *v.* Gibbons. . . . 744
Beauchamp (Earl) *v.* Winn . 134, 460
Beaufort (Duke) *v.* Bates . . 784
Beaumont, *In re* 1291
— *v.* Brengeri . . . 535
— *v.* Carter . . . 1316
— *v.* Greathead 152, 278, 320
— *v.* Reeve . . . 7, 76
Beavan *v.* Delahay . . 773, 779
— *v.* Hastings (Lord) . . 254
— *v.* M'Donnell . . . 436
— *v.* Waters . . . 888
Beaver Line Assoc. Steamers *v.* London & Prov. Mar. Ins. Co.. 1185
Becher *v.* G. E. Ry. . 291, 309, 1038
Bechervaise *v.* G. W. Ry. . . 1018
— *v.* Lewis . . . 1098
Beck *v.* Denbigh 796
— *v.* Evans 1043
— *v.* Pain 204
— *v.* Pierce 267
— *v.* Rebow 699
Beck's Case 17
Beckett *v.* Addyman . 261, 1099, 1102
— *v.* Bradley . . . 72
— *v.* Tasker . . . 419
— *v.* West of England Mar. Ins. Co. 1147
Beckham *v.* Drake . . 268, 269, 271, 324, 941
Beckhusen *v.* Hamblet . . 642, 952
Beckitt *v.* Billbrough . . . 646
Beckley *v.* Newland . . . 294
Beckwaite *v.* Nalgrove . . . 1119
Beckwith *v.* Bullen . . . 950
— *v.* Corral . . . 1309
— *v.* Sidebotham . . 1116
Beddall *v.* Maitland . . . 736
Bedford *v.* Deakin . . . 154
— (Duke) *v.* British Museum Trustees . . . 304
— (Duke of), The . . 838
Bedingfield *v.* Onslow . . . 752
Bedouin (The) 1207
Bedow's Case 53
Beeching *v.* Gower . . . 1269
— *v.* Westbrook . . . 1373
Beely *v.* Parry 232

PAGE

Beer *v.* Beer 317
— *v.* Walker 602
Beeston *v.* Beeston . . . 105
— *v.* Collyer . . . 35, 918
Begbie *v.* Phosphate Sewage Co. . 12
Behn *v.* Burness . 55, 126, 143, 555, 558, 564, 974, 976
Behrens *v.* G. N. Ry. . 1031, 1039, 1041
Belany *v.* Ffrench 966
Belchier *v.* Reynolds . . . 517
Belding *v.* Read 144
Beldon *v.* Campbell . . . 340
Belfast & Ballymena Ry. *v.* Keys . 1036, 1038
Belfour *v.* Weston 674
Bell, *In re* 220, 947
— *v.* Antwerp, London and Brazil Line . . . 144
— *v.* Balls 42, 479
— *v.* Banks 1094
— *v.* Carstairs . . . 1124, 1181
— *v.* Chaplain 1068
— *v.* Gardiner . . . 460, 1258
— *v.* Hobson 1147
— *v.* Ingestre (Lord) . . 71, 1253
— *v.* Kymer 999
— *v.* Reid 103
— *v.* Stocker 265
— *v.* Welch 1082
— *v.* Wilson 667
Bellairs *v.* Ebsworth . . . 1087
Bellamy *v.* Davey 587
— *v.* Debenham . . 293. 495
— *v.* Marjoribanks . . 1291
Bellhouse *v.* Mellor . . . 58
Bellingham *v.* Clark . . . 260
Belshaw *v.* Bush . . 154, 157, 179, 1254
Belworth *v.* Hassell . . . 498
Bence *v.* Shearman . . . 227
Bench *v.* Merrick 1315
Bendix *v.* Wakeman . . . 418
Bendry *v.* Price 95
Benett, *In re* 252
— *v.* P. & O. S.S. Co. . . 1020
Benham *v.* United Guar. Assur. Corp. 573, 1214
Benjamin *v.* Barnett . . . 644
Benlarig (The) 869
Bennett, *In re* 274
— *v.* Bayes . . . 781, 801
— *v.* Brumfitt . . . 40
— *v.* Clough 75
— *v.* Henderson . . . 624
— *v.* Ingoldsby . . . 488
— *v.* Ireland 674
— *v.* Man, Sheff. & Lin. Ry. . 1064
— *v.* Mellor . . . 766, 767
— *v.* Robins 780
— *v.* Stone . . . 504, 745
— *v.* White 223
— *v.* Womack 57
Bennetts *v.* Brown . . . 1006
Bensande *v.* Thames & Mersey Mar. Ins. Co. 1174
Bensley *v.* Bignold . . . 114
Benson *v.* Blunt 1004
— *v.* Chapman . . 1190, 1192
— *v.* Flower 271

	PAGE
Benson *v.* Lanc. & Yorks. Ry.	928
— *v.* Paull	443
Bent *v.* Wakefield Bank	6
Bentall *v.* Burn	536
Bentley *v.* Craven	948
— *v.* Griffin	426
— *v.* Mackay	135
— *v.* Vilmont	595
Bentley Bros. *v.* Metcalfe & Co.	764
Bentsen *v.* Taylor	976
Benwell *v.* Inns	98, 301
Benyon *v.* Godden	966
Berens *v.* Rucker	1180
Beresford *v.* Montgomerie	992
Bergheim *v.* G. E. Ry.	1038
Berkeley *v.* Elderkin	192
— *v.* Hardy[1].	311, 325, 326, 357
Bermingham *v.* Sheridan	643, 650
Bermon *v.* Woodbridge	1158
Bermondsey (Vestry) *v.* Ramsay	193
Bernasconi *v.* Anderson	470
Berndtson *v.* Strang	617
Bernstein *v.* Baxendale	1030, 1040
Berrey *v.* Lindley	727
Berridge *v.* Berridge	1102
— *v.* Fitzgerald	1273
— *v.* Man On Ins. Co.	1109
Berrie *v.* Howitt	963
Berriman *v.* Peacock	707
Berringer *v.* G. E. Ry.	970, 1018
Berry, *In re*	267
— *v.* Alderman	1257
— *v.* Da Costa	1316
— *v.* Henderson	111
— *v.* Lindley	660
Bertie *v.* Beaumont	653
Berwick *v.* Horsfall	331
— (Mayor) *v.* Oswald	151
Bessela *v.* Stern	1313
Bessell *v.* Landsberg	717, 731
Best *v.* Hamand	489, 490
— *v.* Jolly	121
— *v.* Yates	451
Bethell, *In re*	208, 212, 1271, 1318, 1322
— *v.* Blencowe	1372
— *v.* Clark	613
Betjemann *v.* Betjemann	210
Betsy (The)	838
Betterbee *v.* Davis	168
Bettini *v.* Gye	55
Betts *v.* Burch	290
— *v.* Gibbins	454, 459, 967
Bevan *v.* Gething	217
— *v.* Lewis	814
— *v.* M'Mahon	1321, 1322
— *v.* National Bank	1292
— *v.* Oxford (Lord)	225
— *v.* Webb	132
— *v.* Whitmore	435
Bevans *v.* Rees	168, 169
Beverley *v.* Beverley	300
— *v.* Lincoln Gas Co.	374, 580
Beverley's Case	436
Bew, *In re*	775
Bewley *v.* Atkinson	895
Beynon *v.* Cook	413
Bhugwandass *v.* Netherlands India Co.	1125, 1135
Biccard *v.* Shepherd	1162
Bickerdyke *v.* Bollman	1280
Bickerton *v.* Burrell	346
Bickford *v.* Darcy	891
— *v.* Parson	231, 232, 687
Bickmore *v.* Dimmer	694
Biddell *v.* Dowse	14
Bidder *v.* Bridges	186
Biddle *v.* Bond	821, 847, 849, 911, 912, 954
— *v.* Levy	454
Bidgood *v.* Way	418
Biederman *v.* Stone	968, 969
Biffin *v.* Bignell	431
Bigg *v.* Strong	41
— *v.* Whisking	538
Biggar *v.* Rock Life Assur. Co.	1215, 1228
Bigge *v.* Parkinson	566, 568, 569
Biggerstaff *v.* Rowatt's Wharf	382, 815
Biggs *v.* Evans	822
— *v.* Lawrence	112
Bignell *v.* Clarke	798
Bignold *v.* Waterhouse	1077
Bilbie *v.* Lumley	460
Bilborough *v.* Holmes	366
Bill *v.* Bament	535
— *v.* Darenth Valley Ry.	388
— *v.* Lake	205
Bingham *v.* Bingham	522
— *v.* Corbitt	1093
Binnington *v.* Wallis	7
Binns *v.* Nichols	206
— *v.* Pigot	765
Birch *v.* Birch	92
— *v.* Liverpool (Earl)	35
— *v.* Stephenson	288
— *v.* Wright	681, 682, 683, 756, 760
Birchall *v.* Bullough	1334, 1377
Bird, *Ex parte*	347
— *v.* Astock	987
— *v.* Blosse	34, 36, 1316
— *v.* Boulter	42, 479
— *v.* Brown	618
— *v.* Gammon	32, 213
— *v.* Godfrey	214, 219
— *v.* G. N. Ry.	1018
— *v.* Higginson	634
— *v.* M'Gaheg	873
Bird's Case	1106
Birk *v.* Guy	212
Birkenhead, &c., Ry. *v.* Cotesworth	249
Birkett *v.* Whitehaven, &c., Ry.	1071
— *v.* Willan	1051
Birkley *v.* Presgrave	1011, 1013
Birkmyr *v.* Darnell	30, 32
Birmingham and Staffs. Gas Light Co., *Ex parte*	774
— Banking Co., *Ex parte*	386
— Excelsior Money Soc. *v.* Haywood	267, 420
Birnam (The)	869
Birrell *v.* Dryer	70
Birtwistle *v.* Hindle	925

PAGE

Bisgood *v.* Henderson's Transvaal Estates . . . 386
— *v.* Nile Valley Co. . . 386
Bishop, *Ex parte* . . 458, 459, 1105, 1247
— *v.* Balkis Consolidated Co. 638
— *v.* Bishop . . . 1324
— *v.* Bryant . . . 802
— *v.* Curtis 245
— *v.* Eagle 355
— *v.* Elliott . . 696, 699, 700
— *v.* Hatch 95
— *v.* Howard . . 660, 732
— *v.* Jersey (Countess) . 814
— *v.* Pentland . . . 1202
— *v.* Rowe 156
— *v.* Taylor . . . 57, 670
Bissell *v.* Fox 1259
Bissett *v.* Burgess 253
Bize *v.* Dickason 461
Blachford *v.* Kirkpatrick . 23, 492
— *v.* Preston . . . 87
Black *v.* Baxendale . . . 1051
— *v.* Homersham . . . 640
— *v.* Ottoman Bank . . 1092
— *v.* Smith 168
— *v.* Williams 832
Blackburn *v.* Haslam . . . 1122
— *v.* Liverpool and River Plate St. N. Co. . . . 988
— *v.* Mackey . . 10, 408
— *v.* Smith . . . 137
— *v.* Vigors . 1117, 1121, 1122
Blackenhagen *v.* Lond. Assur. Co. 1151, 1171
Blackett *v.* Bates 293
— *v.* Royal Exch. Assur. Co. . . . 69, 1130, 1137, 1200
Blackhan *v.* Doran . . . 1280
Blackhurst *v.* Cockell . . . 1166
Blacklow *v.* Laws 492
Blackwell *v.* M'Naughtan . . 1371
— *v.* Nash 142
Blades *v.* Arundale . . . 791
— *v.* Free 432
Blaiberg *v.* Keeves . . . 484
Blaikie *v.* Stembridge . . . 979
Blair *v.* Bromley . . . 210, 851
— *v.* Ormond 205
Blairmore (The) . . . 179, 1186
— Sailing Ship Co. *v.* Macredie . 1191
Blake *v.* Gale 202
— *v.* Foster 433
— *v.* G. W. Ry. . . . 1054
— *v.* Midland Ry. . . . 1075
— *v.* Nicholson . . 888, 907
— *v.* Phinn . . . 491, 507
Blake's Case 184
Blakely Ordnance Co., *In re* . 223
Blakemore *v.* Bristol & Ex. Ry. . 277, 291, 577, 806, 814
Blakey *v.* Dinsdale . . . 539
— *v.* Dixon 1142
Blanchet *v.* Powell's Llantivit Coll. Co. 997

PAGE

Blanckenhagen *v.* Blundell . . 1244, 1285
Blandy *v.* Herbert . . . 1344, 1346
Blane, *Ex parte* 957
Blasco *v.* Fletcher 982
Blatchford *v.* Cole 733
Bleaden *v.* Hancock . . . 888
Bleadon *v.* Charles . . . 459
Bleakly *v.* Smith 39
Blenkinsop *v.* Clayton . . 535, 539
Blenkiron *v.* Great Central Gas Consumers' Co. . . . 705
Blest *v.* Brown 1098
Blewit *v.* Tritton . . . 1334
Blewitt *v.* Hill 930
Blight *v.* Page . . . 979, 1003
Bliss *v.* Smith 879
Blithman *v.* Martin . . . 83
Bloomenthal *v.* Ford . . . 841
Bloomer *v.* Bernstein . . 172, 543, 603
Blore *v.* Giulini 713
— *v.* Sutton 41
Blount *v.* Pearman . . . 1331
Blower *v.* G. W. Ry. . . . 1028
Bloxam *v.* Sanders . 542, 582, 598, 608
Bloxsome *v.* Williams . . . 113
Bluck *v.* Gompertz . . . 189
— *v.* Siddaway . . . 462
Blumberg *v.* Life Interests, &c., Corp. 160, 168
Blumfield's Case 193
Blundell, *In re* 157
— *v.* Blundell . . . 157
— *v.* Brettargh . . . 517
Blunden *v.* Desert 963
Blyth *v.* Carpenter . . . 816
— *v.* Dennett 731
— *v.* Fladgate . . . 193, 210
Blyther *v.* Townsend . . . 170
Boaler *v.* Mayor . . . 192, 1096
Boardman *v.* Scott . . . 928
— *v.* Sill 905
Boast *v.* Firth . . . 150, 940
Bobbett *v.* Pinkett . . . 859
Bock *v.* Gorrissen 906
Boddington *v.* Castelli . . . 270
Bodeham *v.* Hoskins . . . 856
Boden *v.* French 947
Bodenham *v.* Purchas . . 152, 166
Bodger *v.* Arch . . . 216, 415
Boehm *v.* Campbell . . . 1082
— *v.* Wood 516
Bogg *v.* Pearse . . . 398, 440
Bolch *v.* Smith 925
Bolckow *v.* Seymour . . . 67
Bold *v.* Hutchinson . . . 300
— *v.* Rayner 532
Bolingbroke *v.* Kerr . . . 415
Bolitho, *Ex parte* 815
Bolitho & Co. *v.* Gidley . . 422
Bolivia Republic *v.* Indemnity Mutual Mar. Ins. Co. . . 1178, 1182
Bolognesi's Case . . . 223, 386
Bolton *v.* Buckenham . . . 1094
— *v.* Carlisle (Bishop) . . 749
— *v.* Gladstone . . . 1168

	PAGE
Bolton *v.* Hillersden	331
— *v.* Lambert	17, 331, 481
— *v.* Lancashire and Yorks. Ry.	613, 616
— *v.* Lee	320
— *v.* Prentice	428
— *v.* Richard	152
— *v.* Salmon	1092, 1094
— (Lord) *v.* Tomlin	654, 688, 1371
Bona (The)	1011
Bonar *v.* Macdonald	1092
Bond *v.* Nurse	418, 472
— *v.* Nutt	1166, 1169
— *v.* Pittard	358
— *v.* Rosling	43, 651
— *v.* Simmons	433
— *v.* Warden	1290
Bone *v.* Ekless	122, 124, 467
Bonelli's Tel. Co., *In re*	382
Bonfield *v.* Hassall	1310
Bonion's Case	845
Bonita (The)	340
Bonnard *v.* Dott	89, 809
Bonner *v.* Tottenham Building Soc.	231
Bonnewell *v.* Jenkins	15
Bonnin *v.* Neame	367
Bonomi *v.* Backhouse	210
Bonser *v.* Cox	1091
Bonzi *v.* Stewart	323
Booker & Co. *v.* Pocklington S.S. Co.	975
Boone *v.* Eyre	142
Boorman *v.* Brown	290, 947
— *v.* Nash	269, 275, 626
Booth *v.* Gair	1198
— *v.* Macfarlane	735
— *v.* Turle	42
— *v.* Warrington (Earl)	1311
Boothbey *v.* Sowden	13
Boraston *v.* Green	744
Borland's Trustee *v.* Steel Bros. & Co., Ld.	637
Bornmann *v.* Tooke	977
Borough *v.* White	1288
Borradaile *v.* Brunton	281
Borrett *v.* Gomeserra	480
Borries *v.* Hutchinson	627
— *v.* Imperial Ottoman Bank	322
Borrowman *v.* Drayton	601
— *v.* Free	140
— *v.* Rossell	572
Bos *v.* Helsham	495, 496, 899
Bosanquet *v.* Wray	165, 166
Boson *v.* Sandford	973
Bostock *v.* Hume	1324
— *v.* Jardine	466, 531, 948
— & Co. *v.* Nicholson & Sons	278, 563, 629
Boston *v.* Boston	23, 25
— Deep Sea Fishing Co. *v.* Ansell	930
— Fruit Co. *v.* British & For. Mar. Ins. Co.	1122
Boswell, *In re*	205, 215
— *v.* Kilborn	623
Bothlingk *v.* Inglis	616
Bottomley's Case	382
Bottomley *v.* Bovill	1172, 1183
— *v.* Fisher	1303
— *v.* Nuttall	154
Bouch *v.* Sproule	170
Bouillon *v.* Lupton	1164
Boulter, *In re*	46
— *v.* Arnott	598, 623
Boulton, *Ex parte*	842
— *v.* Dobree	438
— *v.* Jones	221
— *v.* Reynolds	801
Bourdin *v.* Greenwood	214
Bourn *v.* Salmon	678
Bourne, *In re*	369
— *v.* Bourne	369
— *v.* Diggles	862
— *v.* Fosbrooke	912
— *v.* Freeth	364
— *v.* Gatliffe	992, 1052, 1148
— *v.* Mason	308
— *v.* Seymour	553
Bousfield *v.* Hodges	492
— *v.* Wilson	468
Boussmaker, *Ex parte*	437
Bow, McLachlan & Co. *v.* Camosun (Owners)	882
Bowdell *v.* Parsons	141, 143, 145, 596
Bowden *v.* Vaughan	1123
Bowen *v.* Anderson	726, 763
— *v.* Ashley	1332
— *v.* Fox	1373
— *v.* Hall	932
— *v.* Morris	322
— *v.* Owen	169
Bower *v.* Cooper	495
Bowers *v.* Lovekin	117
— *v.* Nixon	288
Bowes, *In re*	248, 860
— *v.* Foster	74, 158
— *v.* Shand	69, 543, 547, 564
Bowker *v.* Austin	966
— *v.* Burdekin	21, 370
Bowlby *v.* Bell	29
Bowles *v.* Atkinson	573
— *v.* Orr	455
— *v.* Round	499, 526
— *v.* Waller	499
Bowman *v.* Nicoll	1337
Bowring *v.* Shepherd	642
Box *v.* Day	1312
Boyd *v.* Bilham	787
— *v.* Brooks	259, 1100
— *v.* Dubois	1028, 1165, 1177
— *v.* Emmerson	854
— *v.* Hind	177, 187
— *v.* Lett	603
— *v.* Shorrock	702
— *v.* Siffkin	556
Boydell *v.* Drummond	34, 212, 529
Boyer *v.* Blackwell	478
Boyers & Co. *v.* Duke	16
Boyfield *v.* Brown	1204
Boyle *v.* Brandon	1387
Boyman *v.* Gutch	488
Boys *v.* Ancell	290
— *v.* Pink	1040
Boyse, *In re*	208, 1242, 1243, 1270, 1376

PAGE
Boyter *v.* Dodsworth . . . 464
Bozelli, *In re* 1323
Bozon *v.* Bolland 964
Brabant *v.* King 864
Brace *v.* Calder 941
— *v.* Wehnert 295
Bracegirdle *v.* Heald . . . 35
Bracewell *v.* Williams . . . 5, 10
Bracey *v.* Carter 892
Brackenbury *v.* Pell . . . 891
Bradburn *v.* Foley . . . 745
— *v.* G. W. Ry. . . . 285
Bradburne *v.* Botfield . . 260, 316
Bradbury *v.* Morgan . . 195, 1099
Bradford *v.* Levy . . . 1183
— *v.* Symondson . . 1111
Bradlaugh *v.* De Rin . . 61, 1374
— *v.* Newdegate . 79, 80
Bradley *v.* Copley . . . 819
— *v.* Gregory . . . 188
— *v.* Holdsworth . . 29, 639
— *v.* James . . 216, 217
— *v.* Waterhouse . .1029, 1042
Bradly *v.* Heath . . . 416
Bradshaw *v.* Beard . . 431, 452
— *v.* Bradshaw . . 458, 465
— *v.* Lanc. & York. Ry. . 245
— *v.* Widdrington . . 200
Brady *v.* Oastler . . . 65, 277
— *v.* Tod . . . 334, 554
Bragg *v.* Anderson . . . 1172
Braithwaite *v.* Cooksey . . 778
— *v.* Foreign Hardwood Co. 142, 279, 604
— *v.* Gardiner . . 1266
— *v.* Skofield . . . 393
Bramley *v.* Chesterton . . 284, 754
Bramley Union *v.* The Guarantee Soc. 1084, 1092
Brampton *v.* Beddoes . . . 100
Bramston *v.* Robins . . . 151
Bramwell *v.* Eglinton . . . 777
— *v.* Lacy 695
Brand *v.* Boulcot . . . 318
Brandao *v.* Barnett . . 860, 1258
Brandon *v.* Brandon . . . 780
— *v.* Curling . 438, 1179, 1181
— *v.* Hubbard . . . 358
— *v.* Nesbitt . . . 438
— *v.* Pate 269
— *v.* Scott . . . 848, 913
Brandt *v.* Bowlby . . . 605
— *v.* Heatig . . . 222
— *v.* Lawrence . . . 625
Brandt's (Wm.), Sons & Co. *v.* Dunlop Rubber Co. 182, 224, 225
Branford *v.* Saunders . . . 1224
Brankelow S.S. Co. *v.* Canton Ins. Office . . . 1207
Branley *v.* S. E. Ry. . . . 1062
Branston (The) 870
Brantom *v.* Griffiths . . . 27
Brashford *v.* Buckingham . . 418
Brass *v.* Maitland . . . 902
Brassington *v.* Ault . . . 416
Bratson *v.* Haworth . . . 1172
Braunstein *v.* Accidental Death Ins. Co. 82
Bray *v.* Mayne 812
Brayshaw *v.* Eaton . . 409, 410
Braythwayte *v.* Hitchcock . 660, 1337
Brazier *v.* Polytechnic Institution...451
Brecknock Co. *v* Pritchard . . 686
Bree *v.* Holbech 521
Bremner *v.* Williams . . . 1015
Brenchley *v.* Higgins . . . 413
Brenda S.S. Co. *v.* Green . 993, 1005
Brentwood Brick & Coal Co., *In re* 525
Brereton *v.* Chapman . . . 1006
Bret *v.* Cumberland . . . 50
Brett *v.* Close 83
— *v.* Clowser 501
— *v.* Cumberland . 232, 249, 261 670, 671
— *v.* East India & London Shipping Co. . . 303
— *v.* Rogers 680
Brettel *v.* Williams . . . 1105
Brewer *v.* Broadwood . . 293, 490
— *v.* Brown 500
— *v.* Dew 271
Brewester *v.* Kitchell . . . 151
— *v.* Kitchin . . . 240
Brice *v.* Bannister . . 224, 1242
— *v.* Berrington . . . 436
— *v.* Carre 50
— *v.* Wilson 417
Briddon *v.* G. N. Ry. . . . 1024
Bridge *v.* Cage 4
— *v.* Wain . . 563, 627, 631
Bridger *v.* Savage 106
Bridges *v.* Garrett 161
— *v.* Hunter 1119
— *v.* L. & N. W. Ry. . . 1026
— *v.* Potts . . . 708, 725
Bridgman *v.* Gill . . . 852, 856
Brierly *v.* Kendall . . . 819
Brigella (The) 1201
Brigg *v.* Thornton . . . 694
Briggs, *In re* 371
— *v.* Sowry 774
— *v.* Wilkinson . . . 341
— *v.* Wilson 217
Brighty *v.* Norton . . . 141
Brigstocke *v.* Smith . . . 212
Brind *v.* Dale . . 1019, 1020
— *v.* Hampshire . . . 309
Bringloe *v.* Morrice . . . 813
Brinkley *v.* Att.-Gen. . 1318, 1322
Brintons *v.* Turvey . . . 928
Brisbane *v.* Dacres . . 460, 462
Bristol Bread Co. *v.* Maggs . 15, 46
— Corporation *v.* Westcott . 668
— (Dean) *v.* Jones . . 54
— (Earl) *v.* Wilsmore . . 156
— & Ex. Ry. *v.* Collins . 1053, 1070
— (Marquess) *v.* Inland Rev. Com. . . . 1341
— Ry., *In re* 443
— Tramways Co. *v.* Fiat Motors . . . 565, 568
— & West of England Bank *v.* Midland Ry. . 818, 911
Bristow *v.* Eastman . . . 164
— *v.* Sequeville . . . 1338
— *v.* Towers 438
Bristowe *v.* Whitmore . . 333, 966

PAGE

Britain *v.* Rossiter . . 24, 35, 36
British Amer. Tel. Co. *v.* Colson . 18
— and Mexican Shipping Co. *v.* Lockett Bros. . . 1006
— Cash, &c., Conveyors, Ltd. *v.* Lamson Store Service Co. . . . 79, 80
— Columbia, &c., Saw Mill Co. *v.* Nettleship . 981, 1072, 1075
— Electric Traction Co. *v.* Inland Rev. Com. . . 1357
— Empire Shipping Co. *v.* Somes 452
— Home Assur. Corp. *v.* Paterson . . . 366
— India Co. *v.* Inland Rev. Com. 1375
— Insulated Wire Co. *v.* Prescot Urban Council 399
— Linen Co. *v.* Drummond 219
— Mar. Mut. Ins. Assoc. *v.* Jenkins 1106
— Mutual Investment Co. *v.* Smart . . . 247
— Oil and Cake Mills *v.* Inland Rev. Com. . . 1346, 1347
— Prov. Life and Fire Ins. Soc., *In re* . . . 382
— Waggon Co. *v.* Lea . . 888
— Westinghouse, &c., Co. *v.* Underground Electric Ry. 285
— Widows Assur. Co., *In re* . 1236
Brittain *v.* Lloyd . . . 455, 967
Britten *v.* G. N. Ry. . . . 1036
— *v.* Hughes 88
Brittin *v.* Partridge . . . 226
Britton *v.* Bathurst . . . 251
— *v.* G. W. Cotton Co. 924, 925
Broad, *In re* 956
— *v.* Jollyffe 97
Broadbent *v.* Ledward . . 848, 913
Broadwater *v.* Blot . . . 867
Broadwood *v.* Granara . . . 766
Brockelbank *v.* Sugrue . . . 328
Brocklebank, *Ex parte* . . . 407
Brocklehurst *v.* Lawe . . 774, 794
Brocklesby *v.* Temperance Building Soc. 968
Brodie *v.* Howard 342
Brogden *v.* Met. Ry. . . 14, 16
Bromage *v.* Lloyd . . 1253, 1287
— *v.* Vaughan . . . 1275
Bromley *v.* Holden . . . 796
— *v.* Smith 413
Brond *v.* Broomhall . . . 833
Brook, *Ex parte* 701
Brooke and Fremlin's Contract, *In re* 241, 423
Brooke *v.* Inland Rev. Com. . . 1361
— *v.* Pickwick . . . 1029
— (Lord) *v.* Rounthwaite . 500
Brooker *v.* Scott 410
— *v.* Wood 113
Brookes *v.* Drysdale . . . 51
— *v.* Hansen . . . 128
Brookman's Trusts, *In re* . . 149
Brooks *v.* Beirnstein . . . 806

PAGE

Brooks *v.* Blackburn Benefit Build. Soc. . . . 402
— *v.* Bockett . . . 471
— *v.* Elkins 1371
— *v.* Haigh 1082
— *v.* M'Donnell . . . 1204
— *v.* Mitchell . . . 1288
— *v.* Stuart 176
— *v.* Torquay Corporation . 377
Broom *v.* Batchelor . . . 1082
— *v.* Davis 889
— *v.* Hall 284
Broome *v.* Speak 128
Broomfield *v.* Southern Ins. Co. . 835
Broomhead, *In re* . . . 902
Brotherhood's Case . . . 382
Brotherston *v.* Barber . . . 1193
Brothwood *v.* Keeling . . . 247
Brough *v.* Homfray . . . 923
— *v.* Whitmore . . . 1127
Broughton *v.* Broughton . . 872
— *v.* Hutt . . . 135
Broun *v.* Kennedy . . . 873
Brouncker *v.* Scott . . . 1007
Brown's Case 1236
Brown *v.* Accrington Cotton Co. 924
— *v.* Ackroyd . . 429, 430
— *v.* Andrew 394
— *v.* Arundell . . . 790
— *v.* Banks 939
— *v.* Brine 76
— *v.* Bristol & Ex. Ry. . . 1050
— *v.* Burtinshaw . . . 729
— *v.* Byers 389
— *v.* Byrne 69
— *v.* Carstairs . 1180, 1182
— *v.* Crump 3
— *v.* Davis 1288
— *v.* De Winton . . . 1286
— *v.* Dimbleby . . 420, 422
— *v.* Doyle 321
— *v.* Duncan 112
— *v.* Edgington . . . 566
— *v.* Elkington . . . 549
— *v.* Fleming 1177
— *v.* Glenn 782
— *v.* Gordon 366
— *v.* G. E. Ry. . . . 144
— *v.* G. W. Ry. . . . 1058
— *v.* Harraden . . . 1288
— *v.* Hodgson . 458, 589, 1067, 1068
— *v.* Jodrell 436
— *v.* Johnson . . 1005, 1006
— *v.* Kidger 1303
— *v.* Kough 1300
— *v.* Langley . . . 66
— *v.* London (Mayor of) . 150
— *v.* M. S. & L. Ry. . 1047, 1049
— *v.* Metrop. Counties Assur. Soc. . 635, 755, 794, 831
— *v.* Muller 627
— *v.* North 1001
— *v.* Overbury . . . 82
— *v.* Powell Duffryn Coal Co. 981
— *v.* Price 1239
— *v.* Raindle 518
— *v.* Royal Ins. Soc. . . 140, 675

PAGE

Brown *v.* Rutherford . . . 208
— *v.* Selwyn 258
— *v.* Shevill 790
— *v.* Smith 1182
— *v.* Stapyleton . 1009, 1128
— *v.* Storey . . . 759, 760
— *v.* Symons . . . 919, 931
— *v.* Tanner . . . 833, 994
— *v.* Tayleur . 1139, 1140, 1173
— *v.* Vawser 1339
— *v.* Vigne 1151
— *v.* Wilkinson . . . 991
Brown, Janson & Co. *v.* Hutchinson 362
Brown, Shipley & Co. *v.* Inland Rev. Com. 1350
Browne, *In re* 105
— *v.* Brandt . . . 765
— *v.* Dawson 735
— *v.* Hare 604
— *v.* La Trinidad . . 308, 380
— *v.* Pendlebury . . . 240
— *v.* Peto 759
Browne's Policy, *In re* . . . 1224
Brownell *v.* Bonney . . . 1278
Browning *v.* Morris . . . 468
— *v.* Stallard . . 33, 179
— *v.* Wright . . . 521
Bruce *v.* Hunter 279
— *v.* Jones . . 1160, 1205
Bruner *v.* Moore . . . 18, 57, 67
Brunsden *v.* Humphrey . . 194
Brunswick (Duke) *v.* Crowl . . 116
— *v.* Hanover (King) . 439
Brunt *v.* Midland Ry. . . . 1030
Brunton, *Ex parte* . . . 223
Bryan *v.* Clay 253
— *v.* Horseman . . . 212
— *v.* Wetherhead . . . 656
Bryans *v.* Nix . . . 310, 604
Bryant *v.* Busk 494
— *v.* Flight 873
— *v.* Hancock & Co. . . 695
— *v.* La Banque du Peuple . 330
Bryant and Barningham's Contract, *In re* 495
Brydges *v.* Kilburne . . . 707
Brydon *v.* Stuart 925
Bryson *v.* Whitehead . . . 294
Bubb *v.* Yelverton . . . 105
Buchanan *v.* Faber . . . 1114
— *v.* Findlay . . . 904
— *v.* Rucker . . . 455
Buck *v.* Hurst 471
— *v.* Lee 270
— *v.* Lodge 519
Buckland *v.* Butterfield . 696, 697
— *v.* Johnson . . . 192
— *v.* Papillon . . . 57
Buckle *v.* Knoop 996
Buckler *v.* Moor 208
Buckley, *Ex parte* . 320, 349, 1285, 1303
— *v.* Collier . . . 418
— *v.* Jackson . . . 1252
— *v.* Pirk 248
— *v.* Taylor . . . 777
Buckman *v.* Levi 1076

PAGE

Buckmaster *v.* Russell . . . 213
Buckworth *v.* Simpson . . 732, 749
Budd *v.* Fairmaner . . . 554
— *v.* Marshall 679
Budd-Scott *v.* Daniell . . 449, 666
Budgett *v.* Binnington . . . 1003
Bufe *v.* Turner 1216
Bulkeley *v.* Butler . . . 1256
Bull, *Ex parte* 775
— *v.* O'Sullivan . . 1293, 1378
— *v.* Price 957
— *v.* Robison 602
— *v.* Sibbs 682
Bullen *v.* Swan Electric Engineering Co. . 845
— *v.* Ward 113
Buller *v.* Fisher 987
— *v.* Harrison . . 310, 355
Bulli Coal Mining Co. *v.* Osborne 209, 210
Bullock *v.* Dodds 259
— *v.* Dommitt . . 149, 686
Bunn *v.* Guy 6, 99
Bunney *v.* Poyntz . . . 598
Bunny *v.* Hopkinson . . . 524
Burbidge *v.* Morris . . . 394
Burbridge *v.* Manners . 1250, 1274
Burchell *v.* Clark . . . 66
— *v.* Gowrie & Blockhouse Collieries Co. . . . 960
Burchfield *v.* Moore . 1295, 1298
Burden *v.* Halton . . . 155
Burdett *v.* Withers . . 751, 752
Burdick *v.* Garrick . . 220, 947
— *v.* Sewell 590
Burge *v.* Ashley . . 104, 107, 467
Burger *v.* Indemnity Mut. Mar. Assur. Co. . . . 1176
Burges *v.* Wickham . 70, 806, 1163
Burgess *v.* Beaumont . . . 931
— *v.* Clements . . 767, 768
— *v.* Eve . . 1086, 1092
Burgh *v.* Legge . . . 1279
Burghart *v.* Angerstein . . 410
— *v.* Hall 410
Burke *v.* Amalgamated Society of Dyers . . . 97
— *v.* Bryant 848
— *v.* S. E. Ry. . . 866, 1036
Burkitt *v.* Blanshard . . . 215
Burland *v.* Kingston-upon-Hull Local Board . . . 441, 442
Burling *v.* Read 736
Burlinson *v.* Hall 225
Burls *v.* Smith . . . 393, 396
Burmester *v.* Barron . . . 1276
— *v.* Hogarth . . . 1249
— *v.* Norris . . . 389
Burn *v.* Boulton . . 165, 215, 217
— *v.* Brown 904
— *v.* Carvalho . . . 182, 225
— *v.* Miller . . . 453, 876
— *v.* Morris 1308
Burnand *v.* Rhodocanachi . . 1132
Burnard *v.* Haggis 407
Burnby *v.* Bollett 569
Burne *v.* Richardson . . . 773
Burnell *v.* Brown . . . 492, 499
— *v.* Minot 456

	PAGE
Burnes *v.* Pennell	379, 391
Burnett *v.* Bouch	959
— *v.* Kensington	1201
— *v.* Lynch	231, 450
Burnley Equitable Soc. *v.* Casson	938
Burns *v.* Cork & Bandon Ry.	1025
Burnside *v.* Dayrell	393, 395
Burnyeat *v.* Hutchinson	110
Burr *v.* Theatre Royal, Drury Lane	926, 928
Burrell *v.* Jones	313
Burrett *v.* Booty	431
Burrough *v.* Moss	418, 1261
— *v.* Skinner	466, 849
Burroughs *v.* Oakley	491
Burrow *v.* Scammell	498, 513
Burrows *v.* Jemino	307
— *v.* March Gas & Coke Co.	281
Bursill *v.* Tanner	421
Burt *v.* Gray	714
Burton *v.* English	1009
— *v.* Palmer	938
— *v.* Pinkerton	281, 1024
— *v.* Reevell	651, 1358
Bury *v.* Thompson	724
Bush *v.* Beavan	443
— *v.* Calis	236
— *v.* Martin	213, 397, 441, 442
Bushel *v.* Wheeler	535, 537
Busk *v.* Davis	583, 609
— *v.* Fearon	838
— *v.* Royal Ex. Assur. Co.	1178, 1218
— *v.* Walsh	467
Busteed *v.* West of England Co.	1230
Buszard *v.* Capel	782
Butcher *v.* L. & S. W. Ry.	1053
— *v.* Stapely	480
— *v.* Steuart	32
Bute (Marquis) *v.* Thompson	149, 674, 979
Butler *v.* Basing	1077
— *v.* Butler	422
— *v.* Knight	344, 891, 893
— *v.* M. S. & L. Ry.	1057, 1065
— *v.* Wildman	1178
— *v.* Woolcott	1057
Butt *v.* G. W. Ry.	864, 1042
Butt's Case	244
Buttemere *v.* Hayes	25
Butterfield *v.* Marler	942
Butterworth *v.* Brownlow	1028, 1029, 1055
Button *v.* Thompson	876
Butts *v.* Swan	1378
Buxton *v.* Baughan	847, 905, 913
— *v.* Jones	1269
— *v.* Lister	292, 629
— *v.* N. E. Ry.	1054, 1070
— *v.* Rust	38
Byford *v.* Russell	880
Byrne, *In re*	268
— *v.* Fitzhugh	316
— *v.* Schiller	995
— *v.* Van Tienhoven	16
Byrom *v.* Thompson	1336
Byson *v.* Whitehead	98
Bywater *v.* Richardson	479

	PAGE
CABALLERO *v.* Henty	499
Cadaval (Duke de) *v.* Collins	461
Caddick *v.* Skidmore	637
Cadle *v.* Moody	717
Cadman *v.* Horner	516
— *v.* Lubbock	168
Caffin *v.* Aldridge	1139
Cage *v.* Acton	1323
Cahill *v.* Dawson	949
— *v.* L. & N. W. Ry.	1023, 1036, 1038
Cahn *v.* Pockett's Bristol Channel Steam Packet Co.	588, 596, 822
Cailiff *v.* Danvers	901
Caine *v.* Coulton	153, 158, 168
— *v.* Horsfall	958
Caird *v.* Moss	135, 461
Cairns *v.* Robins	865, 1051
Calabar (The)	991
Calcutta Steam Nav. Co. *v.* De Mattos	604, 605
— *v.* Weir	1000
Caldecott *v.* Smythies	732, 744
Calder *v.* Dobell	326
— *v.* Rutherford	261
Caldwell *v.* Dawson	1233
Caledonian & Dumb. Ry. *v.* Helensburgh Magistrates	387
Caledonian Ry. *v.* Mulholland	1053
Calland *v.* Loyd	325
Callander *v.* Howard	152
Callender *v.* Oelrichs	950
Callisher *v.* Bischoffsheim	11
Callo *v.* Brouncker	933
Callonel *v.* Briggs	598, 608
Calthorpe *v.* Trechmann	128
Calton *v.* Bragg	279
Calverley *v.* Williams	547
Calvert, *Ex parte*	964
— *v.* Baker	1295
— *v.* Gordon	1089
Calvin's Case	437
Calye's Case	766, 767
Camac *v.* Warriner	567, 630
Cambefort *v.* Chapman	193
Camberwell Building Society *v.* Holloway	487
Cambrian Steam Packet Co., *Ex parte*	282
Cambridge *v.* Anderton	1187
— (Mayor) *v.* Dennis	1084, 1085
— Univ. *v.* Baldwin	1087
Camden (Marquis) *v.* Batterbury	879
— *v.* Cowley	1155
Cameron *v.* Nystrom	927
— *v.* Young	308, 309
Camidge *v.* Allenby	156, 1269
Cammell *v.* Sewell	340, 1189
Campanari *v.* Woodburn	195, 875, 958, 961
Campbell *v.* Christie	1135
— *v.* Fleming	130, 131
— *v.* French	1264
— *v.* Innes	1182
— *v.* Jones	143
— *v.* Lewis	228
— *v.* Mersey Docks	588
— *v.* Webster	1278

PAGE
Campbell *v.* Wenlock (Lord) . 761
Campion *v.* Colvin . . 994, 998
Can *v.* Read 163
Canada Ship Co. *v.* British Shipowner's Assoc. . . . 988
Canadian Oil Works Corp., *In re* 957
Cane *v.* Allen (Lord) . . . 132
— *v.* Baldwin . . . 488, 507
— *v.* Chapman 397
Canham *v.* Barry . . 126, 496, 552
— *v.* Rust 235
Cannan *v.* Bryce 77
— *v.* Hartley . . . 717
— *v.* Meaburn . . 981, 983
Cannee *v.* Spanton . . . 902
Canning *v.* Farquhar . . . 1222
— (Lord) *v.* Raper . . 1353
Cannock *v.* Jones . . . 52, 686
Cape Breton Co., *In re* . . . 948
Capel *v.* Buszard 782
— *v.* Thornton . . . 160
Capital and Counties Bank *v.* Gordon . . . 1243, 1293
Capital Fire Ins. Assoc., *In re* . 966
Capp *v.* Lancaster . . . 144
— *v.* Topham 459
Capper *v.* Wallace . . 970, 1007
Capper's Case 411
Card *v.* Hope 87
Cardwell *v.* Lucas 671
— *v.* Martin . . . 1337
Carew *v.* Cooper 92
— *v.* Duckworth . 1278, 1279
Carew's Act, *In re* . . . 857
Carey *v.* Barrett 87
— *v.* Goodinge . . . 258
Cargo ex Golam 1211
— Laertes 871
Carisbrook (The) 1005
— (S.S.) Co. *v.* London & Prov. Mar. Ins. Co. . . 1009
Carlill *v.* Carbolic Smoke Ball Co. . . 2, 15, 106, 310, 1257, 1361
Carlish *v.* Salt 495
Carlisle, &c., Banking Co. *v.* Bragg...129
Carlon *v.* Kenealy . . 1246, 1255
Carlton S.S Co. *v.* Castle Mail Packets Co. . . 140, 977, 979, 1003
Carmarthen Corp. *v.* Lewis . . 374
Carmichael *v.* Carmichael . . 254
— *v.* Liverpool Assoc. . 988
Carmier *v.* Mercer 681
Carnegie *v.* Connor . . . 976
Carnes *v.* Nesbitt . . 98, 99, 706
Carney *v.* Plimmer . . . 105
Carpenter *v.* Blandford . . . 509
— *v.* Buller . . . 72
— *v.* Creswell . . . 143
— *v.* Dunsmure . . . 244
— *v.* Parker . . . 675
Carpue *v.* L. & B. Ry. . 1018, 1067
Carr *v.* Acraman 831
— *v.* Allatt 830
— *v.* Anderson 260
— *v.* Hinchcliff 322
— *v.* Jackson 352
— *v.* King 434
PAGE
Carr *v.* Lanc. & Yorks. Ry. . . 1022, 1034
— *v.* L. & N.W. Ry. . . . 73
— *v.* Lynch 37
— *v.* Montefiore. . . 46, 1147
— *v.* Royal Exch. Ins. Co. . 1137
Carrier Dove (The) . . . 871
Carrington *v.* Roots . . . 27
Carringtons, Ltd. *v.* Smith . . 810
Carriss *v.* Tattersall . . . 1297
Carritt *v.* Real and Personal Advance Co. 638
Carroll *v.* Bird 941
— *v.* Blencowe . . . 432
Carron Park (The) . . 973, 1009
Carruthers *v.* Newen . . . 344
— *v.* Payne . . . 587
— *v.* Sheddon . . . 1112
— *v.* West . 1261, 1288
Carstairs *v.* Taylor . . . 764
Carter, *In re* 203
— *v.* Boehm . . 1117, 1118, 1119, 1120
— *v.* Crick 551
— *v.* Cummins . . . 674
— *v.* Ely (Dean) . . . 504
— *v.* Flower . . 1271, 1273
— *v.* James 194
— *v.* Ring 144
— *v.* Toussaint . . . 535
— *v.* Wake 819
— *v.* Whalley . . 365, 369
— *v.* White . . . 1249, 1250
— *v.* Williams . . . 229
— *v.* Wormald . . . 184
Cartwright *v.* Cartwright . . 1325
— *v.* Hateley . . . 956
— *v.* Pilkney . . . 240
Carvalho *v.* Burn 270
Casamajor *v.* Strode . . 478, 497
Casborne *v.* Barsham . . . 132
Case of Monopolies . . 102, 103
Casey *v.* Bentley 647
Cashill *v.* Wright 767
Cass *v.* Rudele 482
Cassels *v.* Stewart 358
Casseres *v.* Bell 438
Casson *v.* Roberts 508
Casswell *v.* Cheshire Lines Committee . . 1023, 1030, 1037
Castellain *v.* Preston . . 482, 1219
— *v.* Thompson . . . 905
Castellan *v.* Hobson . . 644, 645
Castelli *v.* Boddington . . . 268
Castle *v.* Playford . . . 592
— *v.* Sworder . . 535, 536, 608
— *v.* Wilkinson . . . 515
Castlegate (The) 966
— S.S. Co. *v.* Dempsey . 1005
Castleman *v.* Hicks . . . 798
Castling *v.* Aubert . . . 33
Castrique *v.* Bernabo . . . 1276
— *v.* Buttigieg . . 1253, 1266
— *v.* Imrie . . . 455
Caswell *v.* Coare 631
— *v.* Worth 923
Caterham Ry., *In re* . . . 065
Catharine (The) 837
Cathcart, *Ex parte* . . . 895

PAGE

Catherwood *v.* Caslon . . . 1320
— *v.* Chaband . . 257
Catley *v.* Wintringham . . . 993
Catlin *v.* King 37
Cato *v.* Irving . . . 833, 994
— *v.* Thompson . . 65, 492, 498
Caton *v.* Caton . . 23, 34, 39, 30), 480, 1316
Cator *v.* Gt. West Ins. Co. of New York 1177
Catt *v.* Howard 1337
— *v.* Tourle . . 100, 229, 302
Catterall *v.* Hindle . . . 161
Cattle *v.* Gamble . . 1345, 1358, 1368
Cattley *v.* Arnold 681
Catton *v.* Simpson . . 189, 1092
Caudery *v.* Finnerty . . . 280
Caunt *v.* Thompson . . . 1273
Cavalier *v.* Pope . . . 308, 309
Cave *v.* Coleman 547
— *v.* Hastings 37
— *v.* Mills 462
Cavenagh *v.* Such . . . 1043
Cavendish-Bentinck *v.* Fenn . 948
Cawley *v.* Furnell . . . 213
Cawthorn *v.* Cordrey . . . 35
Cawthron *v.* Trickett . . . 1007
Caxton & Arrington Union *v.* Dew . . 1087, 1092, 1099
Cayo Bonito (The) . . . 870
Cazenove *v.* Brit. Eq. Assur. Co. 1226, 1231
Celtic King (The) . . . 832
Central Bank of London, *Ex parte* 368
Ceylon Coaling Co. *v.* Goodrich . 966, 1273, 1274, 1278
Chadburn *v.* Moore . . . 329
Chadwick *v.* Clarke . . . 1372
— *v.* Sills 1369
Challoner *v.* Robinson . . . 787
Chalmers, *Ex parte* . 543, 609, 621
Chaloner *v.* Bolckow . . . 678
Chamberlain *v.* Lee . . . 516
— *v.* Napier . . . 59
— *v.* Williamson . . 195
— *v.* Young . . 1242, 1244
Chamberlain's Wharf *v.* Smith . 97
Chamberlyn *v.* Delarive . . 156
Chambers *v.* Griffiths . . . 478
— *v.* Manch. & Milf. Ry. . 89
— *v.* Miller . . . 859
Champernown *v.* Scott . . . 965
Champion *v.* Plummer . . . 37
— *v.* Rigby . . . 132
— *v.* Short . . . 538
Chandelor *v.* Lopus . . . 546
Chandler, *Ex parte* . . . 193
— *v.* Blogg . . . 1176
— *v.* Grieves . . . 933
— *v.* Webster . . . 150
Chandos (Duke) *v.* Talbot . . 502
Chant, *In re* 214, 219
Chanter *v.* Dickinson . . 1365, 1368
— *v.* Hopkins . . 545, 567
— *v.* Johnson . . . 1339
Chape *v.* Reynolds . . . 1144
Chapel *v.* Hickes 883

PAGE

Chapleo *v.* Brunswick Building Society 351
Chaplin *v.* Brammall . . 133, 1098
— *v.* Rogers . . . 597
Chapman *v.* Allen . . . 904
— *v.* Beckington . . 1087
— *v.* Biggs . . . 421
— *v.* Bluck . . . 652
— *v.* Browne . . . 251
— *v.* Callis . . . 36
— *v.* Chapman . . . 894
— *v.* Fraser . . . 1159
— *v.* G. W. Ry. . . . 1052
— *v.* Gwyther . . . 554
— *v.* Keane . . . 1273
— *v.* Michaelson . . 809
— *v.* Milvain . . . 388
— *v.* Morton . 558, 598, 606
— *v.* Shepherd . . 640, 968
— *v.* Smethurst . . . 1307
— *v.* Smith . 234, 344, 347, 655, 746
— *v.* Speller . 521, 561, 562
— *v.* Van Toll . . . 892
— *v.* Walton . . . 949
— *v.* Withers . . . 556
Chapman's Case 931
Chappel *v.* Comfort . . 1007, 1008
Chappell *v.* Poles . . . 466, 467
Chapple *v.* Cooper . . . 409, 410, 411, 452
Chard *v.* Fox 1273
Charles *v.* Blackwell . . 859, 1259
— *v.* Marsden . . . 1261
Charlesworth *v.* Faber . . . 1381
— *v.* Holt . . . 1325
— *v.* Mills . . . 818
— *v.* Watson . 54, 675
Charlotte (The) 871
Charlwood, *In re* 894
Charnley *v.* Grundy . . . 1298
Charter *v.* Watson . . . 209
Chartered Bank of India, &c. *v.* Brit. Ind. St. Nav. Co. . . 992
Chartered Merc. Bank of India *v.* Dickson . 1286
v. Netherlands India St. Nav. Co. . . . 988
Charters *v.* Bayntun . . . 410
Chase *v.* Westmore . . 887, 888
Chasemore *v.* Turner . . . 213
Chasteauneuf *v.* Capeyron . . 831
Chatenay *v.* Brazilian Co. . 46, 60
Chater *v.* Beckett 122
Chatfield *v.* Cox 1363
Chattock *v.* Bellamy . . . 1020
— *v.* Shawe . . . 1226
Chavasse, *Ex parte* . . 103, 1168
Cheale *v.* Kenward 6, 12, 293, 640, 650
Cheedley *v.* Mellor . . . 635
Cheerful (The) 869
Cheesman *v.* Exall . 821, 906, 910, 912, 1076, 1078
Cheetham *v.* Ward . 175, 176, 1097
Cheminant *v.* Thornton . . 169
Cherry *v.* Colonial Bank of Australasia . . 351, 353
v. Heming . . . 22, 36
Cheshire *v.* Bailey . . . 864, 901

PAGE
Cheslyn *v.* Dalby 213
Chesman *v.* Nainby . . . 98
Chester (Bishop) *v.* Freeland . 120
Chesterfield *v.* Bolton . . . 686
— (Lord) *v.* Harris . 635
— *v.* Jansen . . . 285
Chesterfield Brewery *v.* Inland Rev. Com. . . .1341, 1361
Chesterfield Coll. Co. *v.* Hawkins . 311
Chesterman *v.* Lamb . . . 631
— *v.* Mann . . . 295
Chetwynd *v.* Allen . . . 192
Cheveley *v.* Fuller . . . 72
Chew *v.* Holroyd 740
Chidell *v.* Galsworthy . . . 830
Chidley, *In re* 276
Child *v.* Chamberlain . . . 803
— *v.* Douglas . . . 304, 305
— *v.* Stenning 751
Childe and Hodgson's Cont., *In re* 484, 492
Childs *v.* Monins . . . 416, 1303
Chilton *v.* Carrington . . . 910
— *v.* Lond. & Croy. Ry. . 1057
China Steamship Co., *In re* . . 223
China Traders Co. *v.* Royal Ex. Assur. 1117
Chinery *v.* Viall . . 542, 596, 599
Chinnery *v.* Evans . . . 201
Chinnock *v.* Ely (Marchioness) . 14, 475, 514
— *v.* Sainsbury . . 299, 945
Chippendale *v.* Thurston . . 140
Chippendall *v.* Tomlinson . . 274
Chisman *v.* Count 470
Chitty *v.* Selwyn . . .1138, 1139
Cholmeley *v.* Darley . . . 1378
Chope *v.* Reynolds . . . 1109
Chorley *v.* Bolcot 898
Chowne *v.* Baylis . . . 224, 463
Christie *v.* Borelly 54
— *v.* Griggs 1015
— *v.* Lewis 971
Christophers *v.* White . . . 872
Christy *v.* Courtenay . . . 244
— *v.* Row . . . 997, 1000
— *v.* Tancred . . 683, 732
Chubb *v.* Stretch 264
Church *v.* Imperial Gas Co. . . 378
Churchill, *In re* 1103
Churchward *v.* Ford . . . 682
— *v.* Reg. 447
Churton *v.* Douglas . . . 102
Citizen's Bank of Louisiana *v.* First National Bank of New Orleans 73
City Bank, *Ex parte* . . 223, 860
City Discount Co. *v.* McLean . 167
City of Lincoln (S.S.) *v.* Smith . 983, 984, 989
City of London Brewery *v.* Inland Rev. Com. . . .1347, 1348
City of London Gas Co. *v.* Nicholls 378
Civil Service Co-operative Soc. *v.* General Steam Navigation Co. 149
Clack *v.* Carlon 873
Clanricarde *v.* Henning . . . 132

PAGE
Clapham *v.* Colojan . . . 1135
— *v.* Draper 170
— *v.* Langton . . . 1163
— *v.* Moyl 52
— *v.* Shillito . . 550, 553
Clarance *v.* Marshall . . . 462
Clare *v.* Dobson 753
— *v.* Joseph 895
— *v.* Lamb 521
— *v.* Maynard 631
Claridge *v.* Dalton . . . 1280
— *v.* Mackenzie . . . 655
— *v.* S. Staffs. Tram Co. . 864
Claringbould *v.* Curtis . . . 629
Clark, *In re* 423
— *v.* Blything (Hundred of) . 1217, 1221
— *v.* Calvert 271
— *v.* Gaskarth . . . 786
— *v.* Gilbert . . 446, 864, 909
— *v.* Glasgow Assur. Co. 149, 686
— *v.* Hooper 219
— *v.* Hougham . 214, 415, 1337
— *v.* Johnson 355
— *v.* Malpas 132
— *v.* Robinson . . . 475
— *v.* Sewell 157
— *v.* Upton 88
Clarke, *Ex parte* 934
— *In re* 320
— *v.* Army and Navy Co-operative Soc. . 565, 566
— *v.* Bickers 261
— *v.* Birley 1093
— *v.* Cuckfield Union . . 376
— *v.* Dickson . . . 131, 579
— *v.* Earnshaw . . . 900
— *v.* Fuller 38
— *v.* Holmes . . 921, 922, 925
— *v.* Hooper 214
— *v.* Hutchins . . . 1039
— *v.* London & County Bank . . . 1293
— *v.* Millwall Dock Co. . . 790
— *v.* Noel 161
— *v.* Percival . . . 1285
— *v.* Ramuz . . 482, 512, 514
— *v.* Roche . . .1334, 1378
— *v.* Royle 525
— *v.* Roystone . . . 69
— *v.* Sharpe . . . 1276
— *v.* Shee . . . 467, 468
— *v.* Spence . . 586, 587, 885
— *v.* Tipping 947
— *v.* Watson . . . 879, 896
— *v.* Westrope . 145, 623, 747, 754
— *v.* Willott 488
Clason *v.* Simmonds . . . 1151
Clavering's Case 635
Clay *v.* Crofts 1370
— *v.* Harrison 621
— *v.* Ray 87, 465
— *v.* Southern . . . 345, 359
— *v.* Willan 1029
— *v.* Willis 3
— *v.* Yates . . . 114, 867
Claygate *v.* Batchelor . . . 95
Clayton's Case . . . 164, 166

	PAGE
Clayton's Contract, *In re*	274
Clayton *v.* Blakey	662
— *v.* Burtenshaw	1363
— *v.* Corby	635
— *v.* Gregson	71
— *v.* Leech	495
— *v.* Nugent (Lord)	47
Cleary *v.* M'Andrew	966, 994, 995
Cleather *v.* Twisden	851
Cleave *v.* Jones	215, 216
Cleaver *v.* Mutual Reserve Fund	1224
Clegg *v.* Hands	234, 235
— *v.* Rowland	250
Clemence, *Ex parte*	792
Clement *v.* Gunhouse	21
Clements *v.* L. & N. W. Ry.	406
— *v.* Welles	229, 303
— *v.* Williams	408
Clerk *v.* Blackstock	320
— *v.* Laurie	946
— *v.* Wright	481
Clerke *v.* Scroggs	259
Clermont *v.* Tasburgh	516
Cleworth *v.* Pickford	152
Clifford *v.* Inland Rev. Com.	1353
— *v.* Laton	425, 427, 428
— *v.* Parker	1297
— *v.* Turrell	66
— *v.* Watts	148
Clift *v.* Schwabe	1229
Climie *v.* Wood	699, 702, 840
Clinan *v.* Cooke	24
Clink *v.* Radford	1008
Clipsham *v.* Vertue	978
Clive *v.* Beaumont	17
Clode *v.* Bayley	859, 1275
Close *v.* Phipps	464
Closmadeuc *v.* Carrel	1338
Clough, *Ex parte*	46
— *v.* Lambert	1324
— *v.* L. & N. W. Ry.	129, 130, 578, 579
Clouston & Co. *v.* Corry	932, 933
Clow *v.* Brogden	753
Clowes *v.* Clowes	1321
— *v.* Higginson	299, 516
— *v.* Hughes	755, 772
Clubb *v.* Hutson	83
Cluff *v.* Moore	5
Clugas *v.* Penaluna	112
Clun's Case	737
Clunn, *In re*	177
Clutton *v.* Attenborough	1243, 1244, 1252
Clydebank Engineering Co. *v.* Yzquierdo y Castaneda	288
Coaks *v.* Boswell	127, 526
Coates *v.* Railton	613
— *v.* Stevens	548
— *v.* Wilson	410
Coats *v.* Chaplin	1068
— *v.* Inland Rev. Com.	1353
Cobb, *In re*	1260
— *v.* Becke	181, 469
— *v.* G. W. Ry.	1026
— *v.* Stokes	720
Cobban *v.* Downe	865
Cobbett *v.* Wheeler	397
Cobden *v.* Kendrick	466
Coburn *v.* Colledge	205
Cochran *v.* Retberg	1006
Cock *v.* Cross	258
— *v.* Honychurch	184
— *v.* Richards	1311
— *v.* Taylor	999
Cockell *v.* Gray	58
Cockerell *v.* Aucompte	396
Cockey *v.* Atkinson	1138, 1139, 1173
Cocking *v.* Ward	23, 471, 719
Cockle *v.* S. E. Ry.	1025, 1026
Cockran *v.* Irlam	949
Cockrane *v.* Fisher	1167
— *v.* Green	180
— *v.* Willis	9
Cockrill *v.* Sparke	213
Cockroft *v.* Black	252
Cocks *v.* Masterman	136, 467
— *v.* Nash	176, 177
Cockshott *v.* Bennett	87
Cockson *v.* Cock	235
Codd *v.* Brown	745
Coddington *v.* Paleologo	543
Coe *v.* Clay	449, 664
— *v.* Duffield	36
Cogent *v.* Gibson	294, 636
Coggs *v.* Bernard	3, 291, 762, 811, 812, 826, 828, 845, 846, 860, 861, 862, 984, 1027
Coghil *v.* Freelove	242, 248
Cohen *v.* Hale	1291
— *v.* Kittell	107
— *v.* Mitchell	274
— *v.* S. E. Ry.	1049, 1053
— *v.* Tannar	666
Cohen's Exors. and London Co.: Co., *In re*	241
Cohn *v.* Davidson	974, 985, 1162
Colborne & Strawbridge, *Ex parte*	223
Colbourn *v.* Dawson	1082
Colbron *v.* Travers	90, 678
Colby *v.* Gadsden	503, 515
Colchester (Mayor) *v.* Brooke	377
Coldham *v.* Showler	40, 1083
Coldrick *v.* Partridge, Jones & Co.	926
Cole's Case	236
Cole *v.* Cottingham	1312
— *v.* Eley	965
— *v.* Forth	691
— *v.* Gibson	1311
— *v.* Gower	86
— *v.* Green	691
— *v.* Kernot	831
— *v.* Meek	978
— *v.* North Western Bank	821, 822
— *v.* Parkin	1336
— *v.* Robins	435
— *v.* Sims	303
— *v.* White	480
Colebeck *v.* Girdler's Co.	689
Colebrook *v.* Layton	95
Coleham *v.* Cooke	1245
Coleman *v.* Bucks & Oxon Union Bank	856
— *v.* Gibson	534
— *v.* Lambert	999
— *v.* Riches	335, 340
— *v.* Sherwin	318

PAGE
Coleman *v.* S. E. Ry. . . . 1026
— *v.* Upcot 475
— *v.* Waller . . . 88
Coleman's Depositories, *In re* . 1223, 1238
Coles *v.* Barrow 274
— *v.* Bristowe . . . 641, 951
— *v.* Bulman 624
— *v.* Hulme 48
— *v.* Pack 1090
— *v.* Strick 83
— *v.* Trecothick . . 12, 516
Collard *v.* S. E. Ry. . . . 1072
Colledge *v.* Harty 1167
— *v.* Horne 213
Collen *v.* Gardner . . . 329, 655
— *v.* Wright . . . 351, 352, 969
Collett *v.* Curling . . . 667, 777
— *v.* L. & N. W. Ry. . 291, 1017, 1069
Colley *v.* Streeton 753
Collie, *Ex parte* 382
Collier *v.* Jenkins 497
— *v.* Mason 292
Collingbourne *v.* Mantell . . 184
Collinge *v.* Heywood . . . 208
Collingridge *v.* Royal Exch. Assur. Co. 482
Collingwood *v.* Berkeley . . 394
Collins *v.* Benning . . 144, 208
— *v.* Blantern . 82, 106, 120, 552, 1311
— *v.* Bristol & Exeter Ry. . 1033, 1053
— *v.* Brook 407
— *v.* Butler 1270
— *v.* Carey 872
— *v.* Castle 229
— *v.* Collins 899
— *v.* Crouch 249
— *v.* Evans 336
— *v.* Godefroy . . . 4
— *v.* Lamport . . . 832
— *v.* Locke . . . 98, 102
— *v.* Price 887
— *v.* Prosser 320
— *v.* Stimpson . . . 273
Collinson *v.* Lister . . . 246
— *v.* Margesson . . . 212
Collis *v.* Botthamley . . . 38
— *v.* Stack 213
Collyer *v.* Willock 217
Colman *v.* East. Counties Ry. . 387
Cologan *v.* London Assurance . 1193
Colonial Bank *v.* Exchange Bank of Nova Scotia 462
— *v.* Hepworth . . 642
— *v.* Whinney . . 639
Colonial Bank of Australia *v.* Marshall 1295
Colonial Ins. Co. of New Zealand *v.* Adelaide Marine Ins. Co. . 454, 601, 1109, 1111
Coltman, *In re* 401
— *v.* Chamberlain . . 833
Columbine *v.* Chichester . . 650
Columbus Co. *v.* Clowes . . 278
Colvill, *Ex parte* 1233
Colvin *v.* Newberry 972
PAGE
Combe's Case . . . 325
Combe *v.* Woolf 1093
Comber *v.* Leyland . . . 1258
Comfort *v.* Betts 225
Commercial Bank of Australia, *In re* 1299
Comm. Bk. of Australia *v.* Off. Assignee of Wilson's Estate 153
Commercial Bank of Tasmania *v.* Jones 179, 1096
Commercial S.S. Co. *v.* Boulton . 1007
Commings *v.* Heard . . . 194
Commins *v.* Scott 37
Company of African Merchants *v.* British & For. Mar. Ins. Co. 1152, 1169
Commissioners of Stamps *v.* Hope 185, 192
Commonwealth Portland Cement Co. *v.* Weber, Lohmann & Co. 138, 451
Compania Naviera Vasconzada *v.* Churchill . . . 340, 981
Compton *v.* Bagley . . . 503
Congleton Corporation *v.* Pattison 235
Congreve *v.* Evetts . . . 831
Connock *v.* Jones . . . 52, 686
Connor *v.* Martin 262
Conolly *v.* Baxter . . . 682
Conquest *v.* Ebbetts . . 751, 753
Conquest's Case 179
Conservators of River Thames *v.* Inland Rev. Com. . . . 1346
Consolidated Exploration Co. *v.* Musgrave 123
Consolidated Tea and Lands Co. *v.* Oliver's Wharf . . . 1020
Constable *v.* Cloberie . . . 977
— *v.* Noble . . . 1173
Contract Corporation, *In re* . . 383
Conway *v.* Gray 1180
Cooch *v.* Goodman . . 19, 672
Cood *v.* Cood 60
Cook *v.* Culverhouse . . . 241
— *v.* Dawson 247
— *v.* Deaton 408
— *v.* Guerra . 667, 676, 756, 780
— *v.* Jones 1331
— *v.* Lister 1260
— *v.* Moylan 684
— *v.* Wright . . . 11, 1258
Cooke *v.* Clayworth . . . 516
— *v.* Eshelby . . . 73, 322
— *v.* Oxley 16
— *v.* Riddelien . . . 572
— *v.* Seeley . . . 324, 325
— *v.* Stratford . . . 108
— *v.* Tombs 481
— *v.* Tonkin 394
— *v.* Wilson . . 314, 344, 348
Cooker *v.* Child 311
Coolgardie Gold Fields, *In re* . 1334
Coombe *v.* Greene . . 142, 888
Coomber *v.* Howard . . . 777
Coombes *v.* Dibble . . . 104
Coombs *v.* Bristol & Exeter Ry. . 534, 1068
— *v.* Wilkes 37

PAGE

Coondoo *v.* Mookerjee . . . 80
Coope *v.* Cresswell 219
— *v.* Eyre 321
Cooper, *Ex parte* . 119, 614, 618, 621, 1052, 1056
— *In re* . . . 73, 649
— *v.* Bill . . . 611, 612
— *v.* Emery 489
— *v.* Evans 1091
— *v.* Jarman . . . 242, 253
— *v.* Joel 1098
— *v.* Kendall . . 211, 212
— *v.* Lloyd 427
— *v.* L. B. & S. C. Ry. . . 1066
— *v.* L. & S. W. Ry. . . 1064
— *v.* Martin 413
— *v.* Parker 151
— *v.* Phibbs 134
— *v.* Phillips . . 3, 338, 922
— *v.* Prichard . . . 196
— *v.* Simmons . . . 409
— *v.* Smith . . . 36, 531
— *v.* Southgate . . . 100
— *v.* Stephenson . . . 894
— *v.* Taylor 252
— *v.* Turner 158
— *v.* Willomat . . 847, 910
Coore *v.* Callaway 168
Cope *v.* Albinson 14
— *v.* Rowlands . . . 89, 112
— *v.* Thames Haven, &c., Co. . 378
Copeland *v.* N. E. Ry. . . . 441
— *v.* Watts . . . 719
Copin *v.* Adamson 455
Copley *v.* Burton 765
Copper Miners of England *v.* Fox . 373
Coppin *v.* —— 432
— *v.* Walker 346
Coppock *v.* Bower . . . 83, 1337
Corcoran *v.* Gurney . . . 1176
Cordelia (The) 1006
Cordery *v.* Colville . . 1279, 1280
Cordwent *v.* Hunt 174
Core's Case 53
Core *v.* Woddye 312
Cork *v.* Baker 33
— *v.* Lister 157
— *v.* Saunders 187
Cork & Bandon Ry. *v.* Goode . 203
Cork & Youghal Ry., *In re* . . 89
Cork Distillers' Co. *v.* Great Southern Ry., Ireland . . 1052
Corkling *v.* Massey . . . 976
Corlett *v.* Gordon 949
Cormack *v.* Gladstone . . . 1152
Corn *v.* Matthews . . . 406, 938
Corner *v.* Shew 451
Cornfoot *v.* Fowke . . 127, 333, 335, 337, 672
— *v.* Royal Exch. Assur. . 1154
Cornforth *v.* Smithard . . . 212
Cornill *v.* Hudson 204
Cornish *v.* Abington . . 160, 323
— *v.* Accident Ins. Co. . 1238
— *v.* Cleife 687
— *v.* Rowley 507
— *v.* Searell 1372
— *v.* Stubbs . . 635, 661, 720
Cornwall Mining Co. *v.* Bennett . 638

PAGE

Cort *v.* Ambergate Ry. . 146, 172, 603, 626
Cory *v.* Burr . . 1178, 1179, 1183
— *v.* Harrison 101
— *v.* Patton . . . 1122, 1124
— *v.* Scott 1279
— *v.* Thames Ironworks Co. . 282
Cory Bros. & Co., *v.* Owners of S.S. Mecca . . . 164, 165, 167
Cosh's Contract, *In re* . . . 670
Coslake *v.* Till 504
Cossman *v.* West 1188
Cotes *v.* Davis 424
Cotesworth *v.* Spokes . 713, 737, 774
Cothay *v.* Fennell . . . 318, 325
— *v.* Tute 1040
Cottam *v.* Eastern Counties Ry. 649
— *v.* Partridge . . . 216
Cottee *v.* Richardson . . . 653
Cotton, *Ex parte* 840
— *v.* Bull 796
— *v.* Thurland . . . 124
Cottrell *v.* Watkins . . . 488
Couch *v.* Steel 922
Coughlin *v.* Gillison . . . 814
Couldery *v.* Bartrum . 177, 187, 198
Coulson, *Ex parte* . . . 272
Coulthart *v.* Clementson . . 1100
County Life Assur. Co., *In re* . 1223
County of Durham Electrical Power Co. *v.* Inland Rev. Com. . . . 1353, 1362
County of Gloucester Bank *v.* Rudry Merthyr Coll. Co. . 382
County of Lancaster (S.S.) *v.* Sharp 1008
Coupé Co. *v.* Maddick . 807, 847, 901
Coupland *v.* Maynard . . . 717
Courage *v.* Baker . . 209, 463
— *v.* Carpenter . . . 103
Court *v.* Berlin 891
Courteney *v.* Strong . . . 9
Courtney *v.* Taylor . . . 51
Cousins *v.* Phillips . . . 720
Couturier *v.* Hastie . 30, 32, 948
Covas *v.* Bingham 602
Coventry *v.* Gladstone . . 614, 615
— *v.* G. E. Ry. . . . 73
Coverdale *v.* Grant . . . 1005
Coverley *v.* Burrell . . . 499
Covington *v.* Roberts . . . 1011
Cowan *v.* Milbourn . . . 76
Coward *v.* Gregory . 685, 686, 687
Cowell *v.* Simpson . . . 905
Cowen *v.* Truefitt 656
Cowie *v.* Halsall 1336
— *v.* Stirling 1244
Cowles *v.* Gale 504
Cowley *v.* Watts 515
Cowling *v.* Topping . . . 1234
Cowper *v.* Godmond . . . 206
— *v.* Green 4
— *v.* Smith 1093
Cox *v.* Bailey 1370
— *v.* Bent 776
— *v.* Bishop 749
— *v.* Bruce . . . 340, 981
— *v.* G. E. Ry. . . 1023, 1058
— *v.* Hickman . . . 360

PAGE
Cox *v.* Leech . . . 892, 894
— *v.* Liotard 1226
— *v.* Mid. Counties Ry. . . 378
— *v.* Prentice . . 355, 461, 473
— *v.* Rodbard 286
— *v.* Troy . . . 1252, 1264
— *v.* Walker 631
Cox's Contract, *In re* . . . 496
Cox's Trusts, *In re* . . . 170.
Coxe *v.* Harden . . . 590, 1067
Coxhead *v.* Mullis . . . 411
Coxon *v.* G. W. Ry. . 1053, 1070
Coysegame, *Ex parte* . . . 272
Crabtree *v.* Robinson . . . 782
Crace, *In re* . 1085, 1089, 1099
Cradock *v.* Piper 872
Cragoe *v.* Jones 1097
Craig *v.* Watson 862
Cramer *v.* Mott 796
Crampton *v.* Ridley . . . 873
Cranch *v.* White 1308
Crane *v.* Batten 715
— *v.* London Docks Co. . 593, 594
Cranston *v.* Marshall . . . 977
Crantz *v.* Gill 408
Craven *v.* Ryder . . . 598, 612
Crawford *v.* Forshaw . . . 256
— *v.* Toogood . . 503, 543
Crawfurd *v.* Cocks . . . 366
Crawshay *v.* Eades . . . 618
— *v.* Homfray . . . 905
— *v.* Thompson . . 575
— *v.* Thornton . . . 850
Crawter *v.* Marvin . . . 252
Craythorne *r.* Swinburne . . 1080, 1101
Creagh *v.* Blood 436
Crears *v.* Hunter . . 1083, 1257
Crediton (Bishop of) *v.* Bishop of Exeter 190, 191
Cree *v.* Somervail 417
Creen *v.* Wright . . . 918, 931
Cressington (The) . . . 988, 1174
Crew *v.* Petit 400
— *v.* Terry 276
Cribb *v.* Kynoch . . . 922, 927
Crick *v.* Theobald 108
Crickett *v.* Crickett . . . 422
Cripps *v.* Davis 213
— *v.* Hartnoll . . . 30, 31
— *v.* Reade . . 462, 466, 521
Crisdee *v.* Bolton 289
Crisp *v.* Anderson 1337
— *v.* Churchill 77
— *v.* Price 656
Critchley, *Ex parte* . . . 82
Crocker *v.* Gen. Ins. Co. of Trieste . 1151
— *v.* Molyneux . . . 941
— *v.* Sturge . . 1139, 1151
Crockford *v.* Alexander . . . 517
— *v.* Winter . . 333, 464
Croft *v.* Lumley . . 164, 668, 713
Crofton *v.* Crofton . . . 208
— *v.* Poole 273
Crofts *v.* Waterhouse . . . 1016
Cronmire, *In re* . . 106, 124, 423
Crook *v.* Seaford Corporation . 375
Crookewit *v.* Fletcher . . 189, 974
Crooks *v.* Allan 1013

PAGE
Crosby *v.* Wadsworth . . . 27
Cross, *In re* 964
— *v.* Andrews 768
— *v.* Cheshire 455
— *v.* Eglin 601
— *v.* Jordan 737
— *v.* Williams 320
Crosse *v.* Andrews 766
— *v.* Gardner 560
Crossfield *v.* Manchester Ship Canal Co. . . . 81
— *v.* Such 260
Crosskey *v.* Mills 947
Crossley *v.* City of Glasgow Ins. Soc 225
— *v.* Ham 1261
— *v.* Lee 783
— *v.* Magniac . . 159, 160
— *v.* Maycock 17
Crotty *v.* Hodges 1295
Crouan *v.* Stanier 1203
Crouch *v.* Credit Foncier . 221, 1247, 1256
— *v.* G. N. Ry. . . . 1062
— *v.* G. W. Ry. . . . 1054
— *v.* L. & N. W. Ry. . 1020, 1021, 1033, 1039
Crow *v.* Robinson 225
— *v.* Rogers 308
Crowe *v.* Ballard 132
— *v.* Clay 1298
— *v.* Lysaght 188
— *v.* Price 92
Crowfoot *v.* Gurney . . 182, 1379
Crowhurst *v.* Laverack . . . 6
Crowley *v.* Cohen . . 1111, 1127, 1128, 1220
— *v.* Vitty . . . 67, 718
Croydon Commercial Gas Co. *v.* Dickinson 1086
Croydon Hosp. *v.* Farley . . 373
Cruchley *v.* Clarance . . 1249, 1336
Cruickshank *v.* Janson . 1138, 1151, 1153
Cruickshanks *v.* Rose . . . 166
Crusader (The) 871
Cruse *v.* Paine 642
Crutchley *v.* Mann . . . 1249
Cruttwell *v.* Lye 101
Cuckson *v.* Stones 933
Cud or Cuddee *v.* Rutter . 293, 649
Cudlip *v.* Rundal 661
Cuff *v.* Brown 939
— *v.* Penn 544
Cullen *v.* Butler 1184
— *v.* Trimble 577
Culley, *Ex parte* 224
Culling *v.* Tuffnell . . . 700
Cullwick *v.* Swindell . . 702, 840
Culverhouse, *In re* . . . 241
— *v.* Wickens . . . 162
Cumber *v.* Wane . . . 11, 151
Cumberland Union Banking Co. *v.* Maryport Hematite Co. . 840
Cumberledge *v.* Lawson . . 370
Cuming *v.* Brown 620
— *v.* Hill 938
Cumming *v.* Bedborough . 459, 677
— *v.* Shand 854

PAGE

Cumpston *v.* Haigh . . . 888
Cunard *v.* Hyde 1129
Cunard S.S. Co. *v.* Marten . . 1203
Cundell *v.* Dawson . . 110, 624
Cundy *v.* Lindsay . . 528, 593, 594
— *v.* Marriott 156
Cuninghame *v.* City of Glasgow Bank 417
Cunliffe *v.* Harrison . . . 601
— *v.* Whitehead . . . 1247
Cunliffe-Smith *v.* Hankey . . 252
Cunningham *v.* Collier . . . 356
— *v.* Dunn . . 977, 1003
— *v.* Mar. Ins. Co. . 1186
— & Co., *In re* . . 389
Curl *v.* Webster 102
Curlewis *v.* Clark 186
Curling *v.* Austin 520
— *v.* Chalkden . . . 1085
— *v.* Flight 637
— *v.* Robertson . . . 342
— *v.* Shuttleworth . . 510
Currie *v.* Anderson . . 535, 536
— *v.* Bombay Native Ins. Co. 1188
— *v.* Misa . . 2, 153, 1257
Curry *v.* Edensor 1365
Curtice *v.* London, City & Midland Bank 1291
Curtis *v.* Collingwood . . . 308
— *v.* Hannay 557
— *v.* Pugh . . 534, 558, 598, 605, 606
— *v.* Rickards 471
— *v.* Vernon 259
— *v.* Wheeler 773
— *v.* Williamson . . . 327
Curwen *v.* Milburn . . . 212
Cusack *v.* Robinson 532, 534, 536, 597
Cussons *v.* Skinner . . . 933
Cuthbert *v.* Cumming . . 69, 978
Cuthbertson *v.* Irving . 654, 655, 758
Cutler *v.* Bower 55
— *v.* Close . . 629, 883, 914
— *v.* N. Lond. Ry. . . . 1047
— *v.* Simons 519
Cutter *v.* Powell . . . 935, 941
Cutting *v.* Derby 734
Cutts *v.* Salmon 132
— *v.* Thodey . . 486, 509, 511
— *v.* Ward 119
Cuxon *v.* Chadley 180
Cyclists' Touring Club, *In re* . 379
Cynthia (The) 837
Czech *v.* General St. Nav. Co. . 986, 1045

DABBS *v.* Humphries . . . 212
De Comas *v.* Prost . . . 946
Da Costa *v.* Edmunds . . . 1128, 1129, 1136
— *v.* Firth 1206
— *v.* Newnham . . . 1206
Dadswell *v.* Jacobs . . . 947
Dagnall, *In re* . . . 272, 420
Dahl *v.* Nelson . . 970, 977, 978, 1004, 1007
Dakin *v.* Oxley 995

PAGE

Dakin *v.* Watson 1368
Dalby *v.* Hirst 745
— *v.* Ind. & Lond. Life Ins. Co. . 1222, 1225, 1233
Dale *v.* Hall . . . 1020, 1027
— *v.* Hamilton 23
Dalgleish *v.* Hodgson . . . 1168
Dallman *v.* King 877
Dallow *v.* Garrold 965
Dalton *v.* Angus 209
— *v.* Gib . . . 409, 410
— *v.* Mid. Ry. . . 418, 649
— *v.* Whittem . . . 783
Dalzell *v.* Mair 1157
Dames' Contract, *In re* . . 506
Danby *v.* Coutts 328
Dance *v.* Girdler 1087
Dancer *v.* Hastings . . . 655
Dando *v.* Boden 1298
Dane *v.* Kirkwall 436
— *v.* Mortgage Ins. Corp. . 1080
Daniel *v.* Adams 518
— *v.* Bowles . . . 16, 1312
— *v.* Gracie 775
— *v.* Met. Ry. . . 1018, 1030
— *v.* Stepney 783
Daniell *v.* Sinclair . . . 460, 473
Daniels *v.* Harris 1163
— *v.* Davison . . 511, 518
Danks, *Ex parte* 167
Dann *v.* Spurrier . 50, 140, 658, 708
Dansey *v.* Richardson . 762, 846, 900, 901
Dansk, &c., Aktieselskab *v.* Snell . 275
Danube & Black Sea Ry. *v.* Xenos 141, 172
Danubian Sugar Factories *v.* Inland Rev. Com. . . . 1361
Darbey *v.* Whitaker . . . 298
Darbishire *v.* Parker . . . 1275
Darby *v.* Harris 783
D'Arc *v.* L. & N. W. Ry. . . 1048
D'Arcy (Lord) *v.* Askwith . . 692
— *v.* Tamar, &c., Ry. . . 387
Darcy *v.* Allen 102
Darling *v.* Raeburn . . . 975
Darlington Joint Stock District Banking Co., *Ex parte* . . 362
Darnley (Earl) *v.* L. C. & D. Ry. 171, 503
Darrell *v.* Tibbitts . . . 1219
Dartmouth (Mayor) *v.* Silly . . 1084
Dartnall *v.* Howard . . . 862
Dashwood *v.* Jermyn . 3, 306, 1317
Daubuz *v.* Morshead . . . 438
Davey *v.* Mason 1030
— *v.* Shannon . . . 35
David *v.* Britannic Merthyr Coal Co. 926
— *v.* Sabin 522
Davidson *v.* Burnand...1163, 1175, 1184
— *v.* Case 1189
— *v.* Cooper . 21, 189, 190
— *v.* Gwynne . . . 977
— *v.* Stanley . . . 330
— *v.* Willasey . . . 1143
— *v.* Wood . . 425, 436
Davie *v.* Beardsham . . . 482
Davies' Policy Trusts, *In re* . . 1224

PAGE
Davies, *Ex parte* . 821, 847, 849, 954
— *v.* Aston 784
— *v.* Davies . 95, 96, 102, 223, 917
— *v.* England . . 921, 924
— *v.* Fitton 90
— *v.* Humphreys . . 208, 1102
— *v.* Jenkins . . . 818
— *v.* McVeagh . . 1004, 1005
— *v.* Makuna . . . 115
— *v.* Monkhouse . . . 251
— *v.* Penton 290
— *v.* Stacey 677
— *v.* Stainbank . . 1095, 1267
— *v.* Thomas . . . 512
— *v.* Underwood . . . 751
— *v.* Wilkinson . . . 470
Davis, *Ex parte* 940
— *v.* Bomford 1315
— *v.* Bryan . . . 465, 466
— *v.* Burrell . . . 141, 736
— *v.* Cary 151
— *v.* Clarke 1265
— *v.* Eyton 712
— *v.* Foreman 302
— *v.* Freethy . . . 132, 952
— *v.* Garrett 992
— *v.* Gildart 1219
— *v.* Gyde 777
— *v.* Harris 787
— *v.* Hedges 882
— *v.* Holding 84
— *v.* Howard 951
— *v.* Hymen 365
— *v.* James 1068
— *v.* Jones . . . 71, 697
— *v.* Manington . . . 407
— *v.* Marshall . . . 918, 921
— *v.* Mason 99
— *v.* N. W. Ry. . . . 1071
— *v.* Ohrly 526
— *v.* Petrie 198
— *v.* Reilly . . 154, 155, 1256
— *v.* Reyner 416
— *v.* Symonds . . 64, 299, 552
— *v.* Town Properties, &c., Corp. . . . 230, 665
— *v.* Williams 1332
— & Cavey, *In re* . . . 491
— & Co., *In re* . 224, 269, 635, 794, 831
Davison, *In re* 193
— *v.* Donaldson . . 162, 327
— *v.* Gent 718
— *v.* Wilson 736
Davy *v.* Milford 1199
— *v.* Scarth 369
Dawes *v.* Peck . . 604, 1067, 1068
— *v.* Thomas 677
Dawson *v.* Chamney . . 766, 769
— *v.* Collis 558
— *v.* Cropp 797
— *v.* Fitzgerald . . . 82
— *v.* G. N. & City Ry. . 222, 224
— *v.* Inland Rev. Com. . 1341
— *v.* Isle 853
— *v.* Lawes 1094
— *v.* Massey 132
— *v.* Morrison . . . 395
— *v.* Remnant . . 472, 473
PAGE
Dawson *v.* Wrench . . . 391
Day, *In re* 242
— *v.* Bather . . . 765, 766
— *v.* Fynn 502
— *v.* Hemming 115
— *v.* Longhurst . . . 1247
— *v.* McLea 184
— *v.* Singleton . . . 253, 513
— *v.* Wells 516
Deacon *v.* Stodhart . . . 1250
Dean *v.* Hogg 971
— *v.* Hornby 1194
— *v.* James 168
— *v.* McDowell 358
— *v.* Newhall . . . 175, 178
— *v.* Thwaite 209
Deane *v.* Keate 812
Dear *v.* Mellard 402
— *v.* Verity 515
Dearden *v.* Townsend . . . 1065
Deare *v.* Soutten 429
Dearle *v.* Hall 226
Debenham *v.* Mellon . . 425, 427
— *v.* Ox 1311
— *v.* Sawbridge . . 495
De Berkon *v.* Smith . . . 365
De Bernardy *v.* Harding . 875, 934
De Braam *v.* Ford 818
Debtor, *Ex parte* . . 153, 154, 155
— *In re* . 153, 154, 155, 413, 420, 1256
Decharms *v.* Horwood . . . 318
De Clifford (Lord), *In re* . . 251
— — *v.* Quilter . 251
De Cosse Brissac *v.* Rathbone . 455
De Costa *v.* Scandret . . . 1119
De Cuadra *v.* Swann . . . 1191
Deeley *v.* Lloyd's Bank . 165, 167
Deering *v.* Farrington . . . 449
Deeze, *Ex parte* 962
De Francesco *v.* Barnum . . 405
Defries & Sons, Ltd., *In re* . 156, 1290
De Gamende *v.* Pigou . . . 1157
De Garey *v.* Claggett . . . 1167
De Gelder *v.* Savory . . . 349
Degg *v.* Midland Ry. . . . 927
De Grave *v.* Monmouth (Mayor) . 375
De Greuchy *v.* Wills . . . 264
D'Eguino *v.* Bewick . . . 1167
De Hahn *v.* Hartley . . . 1166
De Hart *v.* Campania Anonima de Seguros Aurora . . . 1202
De Hoghton *v.* Money . . . 81
Deighton and Harris' Cont., *In re* . 506
De la Bere *v.* Pearson . . . 279
Delaney *v.* Fox . 655, 665, 675, 739
— *v.* Stoddart . . . 1169
De Lassalle *v.* Guildford . . 66
De la Vega *v.* Vianna . . . 59
Delta Syndicate Co., *In re* . . 638
De Mattos *v.* Benjamin . . . 104
— *v.* Gibson . 227, 228, 303
— *v.* North . . . 1109
— *v.* Saunders . 1114, 1188, 1202
De Medina *v.* Polson . . . 750
Den *v.* Hopkinson 728
Denaby Main Colliery Co. *v.* M. S. & L. Ry. 1061, 1063

	PAGE
Denby *v.* Henderson	98
— *v.* Moore	677
— *v.* Nicoll	713
Dendy *v.* Evans	715
Denew *v.* Daverell	889
De Nicholls *v.* Saunders	667, 676, 756, 777, 780
Denn *v.* Cartwright	658
— *v.* Rawlins	720
Dennett *v.* Atherton	666
Denny *v.* Hancock	500
Denoon *v.* Home & Col. Assur. Co.	1132, 1141
Dent *v.* Dent	92
— *v.* Smith	1165, 1168, 1175
Denton *v.* G. N. Ry.	1024
— *v.* Macneil	128
— *v.* Peters	1253
— *v.* Richmond	288
— *v.* Rodie	815
Denton's Estate, *In re*	1080, 1101
Denys *v.* Shuckburgh	209
De Oleaga *v.* West Cumberland Iron Co.	603
De Porquet *v.* Page	1372
De Pothonier *v.* De Mattos	177
Derby (Earl) *v.* Taylor	231
Derbyshire, *In re*	853
Derenburg & Co., *Ex parte*	157
De Ribeyre (La Marquise) *v.* Barclay	852
Dering *v.* Winchelsea (Earl)	1101
De Roo *v.* Foster	406
De Rothschild *v.* Royal Mail, &c. Co.	901, 1019
De Roufigny *v.* Peale	893
Derry *v.* Mazarine (Duchess)	432
— *v.* Peek	126, 1123
Desbrow *v.* Wetherby	1295
De Sewhanberg *v.* Buchanan	550
De Silvale *v.* Kendall	994
Deslandes *v.* Gregory	314, 348
De Thoren *v.* Att.-Gen.	1319
Deuters *v.* Townsend	1261
Deux *v.* Jefferies	178
De Vaux *v.* Salvador	1127, 1175
Devaux *v.* Conolly	466
— *v.* J'Anson	1141, 1142
Devaynes *v.* Noble	164, 166
Dever, *Ex parte*	272, 1300
Deverell *v.* Bolton (Lord)	487, 490, 492
Deverges *v.* Sandeman, Clark & Co.	827
Devon *v.* Paulett	245
Devonald *v.* Rosser	452, 915
Dew *v.* Parsons	464
De Waal *v.* Adler	140
De Wahl *v.* Braune	432
Dewar *v.* Goodman	236, 687
Dewhirst, *Ex parte*	273
De Wilton, *In re*	1320
— (Lord Grey) *v.* Saxon	301
De Wolf *v.* Archangel Insur. Co.	1140
D'Eyncourt *v.* Gregory	695
Diamond (The)	990
Dias *v.* Freeman	222
Dibb *v.* Walker	219
Dibbins *v.* Dibbins	331
Dibble *v.* Bowater	795
Dick *v.* Donald	484
— *v.* East Coast Ry.	1056
Dickenson *v.* Gapp	553
v. Jardine	1178
— *v.* Naul	559
Dicker *v.* Jackson	55
Dickinson *v.* Barrow	24, 480
— *v.* Dodds	17
— *v.* Follett	549
— *v.* Kitchen	832
— *v.* Marrow	181, 537
— *v.* Valpy	363, 365, 389, 1306
Dickson *v.* G. N. Ry.	1020, 1022, 1047, 1048
— *v.* Reuter's Telegraph Co.	351
— *v.* Swansea Vale Ry.	223
Didcot, Newbury, &c., Ry. *v.* G. W. Ry.	1060
Diddear *v.* Faucit	1323
Diederichsen *v.* Farquharson	1008
Diestal *v.* Stevenson	279
Digby *v.* Atkinson	752
Diggle *v.* Higgs	104, 105, 124
Dilk *v.* Keighley	406
Dillon *v.* Rimmer	155
Dimech *v.* Corlett	290
Dimmock *v.* Hallett	494, 495, 496
— *v.* Sturla	1090
Dingle *v.* Hare	335, 554, 632
Diplock *v.* Blackburn	942
— *v.* Hammond	1372
Dirks *v.* Richards	902
Di Sora *v.* Phillips	60
Ditcham *v.* Worrall	411
Dixon, *Ex parte*	160
— *v.* Adams	4
— *v.* Baldwen	613, 615, 618
— *v.* Baty	748
— *v.* Bovill	310
— *v.* Bradford Coal Supply Co.	725
— *v.* Fletcher	601
— *v.* Hamond	355, 954
— *v.* Hurrell	430
— *v.* Kennaway	638, 647
— *v.* Nuttall	1288
— *v.* Reid	1182, 1183, 1193
— *v.* Stansfeld	962
— *v.* Steel	1103
— *v.* Whitworth	1203
— *v.* Yates	598, 618
Dobell *v.* Green & Co.	978, 979
— *v.* Hutchinson	36, 500
— *v.* Stevens	496, 552
Dobson *v.* Bolton	1202
— *v.* Collis	34
— *v.* Hudson	878, 886
— *v.* Sotheby	1215
— *v.* Wilson	1010
Docwra, *In re*	423
Dod *v.* Monger	799
Dodd *v.* Acklom	717, 719
— *v.* Churton	884
— *v.* Dodd	428
— *v.* Ponsford	54

PAGE

Dodgson *v.* Scott 392
Dodsley *v.* Varley 537
Dodson *v.* Mackey 213
— *v.* Sammell . . . 249
— *v.* Wentworth . . 613, 615
Doe *v.* Alexander 737
— *v.* Amey . . . 660, 712, 733
— *v.* Amos 1370
— *v.* Archer 723
— *v.* Ball 188, 268
— *v.* Batten . . . 731, 734
— *v.* Bayley 726
— *v.* Baytup 740
— *v.* Beavan 268
— *v.* Bell 43
— *v.* Benson 728
— *v.* Bingham . . . 191, 749
— *v.* Birch 710
— *v.* Birchmore 654
— *v.* Bliss 714
— *v.* Bluck 721
— *v.* Bold 722
— *v.* Bond 711
— *v.* Bowditch . . . 710, 738
— *v.* Brindley 713
— *v.* Browne . . . 659, 660
— *v.* Brydges 737
— *v.* Bucknell 760
— *v.* Burt 656
— *v.* Butler 726
— *v.* Byron 738
— *v.* Calvert . . . 728, 731
— *v.* Carew 712
— *v.* Carter . . . 268, 669
— *v.* Cartwright 662
— *v.* Catomore 191
— *v.* Cawdor 709
— *v.* Chamberlaine . . . 662
— *v.* Chaplin 723
— *v.* Church 723
— *v.* Clarke 653
— *v.* Coombs 1339
— *v.* Cooper . . . 708, 709
— *v.* Courtenay 718
— *v.* Cox 661, 720
— *v.* Crick 721, 731
— *v.* Culliford 726
— *v.* Davies . . 661, 663, 755
— *v.* Day 1330
— *v.* Derry 721
— *v.* Dixon 658
— *v.* Dobell . . . 660, 727
— *v.* Donovan 725
— *v.* Dunbar 730
— *v.* Dyson 738
— *v.* Edwards . . . 756, 1372
— *v.* Ekins 713
— *v.* Elsam 710
— *v.* Evans . . . 259, 708
— *v.* Fereday 1331
— *v.* Flynn . . . 708, 709
— *v.* Forster 729
— *v.* Frankis 1372
— *v.* Franks 737
— *v.* Frowd 709
— *v.* Fuchau 737
— *v.* Fuller 1371
— *v.* Galloway 656
— *v.* Gardiner 659

PAGE

Doe *v.* Geekie . . . 718, 720
— *v.* Gladwin 174
— *v.* Godwin 711
— *v.* Goldwin . . 722, 724, 755
— *v.* Gower 664
— *v.* Grafton . . . 661, 725
— *v.* Green 658
— *v.* Guest 57
— *v.* Hazell 726
— *v.* Hiscocks 47
— *v.* Howard 729
— *v.* Hubbard 46
— *v.* Hughes . . . 722, 729
— *v.* Hulme 722
— *v.* Humphreys . . . 732
— *v.* Ingleby 712
— *v.* Jackson 724
— *v.* Johnson 728
— *v.* Jones 662, 714
— *v.* Keeling . . . 235, 711
— *v.* Kennard 707
— *v.* Kightley 723
— *v.* Kneller 711
— *v.* Knight 20
— *v.* Lamb 728
— *v.* Laming . . 668, 765, 1216
— *v.* Lea 725, 728
— *v.* Lewis . . . 244, 1358
— *v.* Lines 727
— *v.* Litherland 708
— *v.* Long 709
— *v.* Lumbly 729
— *v.* Lucas 730
— *v.* M'Kaeg 662
— *v.* Masters 737
— *v.* Matthews 728
— *v.* Meux 711, 714
— *v.* Miles 721
— *v.* Mills 740
— *v.* Milward 717
— *v.* Mitchell 740
— *v.* Mizem 722
— *v.* Morphett 726
— *v.* Morse 660
— *v.* Nainby 720
— *v.* Needs 47
— *v.* Ongley 760
— *v.* Palmer 732
— *v.* Pasquali 709
— *v.* Paul 737
— *v.* Peck 711
— *v.* Pedgriph . . 40, 475, 1371
— *v.* Perrin 728
— *v.* Phillips 1332
— *v.* Pitcher 120
— *v.* Pittman 709
— *v.* Poole 718
— *v.* Powell 653
— *v.* Price 662
— *v.* Pritchard 259
— *v.* Pullen . . . 659, 662
— *v.* Raffan 726
— *v.* Reid 235
— *v.* Rhodes 729
— *v.* Robinson 244
— *v.* Rock 662
— *v.* Roe 723, 737
— *v.* Rowe 712
— *v.* Rowlands 753

PAGE

Doe *v.* Samuel 727
— *v.* Sayer 721
— *v.* Scott 726
— *v.* Skirrow 655
— *v.* Smaridge . . . 658, 720
— *v.* Smith . . 268, 660, 669, 723, 727, 1371
— *v.* Smythe 740
— *v.* Snowdon 729
— *v.* Somerton 731
— *v.* Spence 730
— *v.* Spiller . . . 723, 730
— *v.* Stanion . . . 708, 709
— *v.* Stapleton 728
— *v.* Steel 732
— *v.* Stennett 662
— *v.* Steward . . . 270, 272
— *v.* Stratton 720
— *v.* Summersett . . . 722
— *v.* Sutton 147
— *v.* Thomas . . . 662, 663
— *v.* Thompson 654
— *v.* Tom 755
— *v.* Turner 663
— *v.* Walters 722
— *v.* Wandlass 737
— *v.* Watkins . . . 729, 731
— *v.* Watt 659, 710
— *v.* Wells 709
— *v.* Wheeler 416
— *v.* Wiggins . . . 1358, 1370
— *v.* Wilkinson 723
— *v.* Williams . . 709, 719, 730
— *v.* Wood. . . . 661, 719
— *v.* Woodman 730
— *v.* Woombwell . . . 729
— *v.* Worsley 668
— *v.* Wrightman . . . 726, 730
Dogget *v.* Vowell 7
Doggett *v.* Catterns . . . 107
Doherty *v.* Allman . . . 706
Dolby *v.* Iles 655
Dolling *v.* White 1323
Doloret *v.* Rothschild . . 504, 650
Doman *v.* Dibdin 1246
Domett *v.* Beckford . . . 999
Dominion Coal Co. *v.* Dominion Iron & Steel Co. . . . 138, 139, 279
Donald *v.* Suckling . 818, 828, 903, 909
Donaldson *v.* Donaldson . . 3
— *v.* Gillot . . 647, 897
— *v.* Haldane . . . 862
Donellan *v.* Read . . . 36, 718
Donnell *v.* Bennett . . . 302
Donovan *v.* Laing, Wharton & Down Construction Syndicate 916
Doolan *v.* Midland Ry. . . . 1049
Doorman *v.* Jenkins . . 827, 845
Dora Forster (The) . . . 1195
Dorchester *v.* Webb . . . 259
Dormay *v.* Borradaile . . . 1229
Dormer *v.* Williams . . . 1320
Dosseitei (The) 869
Doubleday *v.* Muskett . . . 393
Dougal *v.* Kemble . . . 1001
— *v.* McCarthy . . . 662

PAGE

Doughty *v.* Bowman . . . 236
Douglas *v.* Culverwell . . . 132
— *v.* Patrick . . 167, 168
— *v.* Scougall . . . 1162
Douglas-Norman, *In re* . . 966
Douse *v.* Earl 687
Dover *v.* Mills 865
Dowden & Pook, Ltd. *v.* Pook . 95, 96, 99, 100
Dowling, *In re* 273
— *v.* Bettjemann . . 300
— *v.* Ford 217
Down *v.* Hatcher 151
— *v.* Pinto 920
Downe *v.* Fletcher . . . 265
Downes *v.* Back 816
— *v.* Green . . 1223, 1224
— *v.* Richardson . . . 1336
Downman *v.* Jones . . . 313
— *v.* Williams . . . 347
Downs *v.* Cooper 655
Dowse, *In re* 157
— *v.* Cale 687
— *v.* Coxe 417
Dowson & Jenkins' Contract, *In re* 330
Doyle *v.* Dallas 1191
— *v.* Foley 254
— *v.* Powell 1151
Dracachi *v.* Anglo-Egyptian Navigation Co. . . 1014
Drage *v.* Ibberson 83
Drake *v.* Beckham . . 362, 364
— *v.* Mitchell 193
Draper *v.* Crofts . . . 683, 732
Draupner (The) 1008
Draycott *v.* Harrison . . 420, 421
Drayton *v.* Dale 274
Dresel *v.* Ellis 422
Dresser *v.* Bosanquet . . . 908
— *v.* Norwood . . 160, 322
Drew *v.* Baily 257
— *v.* Josolyne 270
— *v.* Lockett 1103
— *v.* Nunn . . . 426, 436
Drewe *v.* Corp. 497
Driefontein Gold Mines *v.* Janson 1179
Drinkwater *v.* Goodwin . 323, 345
— *v.* Lond. Assur. Co. . 1217
Driscol *v.* Bovil 1169
— *v.* Passmore . . . 1123
Driver *v.* Broad 23
— *v.* Burton . . 318, 455, 459
— *v.* Lawrence . . . 654
Drogheda Steam Packet Co., *In re* 203
Drope *v.* Thaire 325
Drue *v.* Thorne 263
Drummond's Contract, *In re* . 423
Drummond *v.* Van Ingen . 568, 569, 571
Drury *v.* Defontaine . . . 113
— *v.* Hooke . . 1311, 1312
— *v.* Macaulay . . . 1378
— *v.* Macnamara . 43, 449, 664
Dry *v.* Davy 1087
Dubowsky *v.* Goldstein . . . 98
Duck *v.* Mayeu . . 175, 178, 1096

PAGE

Duckett *v.* Williams . . . 1231
Duckworth *v.* Alison . . 290, 884
Duddell *v.* Simpson . . 496, 506
Dudgeon *v.* Pembroke . 1130, 1136, 1162, 1165, 1175
Dudley *v.* Smith 1016
— *v.* Ward 703
Duero (The) 985
Dufaur *v.* Profess. Life Assur. Co. . 1229
Duff *v.* Budd . . 1051, 1068
— *v.* Mackenzie . . . 1200
Duffell *v.* Wilson 1231
Duffield *v.* Williams . . . 267
Dufourcet *v.* Bishop . . 995, 1073
Dugdale *v.* Lovering . . . 454
Duhammel *v.* Pickering . . 438
Duignan *v.* Walker . . . 99
Duke *v.* Andrews 17
— *v.* Barnett . . . 484, 521
Duke of Bedford (The) . . . 838
Duke of Manchester (The) . . 992
Dumergue *v.* Rumsey . . 700, 703
Dunbeth, *In re* 1172
Duncan, *In re* 254
— *v.* Benson . . . 839
— *v.* Blundell . . . 889
— *v.* Cafe . . . 510, 849
— *v.* Cannan . . . 58
— *v.* Dixon 404
— *v.* Findlater . . . 443
— *v.* Hill 967
— *v.* Lowndes . . . 1105
— *v.* Topham . 18, 141, 544
— & Co., *In re* . 104, 106, 158
— Fox & Co. *v.* N. & S. W. Bk. . 1103, 1266, 1267
Duncombe *v.* Reeve . . . 799
— *v.* Tickridge . . 32, 408
Duncuft *v.* Albrecht . . 640, 649
Dundonald *v.* Masterman . 851, 891
Dunk *v.* Hunter 680
Dunkley & Sons, *In re* . . . 435
Dunlop *v.* Balfour 1008
— *v.* Higgins . 18, 475, 627
— *v.* Lambert . 604, 605, 1067, 1068
Dunn *v.* Bucknall Brothers . . 988, 1073
— *v.* Flood 518
— *v.* Macdonald . . . 354
— *v.* Reg. 934
— *v.* Sayles 916
Dunne *v.* English . . . 132, 948
Duns, Brown & Co. *v.* Binning . 1186
Dunstan *v.* Burwell . . . 261
Dunvegan Castle (The) . . 836
Dupen *v.* Keeling 464
Duppa *v.* Mayo 781
Duranty *v.* Hart . . 63, 340, 836
Durel *v.* Evans 41
Durham *v.* Robertson . . . 224
— (Earl) *v.* Legard . 502, 516
— (Mayor) *v.* Fowler . . 1087, 1091, 1094
Durrant *v.* Ecclesiastical Commissioners 460
Durrell *v.* Bederley . . . 1119
Dutchman *v.* Tooth . . . 1083
Duthie *v.* Hilton 494

PAGE

Duthy and Jesson's Contract, *In re* 494
Dutton *v.* Marsh . . 1303, 1307
— *v.* Poole 308
— *v.* Solomonson . 604, 624, 1067
Duvergier *v.* Fellows . . 75, 103
Dwyer *v.* Gurry 816
Dyer *v.* Hargrave 526
Dykes *v.* Blake . . 478, 497, 499
Dynen *v.* Leach . . . 923, 925
Dyson *v.* Forster . . 229, 230, 235
— *v.* Rowcroft . . . 1196

E. W. A., *In re* . . . 175, 1097
Eaglesfield *v.* Londonderry (Marquis) 127, 135
Eagleton *v.* Gutteridge . . 191, 1358
Earle *v.* Hopwood . . . 79, 80
— *v.* Maugham . . . 457
— *v.* Oliver 453
— *v.* Rowcroft . . . 1183
Early *v.* Garrett 523
Easley *v.* Crockford . . . 1309
East *v.* Smith 1273
East and West India Dock Co. *v.* Shaw, Savill & Albion Co. . 1060
East Angl. Ry. *v.* Eastern Counties Ry. 387
East of England Banking Co., *In re* 279, 1270
East India Co. *v.* Glover . . 378
— *v.* Pullen . . 1077
— *v.* Sandys . . 102
— *v.* Vincent . . 707
East Indian Ry. *v.* Kalidas Mukerjee 1015, 1016, 1017, 1018, 1020, 1069
East London Union *v.* Metropolitan Ry. . . . 145, 512
East Stonehouse Urban Council *v.* Willoughby . . . 748
Eastabrook *v.* Scott . . . 1318
Eastbourne Corp. *v.* Att.-Gen. . 1340, 1345
Easterby *v.* Sampson . . 47, 50, 236
Easterly *v.* Pullen . . . 214
Eastern Counties Ry. *v.* Philipson 142
Eastern Telegraph Co. *v.* Dent . 669, 715
Eastgate, *In re* . . . 124, 435
Eastland *v.* Burchell . . . 431
Eastwood *v.* Kenyon . . 7, 10, 30
Eaton *v.* Basker 378
— *v.* Bell 397
— *v.* Western . . 939, 940
Eaves *v.* Dixon 549
Ebsworth *v.* Alliance Mar. Ins. Co. 1111
Ebsworth and Tidy's Contract, *In re* 496
Eccles *v.* Mills . . . 232, 689
Ecclesiastical Commis. *v.* Merral. 375
— *v.* N. E. Ry. 176
Eccleston *v.* Clipsham . . . 316
Echliff *v.* Baldwin . . . 517

PAGE

Eckstein *v.* Reynolds . . 169, 170
Economic Life Assur. Soc. *v.* Usborne 192
Edan *v.* Dudfield 535
Edelstein *v.* Schuler 1289
Eden (The) 992
— *v.* Blake 64, 67
— *v.* Parkinson 1168
— *v.* Ridsdale's Co. . . . 957
Edgar *v.* Blick 1370
— *v.* Bumstead 950
— *v.* Fowler 123
Edgcombe *v.* Rodd 82
Edge *v.* Boileau . . . 54, 666
— *v.* Bumford . . . 1247, 1248
— *v.* Frost 314
— *v.* Stafford 682
— *v.* Strafford 24
Edgell *v.* Day . . 469, 510, 849, 953, 954
Edger *v.* Knapp 456
Edgware Highway Board *v.* Harrow District Gas Co. . . 2
Edie *v.* East India Co. . . 378
Edis *v.* Bury . . 1242, 1285
Edmond (The) . . . 834, 836
Edmonds *v.* Goater . . . 213
Edmunds *v.* Brown . . . 372
— *v.* Bushell . . 338, 592
— *v.* Downes . . 213, 214
— *v.* Groves . . . 108
— *v.* Wallingford . 457, 458
— *v.* Waugh . . . 201
Edmundson *v.* Longton Corp. . 152
— *v.* Render . . 100, 101
Edridge *v.* Hawker . . . 736
Edward Hawkins (The) . . 869
Edwards, *Ex parte* 273, 463, 956, 965
— *In re* . . 280, 543, 609
— *v.* Aberayron Ins. Society . . 81, 82
— *v.* Barnard . 1302, 1305
— *v.* Baugh . . 11, 12
— *v.* Brewer . . . 607
— *v.* Brown . . . 129
— *v.* Cameron's, &c. Co. . 1307
— *v.* Carter . . . 411
— *v.* Chapman . . . 175
— *v.* Farebrother . . 433
— *v.* Footner . . . 1123
— *v.* Glyn 271
— *v.* Hall 637
— *v.* Harben . . . 254
— *v.* Havill . . . 340
— *v.* Hodding . . 355, 849
— *v.* Hodges . . . 738
— *v.* Jevons . . . 1082
— *v.* Kelly 33
— *v.* M'Leay . . 523, 525
— *v.* Millbank . . . 759
— *v.* Ronald . . . 199
— *v.* Scarsbrook . . . 463
— *v.* Sherratt . . . 1077
— *v.* Towels . . . 428
— *v.* Walters . . . 1283
— *v.* Weeks . . . 174
— *v.* West . . . 482, 1214
— *v.* Wickwar . . . 523
— *v.* Yeates . . . 168

PAGE

Edwick *v.* Hawkes . . . 736
Egan *v.* Kensington Union . . 873
Egerton *v.* Brownlow (Earl). 78, 81
— *v.* Mathews . . . 37
Egg *v.* Barnett 156
Egmont (Earl) *v.* Smith . . 482
Ehrensperger *v.* Anderson . 467, 470
Ehrman *v.* Bartholomew . 100, 302
Eicholz *v.* Bannister . 466, 559, 560
Ekins *v.* Tresham . . . 548, 550
Elbinger *v.* Armstrong . . . 627
— Actien-Gesellschaft *v.* Claye 324
Elderslie S.S. Co. *v.* Borthwick . 985
Eldridge *v.* Stacey . . . 800
Elec. Tel. Co., *In re* . . . 815
Eley *v.* Positive Assur. Co. . 41, 380
Elgood *v.* Jones 241
Elias *v.* Snowdon Slate Co. . . 657
Elin (The) 838
Elkington *v.* Holland . . . 894
Ellen *v.* Topp 939
Ellenborough, *In re* . . 19, 224
Ellesmere Brewery Co. *v.* Cooper . 1102
Elliman *v.* Carrington . . . 96
Ellinger *v.* Mutual Life Ins. Co. of N. Y. 1229
Elliot *v.* Davis . . 315, 370, 373
— *v.* Edwards . . . 488, 507
— *v.* Merryman . . . 414
— *v.* Wilson 1169
Elliott *v.* Clayton 273
— *v.* Crutchley . . 148, 149
— *v.* Johnson . . 232, 749
— *v.* Kemp 257
— *v.* Liggins 933
— *v.* Pybus 586
— *v.* Richardson . . . 85
— *v.* Royal Ex. Assur. Co. . 82
— *v.* Thomas 538
— *v.* Turner 45
Ellis *v.* Chinnock 631
— *v.* Emanuel 1088
— *v.* Glover and Hobson . 703, 840
— *v.* Goulton 510
— *v.* Hamlen . . 877, 880, 886
— *v.* Hunt 614
— *v.* Johnson 421
— *v.* M'Henry 199
— *v.* Mason 1378
— *v.* Pond 967
— *v.* Rogers 492
— *v.* Rowbotham . . 170, 681
— *v.* Schmœck 390
— *v.* Taylor 801
— *v.* Thompson . . . 542
— *v.* Turner 985
— *v.* Wilmot . . 1096, 1104
Ellison *v.* Bignold . . . 50
Elliston *v.* Reacher . . . 229
Elmore *v.* Kingscote . . . 529
— *v.* Stone . . 535 536, 597
Elmslie *v.* Corrie 197
Elmsville (The) . . . 966, 1278
Elphick *v.* Barnes . . . 556, 580
Elphinstone (Lord) *v.* Monkland Iron Co. . . . 288, 714
Elsee *v.* Gatward . . . 2, 860
Elswick Park (The) . . . 870

PAGE

Elswick S.S. Co. *v.* Montaldi . 1003, 1004
Eltham *v.* Kingsman . . . 849
Elton *v.* Larkins 1119
Elves *v.* Crofts 100
Elvy *v.* Norwood 202
Elwes *v.* Maw . . . 696, 700
Ely (Dean) *v.* Cash . . . 199
Emancipation (The) . . . 837
Emanuel *v.* Dane 557
Embiricos *v.* Anglo-Austrian Bank 61, 1259
Emden *v.* Carte . . . 268, 273
Emery *v.* Day 208
— *v.* Emery . . . 429, 430
— *v.* Richards . . . 849
— (Geo. D.) & Co. *v.* Wells 172, 279
Emly *v.* Lye . . . 330, 814, 1305
Emma Mining Co. *v.* Grant . . 196
Emmanuel, *Ex parte* 271
Emmens *v.* Elderton . 449, 452, 874, 916, 918, 934, 941, 945
Emmerson *v.* Heelis . . 42, 478
Emmerson's Case . . . 134, 641
Emmerton *v.* Matthews . . 569
Emmett, *In re* 211
— *v.* Norton . . . 429
— *v.* Tottenham . . . 1254
Empress Assur. Corp. *v.* Bowring . 1121, 1156
Empress Engineering Co., *In re* . 313, 332
Empson *v.* Soden 745
Enderby *v.* Gilpin . . . 106
Energy (The) 991
England *v.* Curling . . . 295
— *v.* Davidson . . . 4, 6
— *v.* Marsden . . . 458
English *v.* Blundell . . 316, 319
— *v.* Darley . . . 1267
— and Colonial Produce Co., *In re* . . 332, 380
— and Foreign Credit Co. *v.* Arduin . . . 17
— Bank of River Plate, *In re* 1276, 1282, 1298, 1299
— Channel Steamship Co. *v.* Rolt . . . 381, 383
Enoch and Zaretsky ; Bock & Co's Arbitration 899
Enthoven *v.* Hoyle . . 191, 1337
Entwisle *v.* Ellis 1199
Entwistle, *In re* 1300
Enys *v.* Donnithorn . . . 320
Equitable Fire and Accident Office *v.* The Ching Wo Hong 1219
Erichsen *v.* Barkworth . . . 1004
Erie County, &c. Fuel Co. *v.* Carroll 285
Ernest *v.* Nicholls 360
Erskine *v.* Adeane . 66, 673, 693
— Oxenford & Co. *v.* Sachs . 952
Escalera Silver Lead Mining Co., *In re* 144
Esdaile *v.* Oxenham . . . 965
— *v.* Sowerby . . . 1280
— *v.* Stephenson . . . 499
Esposito *v.* Bowden . . . 103, 1179

PAGE

Essex *v.* Daniell 509
Este *v.* Smith 1322
Etches *v.* Aldan 1142
Etherington *v.* Parrot . 425, 426, 434
Europa (The) . . 837, 975, 989
European Assur. Soc. Arbitration Acts, *In re* 179
European Bank, *In re* . . . 860
— *v.* Fox . . . 163
European Central Ry., *In re* . 192
European and Australian Royal Mail Co. *v.* Royal Mail Packet Co. . 147, 832, 849, 912, 1076
Eustace *v.* Dublin Trunk Ry. . 645
Evans *v.* Bicknell 300
— *v.* Bignold 1225
— *v.* Birch . . . 930, 936
— *v.* Bremridge . 1091, 1097
— *v.* Carrington . . 76, 1325
— *v.* Cramlington . . . 344
— *v.* Davies 217
— *v.* Davis 710
— *v.* Edmonds . . 127, 1325
— *v.* Elliott 759
— *v.* Hoare 37
— *v.* Hooper 344
— *v.* Hutton 983
— *v.* Judkins 169
— *v.* Kymer 1258
— *v.* Levy 669
— *v.* Mann 273
— *v.* Mathias 655
— *v.* Nichol 1067
— *v.* Powis . . . 177, 187
— *v.* Roberts 27
— *v.* Roe . . . 64, 920
— *v.* Simon 212
— *v.* Ware 406
— *v.* Wright 794
Evelyn *v.* Chichester . . . 409
— *v.* Raddich . . . 752
Everard *v.* Watson . . . 1273
Everett *v.* Collins . . . 161
— *v.* Desborough . . 333
— *v.* Lond. Assur. Co. . 1217
— *v.* Robertson . . . 212
Everth *v.* Smith 1192
Ewart *v.* Graham 634
— *v.* Latta . . . 198, 1103
Ewers *v.* Hutton 1324
Exall *v.* Partridge . . 457, 458, 459
Exchange Bank of Yarmouth *v.* Blethen 21
— Telegraph Co. *v.* Central News . . . 300
Exeter Carriers' Case . . . 1057
Eyles *v.* Ellis 152
Eyre *v.* Bartrop 1093
— *v.* Countess of Shaftesbury . 258
— *v.* Forbes 91
— *v.* Glover 1143
— *v.* McDowell . . 392, 1302
Eyres *v.* Coward 263
Eyston *v.* Simonds . . 507, 516
— *v.* Studd 45

FABIAN *v.* Plant 3

	PAGE
Fabian *v.* Winston	737
Failes *v.* Failes	428
Fairclough *v.* Marshall	756
— *v.* Pavia	1248
Fairlie *v.* Christie	190, 1134
— *v.* Fenton	344
Fairman *v.* Oakford	918, 931
Fairtitle *v.* Gilbert	654
Faith *v.* Richmond	1305
Faithfull, *In re*	964, 965
— *v.* Ewen	965
Falcke *v.* Gray	292, 293, 629
Falkner *v.* Ritchie	1193
Fallowes *v.* Taylor	19
Falmouth (Earl) *v.* Roberts	1297
— *v.* Thomas	25, 27
Fancourt *v.* Thorne	1372, 1373
Fane *v.* Fane	126
— *v.* Spencer	490
Farebrother *v.* Ansley	456, 967
— *v.* Simmons	42
Farhall *v.* Farhall	417
Farina *v.* Home	536
Farley *v.* Briant	247
Farlow *v.* Stevenson	680
Farmeloe *v.* Bain	74
Farmer *v.* Inland Rev. Com.	1361
— *v.* Rogers	716
— *v.* Russell	467
Farnham *v.* Atkins	407
Farnsworth *v.* Garrard	889, 890
Farnworth *v.* Hyde	1188, 1192, 1193
— *v.* Packwood	767
Farquhar *v.* Farley	508
— *v.* Southey	1294, 1336
Farquharson *v.* King	593
Farr *v.* Ward	279
Farrall *v.* Hilditch	51
Farrance *v.* Elkington	735
Farrant *v.* Barnes	901, 923, 1023
— *v.* Lovel	707
— *v.* Olmius	288
Farrar *v.* Deflinne	369
— *v.* Hutchinson	74, 158
Farrer *v.* Nightingal	497, 521
Farrow *v.* Wilson	195, 930
Farwell *v.* Boston & Worcester Railroad Corporation	926
Faulder *v.* Silk	436
Faviell *v.* Gaskoin	745
Fawcett and Holmes, *In re*	495
— *v.* Cash	918, 919
Fawcus *v.* Sarsfield	1162
Fawkes *v.* Lamb	70, 344
Fazakerly *v.* M'Knight	48
Fear *v.* Castle	265
Fearn *v.* Cochrane	154
— *v.* Filica	330
— *v.* Lewis	213
Fearon *v.* Aylesford (Earl)	1324, 1326
Featherston *v.* Hutchinson	76, 121
Feise *v.* Parkinson	1159
— *v.* Wray	607
Feistel *v.* King's College, Cambridge	91
Feize *v.* Thompson	278
Fell *v.* Goslin	320
— *v.* Knight	765
— *v.* Whittaker	804
Fells *v.* Read	300, 629
Feltham *v.* Cartwright	634
— *v.* England	922
— *v.* Terry	465
Felthouse *v.* Bindley	14
Fenn *v.* Bittleston	808, 819, 847
— *v.* Harrison	329, 331, 335, 1281
Fennell *v.* Ridler	113
Fenner *v.* Blake	718
— *v.* Duplock	655
Fenton *v.* Browne	501
— *v.* Dublin St. P. Co.	973
— *v.* Emblers	35, 205
— *v.* Holloway	435
— *v.* Logan	784, 793
— *v.* Pearson	103
— *v.* Thorley	928
Fenwick *v.* Rolinson	1206
— Stobart & Co., *In re*	1279
Feret *v.* Hill	749
Ferguson *v.* ——	690
— *v.* Spencer	199
Fergusson *v.* Norman	122
Ferns *v.* Carr	137, 940
Ferre (The)	986
Ferret *v.* Hill	125
Ferris *v.* Bond	1285
Ferry *v.* Williams	887
Fesenmayer *v.* Adcock	471
Fessard *v.* Mugnier	144, 177
Fetter *v.* Beal	279
Few *v.* Perkins	711, 714
Fewings, *Ex parte*	192
— *v.* Tisdal	934, 935
Feyerick *v.* Hubbard	455
Fickus, *In re*	3, 296
Field *v.* Lelean	69, 599, 644
— *v.* Megaw	225, 831
— *v.* Newport Ry.	169
Field S.S. Co. *v.* Burr	1127
Field's Marriage Bill	1323
Fielden *v.* Slater	229
Fielder *v.* Marshall	1242, 1243, 1265, 1285
Fielding *v.* Corry	1274
Figlia Maggiore (The)	341, 590, 1014
Filby *v.* Hounsell	15, 37, 475
Fillieul *v.* Armstrong	933
Filliter *v.* Phippard	1221
Finance and Issue, Ld. *v.* Canadian Produce Corporation	137
Finch *v.* Boning	168
— *v.* Brook	167, 169
— *v.* Miller	169
— *v.* Underwood	293
Finck *v.* Tranter	460, 676
Findon *v.* M'Laren	790, 793
— *v.* Parker	79
Fine Art Soc. *v.* Union Bank	1289
Finlay *v.* Brist. & Ex. Ry.	375, 683
— *v.* Chirney	195, 253, 254, 1316
— *v.* Jowle	940
Finucane *v.* Small	864, 900
Firbank *v.* Bell	1378
— *v.* Humphreys	352
Firth *v.* Inland Rev. Com.	1347, 1386
— *v.* Purvis	798

PAGE
Fischel *v.* Scott 557
Fish *v.* Hutchinson . . . 31
— *v.* Kelly 891
— *v.* Kempton 322
— *v.* Richardson 416
Fisher *v.* Apollinaris Co. . . 83
— *v.* Dixon 695
— *v.* Fellows 459
— *v.* Miller 309
— *v.* Mowbray . . . 405
— *v.* Samuda . . . 563, 579
— *v.* Smith 1002
— *v.* Val de Travers Co. . . 284
Fishmongers' Co. *v.* Robertson . 13, 374
Fishwick *v.* Milnes . . . 1373
Fisk *v.* Masterman . . . 1159
Fitch *v.* Jones . . . 1257, 1296
— *v.* Sutton . . . 3, 151
Fitton *v.* Accidental Death Ins. Co. 1237
Fitz *v.* Iles 694
Fitzgeorge, *In re*. . 1085, 1096, 1104
Fitzgerald, *In re* 59
— *v.* Dressler . . 33, 1080
— *v.* Fitzgerald . . 1323
— *v.* Trant . . . 178
Fitzherbert *v.* Mather . 1121, 1124, 1227
Fitz-Hugh *v.* Dennington . . 144
Fitzmaurice *v.* Bayley . . 41, 331
Fitzroy *v.* Cave . . . 79, 80, 225
Fitzsimmons *v.* Mostyn (Lord) . 458
Fivaz *v.* Nicholls 75
Flanders *v.* Clarke . . . 258
Flannagan *v.* Bishopwearmouth Overseers 429
Flarty *v.* Odlum 92
Fleet *v.* Murton . . 69, 349, 532
— *v.* Perrins 433
Fleetwood *v.* Hull 235
Fleming *v.* Bank of New Zealand . . . 2, 5, 1257
— *v.* Buchanan . . . 246
— *v.* Gooding . . . 655
— *v.* Loe 165
— *v.* Man. Shef. & Linc. Ry. . . . 970, 1018
Flemyng *v.* Hector . . . 396
Fletcher, *In re* 157
— *v.* Alexander . . . 1013
— *v.* Bowsher . . . 577
— *v.* Braddick . . . 973
— *v.* Dyche . . 290, 884
— *v.* Gillespie . . . 886
— *v.* Harcot . . . 76
— *v.* Inglis . . . 987, 1174
— *v.* Marshall . 468, 644, 945
— *v.* Nokes 715
— *v.* Sondes (Lord) . . 94
— *v.* Tayleur . . . 282
Flight *v.* Bentley 676
— *v.* Bolland . . . 407, 515
— *v.* Booth . . 479, 495, 500
— *v.* Maclean . . . 1286
— *v.* Reed 10
Flindt *v.* Scott 103
— *v.* Waters 437
Flinn *v.* Headlam . . . 1123
Flint *v.* Brandon . . . 292, 295
— *v.* Flemyng . . . 1141
— *v.* Le Mesurier . . 1111, 1144
Flitcroft's Case 383
Florence *v.* Jenings . . . 192
Flory *v.* Denny 818
Flower *v.* Bolingbroke . . . 891
— *v.* Hartopp . . . 486
— *v.* L. & N. W. Ry. . . 406
— *v.* Sadler . . 82, 83, 133
Floyd, *In re* 678
— *v.* Nangle 891
Fluck *v.* Tollemache . . . 408
Flud *v.* Rumcey 258
Fludyer, *In re* 251
Flureau *v.* Thornhill . . 513, 749
Foakes *v.* Beer . . 11, 151, 175
Foley *v.* Addenbrooke . . . 316
— (Lady) *v.* Fletcher . 177, 178
— *v.* Hill 164, 853
— *v.* Tabor 1116
— *v.* United Fire Assur. Co. . 1138, 1142, 1148
Foligno *v.* Martin 520
Follett *v.* Hoppe . . . 462, 465
Follit *v.* Koetzow 77
Foord *v.* Noll 169
Foot *v.* Baker 108
Foquet *v.* Moor 717
Forbes *v.* Aspinall . 1141, 1142, 1208
— *v.* Cochrane . . . 59
— *v.* Cowie 1208
— *v.* Jackson 1103
— *v.* Marshall . . . 1307
— *v.* Wilson 1139
Forbes' Claim, Universal Non-Tariff Fire Co., *In re* . . 1215
Ford, *Ex parte* 273
— *In re* 489
— *v.* Beech . . 176, 177, 178
— *v.* Cotesworth . . 977, 1003
— *v.* Fothergill . . . 410
— *v.* Tiley 141
— *v.* Yates 65
Ford's Case 259
Forder *v.* G. W. Ry. . . . 1028
Fordham *v.* L. B. & S. C. Ry. . 1026
Fordley's Case 140
Fores *v.* Johnes 77
Forgan *v.* Burke . . . 919, 921
Forget *v.* Baxter . . . 641, 951
— *v.* Ostigny 106
Forman *v.* The Liddesdale . . 880
Formby *v.* Barker . . . 228, 229
— Bros. *v.* Formby . . 323
Forrer *v.* Nash . . . 293, 495
Forrester *v.* Pigou . . . 1124
Forrester's Case 407
Forshans *v.* Chabert . . . 1134
Forster *v.* Baker 224
— *v.* Christie . . . 1181
— *v.* Mackreth . . 1303, 1304
— *v.* Patterson . . . 204
— *v.* Taylor 321
— *v.* Wilson 275
— & Co., *In re* . . . 930
Forysth *v.* Bristowe . 200, 211, 214
Fort *v.* Lee 1119
Fortescue *v.* Hennah . . . 296

PAGE

Forth *v.* Simpson 904
— *v.* Stanton . 180, 221, 227, 1080
Forward *v.* Pittard . .1027, 1051
Foster *v.* Bates 415
— *v.* Blakelock . . . 953
— *v.* Cockerell . . . 226
— *v.* Colby 1000
— *v.* Dawber . . . 158, 215
— *v.* Frampton . . . 615
— *v.* G. W. Ry. . . . 1054
— *v.* Green 462
— *v.* Inland Rev. Com. . . 1341
— *v.* Jolly . . . 65, 74
— *v.* Ley 457
— *v.* Mackinnon . 129, 1259, 1267
— *v.* Mutual Reserve Life Assur. Co. . .1227, 1231
— *v.* Smith . . . 555, 558
— *v.* Stewart . . . 446, 453
— *v.* Wilmer 1170
Fothergill *v.* Rowland . . . 303
— *v.* Walton . . . 976
Foulger *v.* Arding . . . 679, 680
Foulkes *v.* Met. Dist. Ry. . 970, 1018, 1054
— *v.* Sellway 1315
Fountain *v.* Smith . . . 418
Fountaine *v.* Carmarthen Ry. . 815
Fowell *v.* Franter or Tranter . 708
Fowkes *v.* Manch., &c. Ins. A. . 1226
Fowle *v.* Freeman 37
Fowler, *Ex parte* 141
— *v.* Fowler . . . 134, 157
— *v.* Knoop 590
— *v.* Monmouthshire Canal Co. 117
— *v.* Scottish Equitable . 1231
Fowles *v.* G. W. Ry. . . . 1053
Fox *v.* Chester (Bishop) . . 94
— *v.* Clifton 365
— *v.* Crane 519
— *v.* Pursell 303
— *v.* Oakley 663
— *v.* Scard 98
Foxcraft *v.* Wood 907
Foxwist *v.* Tremaine . . . 415
Foy *v.* Bell 1157
Fracis *v.* Sea Ins. Co. . . 1165
Fragano *v.* Long . . . 604, 1067
Frampton, *Ex parte* and *In re* . 329
— *v.* Coulson . . . 144
France *v.* Clark 646
Francesco *v.* Barnum . . . 938
Francis *v.* Boulton . .1203, 1208
— *v.* Bruce . . . 208, 1283
— *v.* Cockrell . 451, 889, 1015, 1025
— *v.* Grover 201
— *v.* Hawkesley . . . 212
— *v.* Wyatt . . . 790, 793
Frank *v.* Mainwaring . . . 519
Frankland *v.* Cole 892
— *v.* Nicholson . . . 1321
Franklin *v.* Hosier . . . 887, 967
— *v.* Neate . . 825, 828, 911
Franklyn *v.* Lamond . 349, 350, 479, 505
— *v.* Miller 142
Franks, *Ex parte* 432

PAGE

Frape, *In re* 895
Fraser, *In re* 368
— *v.* Caledonian Ry. .1016, 1026
— *v.* Hill 829
— *v.* Marsh 341
— *v.* Pendlebury . . . 464
— *v.* Tel. Constr. Co. . . 975
Fray *v.* Voules 893
Frazer *v.* Bunn 1371
— *v.* Hatton 4
— *v.* Jordan . . .1093, 1267
Freake *v.* Cranefeldt . . . 205
Free *v.* Hawkins 65
Freedom (The) . . .1014, 1174
Freeland *v.* Glover . . . 1119
Freeman *v.* Baker 571
— *v.* Birch . . . 911, 1068
— *v.* Cooke . . .72, 73, 592
— *v.* E. I. Co. . . . 340
— *v.* Edwards . . . 794
— *v.* Inland Rev. Com. . 1331
— *v.* Jeffries . . . 470
— *v.* Stacey . . . 202
Freestone *v.* Butcher . . . 426
Freeth *v.* Burr . . 172, 173, 603
Freme *v.* Wright 484
French *v.* Campbell . . . 142
— *v.* Gerber 1007
— *v.* Macale 298
— *v.* Newgass . . . 975
— *v.* Patton . . . 191, 1135
— *v.* Phillips 797
Frend *v.* Buckley 490
Frescobaldi *v.* Kinaston . . 254
Freshfield's Trust, *In re* . . 226
Friar *v.* Grey 708
Friedlander v. London Assur. Co. . 1216
Friend *v.* Harrison . . . 76
— *v.* Young . . . 165, 360
Friesland (The) 871
Frisby, *In re* 200
Friswell *v.* King 963
Frith *v.* Forbes 1300
— *v.* Frith . . . 66, 946
Frontin *v.* Small . . . 325, 357
Frost, *In re* 223
— *v.* Aylesbury Dairy Co. . 565, 566
— *v.* Knight . . 142, 207, 626, 934, 1313
— *v.* Oliver 342
Frowd *v.* Frowd 428
Fry *v.* Chartered Bank of India 1008
— *v.* Lane 413
— *v.* Malcolm 85
Fryer *v.* Ewart . . 712, 714, 719
Fullalove *v.* Parker . . . 116
Fuller *v.* Abrahams . . . 477
— *v.* Smith . . . 137, 466
— *v.* White Feather Reward 386
— *v.* Wilson . . . 336, 525
Fullerton *v.* Provincial Bank of Ireland 11
Furley *v.* Bates . . 584, 588, 622
— *v.* Wood 728
Furness *v.* Meek 21
Furnivall *v.* Coombes . . 49, 356
— *v.* Grove . . . 717
Furtado *v.* Rodgers . . 103, 1179

PAGE

Fusilier (The) 869
Fydell *v.* Clark 1281

GABARRON *v.* Kreeft . . 583, 589
Gabay *v.* Lloyd . . 71, 989, 1131
Gaby *v.* Driver . . . 347, 510
Gadd *v.* Houghton . . . 347
— *v.* Provincial Union Bank . 809
— *v.* Thompson . . . 405
Gaden *v.* Newfoundland Savings Bank 853
Gaetano and Maria (The) . 63, 341, 971
Gainsford *v.* Carroll . . 626, 628
Gairdner *v.* Senhouse . . . 1172
Galam, Cargo ex 1211
Gale, *In re* 202
— *v.* Burnell 820
— *v.* Capern 213
— *v.* Lindo 1317
— *v.* Reed 98
Galland, *In re* 966
Gallin *v.* L. & N. W. Ry. . . 1025
Galsworthy *v.* Strutt . . . 289
Galway *v.* Matthew . . . 1304
Gambles *v.* Ocean Marine Ins. Co. 1131, 1153
Games, *Ex parte* 177
Gammon *v.* Beverley . . . 1206
Gandy *v.* Adelaide Mar. Ins. Co. . . . 1116
— *v.* Gandy . 313, 332, 1324
— *v.* Jubber . . . 660
Gane *v.* Norton Hill Colliery Co. . 928
Garden *v.* Bruce 209
Gardener *v.* Salvador . . . 1191
Gardiner, *In re* . . . 272, 420
— *v.* Davis . . . 345
— *v.* Gray . . 564, 571, 572
— *v.* Houghton . . . 307
— *v.* Williamson . . 775
Gardner *v.* Cazenove . . . 833
— *v.* Grout 538
— *v.* M'Mahon . . . 213
— *v.* Trechmann . . . 1008
— *v.* Walsh . . 191, 1092, 1295
Gardom, *Ex parte* . . . 1105
— *v.* Lee 508
Garforth *v.* Fearon . . . 91
Garland, *Ex parte* . . . 417
— *v.* Jacomb . . . 363
Garner *v.* Moore 417
— *v.* Wingrove . . . 205
Garnett *v.* M'Kewan . . . 860
— *v.* Willan 1053
Garrard *v.* Lewis 1296
— *v.* Tuck 662
— *v.* Woolner . . . 187
Garrels *v.* Kensington . . . 1168
Garrett *v.* Handley . . . 324
Garside *v.* Trent Navigation Co. . 1051
Garth *v.* Earnshaw . . . 1324
Garton *v.* Brist. & Exeter Ry. . 1021, 1033, 1046, 1047, 1048, 1061, 1062
— *v.* G. W. Ry. . . . 1064
Gascoyne *v.* Edwards . . . 194
Gaskell *v.* King 121

PAGE

Gaskell and Walters' Contract, *In re* 260
Gaskin *v.* Balls 694
— *v.* Davis 1246
Gas Light & Coke Co. *v.* Hardy . 789
— *v.* Towse . 513. 664
— *v.* Turner . 85, 749
Gaters *v.* Madeley . . . 261, 433
Gates *v.* Bill & Son . . . 915
Gateward's Case 635
Gath *v.* Lees 140
Gatliffe *v.* Bourne 1148
Gatty *v.* Fry . . . 1293, 1378
Gaunt *v.* Taylor 251
Gaussen *v.* Morton . . . 946
Gay *v.* Lander 1286
Gayford *v.* Nicholls . . . 846
Gaynor *v.* Wood 157
Gaze, *Ex parte* 167
Geach *v.* Ingall 1227
Geary *v.* Physic 40
Geddes *v.* Pennington . . . 573
Gedge *v.* Royal Exch. Assur. . 1110
Gee, *In re* 313
— *v.* Lanc. & York. Ry. . . 282
— *v.* Metropolitan Ry. . . 1025, 1030
— *v.* Pack 165, 1088
Geeckie *v.* Monk . . . 718, 1104
Geere *v.* Mare . . . 87, 465
Geery *v.* Reason 52
Gell *v.* Burgess 152
— *v.* Vermedum 519
Gelley *v.* Clerk 770
General Accident Assur. Corporation *v.* Noel . . . 307
— *v.* Robertson . . . 1236
— Assur. Co. *v.* Worsley . 724, 729
— Bill Posting Co. *v.* Atkinson . . 172, 935
— Council of the Bar *v.* Inland Rev. Com. . 1386
— Finance Co. *v.* Liberator Building Soc. . . 72
— Share Co. *v.* Wetley Brick Co. 737
— South American Co., *Ex parte* 1300
— Steam Nav. Co. *v.* Rolt . 1092
Genese, *In re* 423
Genessee (The) 869
Genforsiking Aktieselskabet *v.* Da Costa . . 1125, 1381
Gennings *v.* Lake 656
Gentle *v.* Faulkner . . . 714
George, *In re* 208
— *v.* Claggett . . . 322
— *v.* Goldsmiths' Ins. Assoc. . 1240
— *v.* Skivington . . . 889
— *v.* Thyer 1319
Georges *v.* Georges . . . 964
Gerard *v.* Clowes 285
Gerish *v.* Chartier . . . 32
German *v.* Chapman . 304, 305, 306, 695
Gernon *v.* Roy. Ex. Assur. Co. . 1187

PAGE

Gerrard *v.* Boden 239
Gibbins *v.* N. E. Met. Asyl. Dist. . 15
Gibbon *v.* Budd . . . 115, 873
— *v.* Mendez . . . 998
— *v.* Paynton . . 902, 1029
— *v.* Pease 879
Gibbons *v.* Prewd 14
Gibbs *v.* Daniel . . . 132, 952
— *v.* Fremont . . . 59, 61, 280
— *v.* Grey . . . 340, 983
— *v.* Guild 210
— *v.* Harding . . 78, 297, 1325
— *v.* Société des Métaux . . 199
— *v.* Southam 144
Giblin *v.* McMullen . 845, 846, 896
Gibson *v.* Bradford . . . 1143
— *v.* Carruthers 269, 270, 275, 612
— *v.* Clarke 519
— *v.* Dickie . . . 76, 1310
— *v.* Doeg 714
— *v.* East India Co. . . 378
— *v.* Holland . . 39, 219, 530
— *v.* Ireson 790
— *v.* Jeyes 132
— *v.* Kirk 682
— *v.* Lupton 321
— *v.* Minet . . . 310, 1248
— *v.* Small 1162
— *v.* Spurrier . . 478, 497, 500
— *v.* Sturge 996
— *v.* Wells 693
Gidley *v.* Palmerston (Lord) . . 354
Gieve, *In re* 106
Gifford *v.* Whittaker . . . 184
Gilbert, *In re* 259
Gilby *v.* Copley 311
Gilchrist, *Ex parte* . . . 422
Giles *v.* Edwards 467
— *v.* Hart 301
— *v.* Jones 109
— *v.* Smith . . . 314, 394
— *v.* Spencer . . . 776, 786
Gilkes *v.* Leonino 17
Gill, *Ex parte* 940
— *In re* 256
— *v.* G. E. Ry. 1026
— *v.* Manchester, Sheffield & Lincolnshire Ry. . 1028, 1054
Gillespie, *In re* 1299
— *v.* Cheney . . 567, 568
— *v.* City of Glasgow Bank . 417
Gillett *v.* Mawman . . . 885
Gilliat *v.* Gilliat 477
Gilligan *v.* National Bank . . 819
Gilling, *In re* 1325
Gillingham *v.* Beddow . . . 101
Gilman *v.* Elton 790
— *v.* Robinson . . . 328
Gilmour *v.* Supple . . . 584
Gilroy *v.* Price 806
Gingell *v.* Purkins 462
Gipps *v.* Hume 82
Gipsy (The) 340
Girardy *v.* Richardson . . . 77
Giraud *v.* Richmond . . 35, 171
Gisbourn *v.* Hurst 786
Gladstone *v.* Clay 1147
— *v.* King . . 1116, 1119, 1121, 1227

PAGE

Gladwell *v.* Steggall . . 292, 898
Glaholm *v.* Hays 974
Glasdir Copper Mines, *In re* . . 702
Glascock *v.* Balls 1250
Glasier *v.* Rolls 126
Glasscott *v.* Day 167
Glazebrook *v.* Woodrow . 142, 143
Gledstanes *v.* Allen . . . 1000
Glen *v.* Dungey . . 682, 1356, 1358
— *v.* Lewis 1216
Glendarroch (The) . . . 1176
Glendinning, *Ex parte* . . . 1095
Glenester *v.* Hunter . . 393, 396
Glenfruin (The) 806
Glengaber (The) 871
Glengall (Lord) *v.* Barnard . . 42
Glenie *v.* Tucker . . . 1249, 1250
Glenlivet (The) 1202
Glenochil (The) 989
Glenwood Lumber Co. *v.* Phillips . 652
Gloag's Contract, *In re* . . . 492
Glossop *v.* Heston Local Board . 439
Gloucester Munic. Elec. Petn., *In re* 332
Glover *v.* Black 1127, 1128, 1144, 1145
— *v.* Cope 233
— *v.* Halkett . . . 1361, 1365
Glyn, Mills & Co. *v.* E. & W. India Dock Co. . . . 591, 980
Glynn *v.* Baker 222
— *v.* Margetson . . . 1171
— *v.* Thomas . . 796, 801, 804
Goblett *v.* Beechy 45
Godard *v.* Gray 455
Goddard *v.* Cox 166
— *v.* O'Brien . . . 186
Godefroy *v.* Dalton . . 891, 894
— *v.* Jay 893
Godin *v.* Lond. Assur. Co. . . 1219
Godlonton *v.* Fulham Property Co. 788
Godolphin *v.* Tudor . . . 92
Godts *v.* Rose 582
Godwin *v.* Francis . . 40, 968
Goetz, Jonas & Co., *In re* . . 270
Goggerly *v.* Cuthbert . . . 1261
Golden *v.* Manning . . . 1051
Golding, Davis, & Co., *Ex parte* . 620
Goldmann *v.* Kann . . . 644
Goldschmidt *v.* Whitmore . . 1183
Goldsmiths' Co. *v.* West Metropolitan Ry. 58
Goldstein *v.* Hollingsworth . . 679
Goman *v.* Salisbury . . . 171
Gompertz *v.* Bartlett . . . 136
— *v.* Kensit . . . 1321
Gooch *v.* Clutterbuck . . . 231
Good, *Ex parte* . . 176, 1097, 1105
— *v.* Cheesman . . 177, 188
— *v.* Isaacs 1005
— *v.* Walker 1247
Goodall *v.* Lowndes . . . 355
— *v.* Polhill 1275
— *v.* Skelton 597
Goode *v.* Harrison 367
— *v.* Job 200
Goodland *v.* Blewith . . . 168
Goodman *v.* Boycott . . 865, 911
— *v.* Chase 32
— *v.* Griffiths . . 38, 529

PAGE

Goodman *v.* Harvey . . . 1309
— *v.* Pocock . . . 934
— *v.* Sayers . . . 461
Goodright *v.* Cordwent . . . 731
— *v.* Gregory . . . 21
— *v.* Richardson . 658, 707
— *v.* Straphan . . . 20
Goodson *v.* Forbes . . . 1332
Goodtitle *v.* Morgan . . . 521
— *v.* Morse . . . 654
— *v.* Woodward . . 722
Goodwin *v.* Coates . . . 156
— *v.* Robarts . . . 1289
— *v.* Willoughby . . 3
Goodyear *v.* Simpson . . . 1371
Goom *v.* Aflalo 531
Gophir Diamond Co. *v.* Wood . 101
Gordon *v.* Calvert . 1099, 1102
— *v.* Ellis . . . 357, 358
— *v.* Gordon 422
— *v.* Gt. W. Ry. . 1048, 1049
— *v.* Howden . . . 829
— *v.* James 159
— *v.* London City & Midland Bank . . . 1259
— *v.* Morley 1130
— *v.* Rae 1088
— *v.* Rimmington . . . 1177
— *v.* Sea Fire Assur. Soc. . 391
— *v.* Silber 771
— *v.* Strange . . . 158
— *v.* Street 129, 134
Gore *v.* Gibson 435
— *v.* Lloyd 653
Gorely, *Ex parte* . . 1221, 1222
Goring *v.* Edmonds . . . 1094
— *v.* Warner 669
Gorringe *v.* Irwell Indiarubber, &c. Works 224
Gorrissen *v.* Perrin 557
Gorsedd S.S. Co. *v.* Forbes . . 1157
Gorton *v.* Falkner . . . 784, 793
Gosbell *v.* Archer . . 40, 508, 514
Gosling *v.* Higgins . . . 983
— *v.* Woolf 490
Goss *v.* Nelson 1245
— *v.* Nugent (Lord) 67, 171, 189, 505, 544
— *v.* Withers 1193
Gott *v.* Gandy 685
Gough *v.* Findon . . . 9, 936
— *v.* Gough 742
— *v.* Wood & Co. . . . 840
Gould *v.* Coombs 471
— *v.* Oliver 1129
— *v.* Stuart 934
Gouthwaite *v.* Duckworth . . 321
Govier *v.* Hancock . . . 427
Gowan *v.* Forster 216
Gower *v.* Capper 14
Grace *v.* Morgan 632
Grady, *Ex parte* 382
Græme *v.* Wroughton . . . 91
Grafftey *v.* Humpage . . . 296
Grafton *v.* Armitage . . . 587
Graham, *Ex parte* . . 15, 271
— *v.* Ackroyd . . . 949
— *v.* Allsopp . . . 677
— *v.* Barras 1167

PAGE

Graham *v.* Belfast & Northern Counties Ry. . . . 1028
— *v.* Fretwell 41
— *v.* Gibson 185
— *v.* Hope[3] 368
— *v.* Johnson 11
— *v.* Musson . . . 37, 41
— *v.* Oliver 498
— *v.* Public Works Comrs. . 354
— *v.* Tate 457
— *v.* Whichelo . . . 719
Grainger *v.* Aynsley . . . 936
Grammar *v.* Nixon . . . 335
Granger *v.* Dacre 603
— *v.* George 209
— *v.* Worms 502
Grant, *Ex parte* 951
— *v.* Austen 309
— *v.* Coverdale . . . 978
— *v.* Delacour . . . 1147
— *v.* Ellis 199
— *v.* Fletcher . . . 531
— *v.* Gold Explor. Synd. of British Columbia . . 957
— *v.* Hunt 16
— *v.* Maddox 69
— *v.* Munt 547
— *v.* Norway . . . 340, 981
— *v.* Paxton . . . 1128, 1147
— *v.* United Kingdom Switchback Co. . . 382
— *v.* Vaughan . . 157, 1285
Gratitudine (The) . 838, 983, 1178, 1309
Gratland *v.* Freeman . . . 333
Graveley *v.* Barnard . . . 98
Graves, *Ex parte* 438
— *v.* Graves 247
— *v.* Key . . . 74, 158
— *v.* Legg . . 70, 138, 974
Gray, *In re* 940
— *v.* Bell 250
— *v.* Bompas 732
— *v.* Bonsall 714
— *v.* Briscoe 524
— *v.* Carr 1008
— *v.* Cox 567
— *v.* Fowler 513
— *v.* Guttridge . 349, 510, 849
— *v.* Haig 947
— *v.* Johnson 450
— *v.* Milner 1243
— *v.* Owen 717
— *v.* Pearson 390
— *v.* Raper 402
— *v.* Smith . . . 15, 23
— *v.* Stait . . . 779, 795
Graydon, *In re* 274
Grazebrook, *In re* 103
Gt. Britain Assur. Soc., *In re* . 1236
— S.S. Assn. *v.* Wyllie . 1106
— S.S. Premium Assoc. *v.* White . . . 1381
Gt. E. Ry. *v.* Lord's Trustee . . 1057
Great Eastern (The) . . . 339
Greathead *v.* Bromley . . . 192
Gt. Ind. Pen. Ry. *v.* Saunders . 1198, 1203
Gt. North Fishing Co. *v.* Edgehill . 936

PAGE

Gt. N. Ry. *v.* Harrison . . . 141
— *v.* Hawcroft . . . 1024
— *v.* Inland Rev. Com. . 1341, 1344, 1355
— *v.* Kennedy . . . 139
— *v.* M. S. & L. Ry. . 173
— *v.* Palmer . . . 1065
— *v.* Shepherd . 1023, 1036, 1037, 1038
— *v.* Swaffield . . . 1052
— *v.* Witham . . . 13
Gt. N. W. Central Ry. *v.* Charlebois 387
Great Pacific (The) . . . 837
Gt. W. Ins. Co. *v.* Cunliffe . . 943
Gt. W. Ry. *v.* Bagge . . . 1068
— *v.* Blake . . . 1070
— *v.* Bunch . . . 1038
— *v.* Crouch . . . 1056
— *v.* Goodman . . . 1034
— *v.* Inland Rev. Com. . 1341
— *v.* London and County Banking Co. . . 1293
— *v.* M'Carthy . . 1049
— *v.* Postmaster-General . 1021
— *v.* Redmayne . 283, 1075
— *v.* Rimell . . . 1042
— *v.* Smith . . . 720
— *v.* Sutton . . 463, 1060, 1062
— of Canada *v.* Fawcett . 1019, 1066
Greaves *v.* Ashlin 621
— *v.* Hepke . . . 581, 597
— *v.* Whitmarsh, Watson & Co. 680
Grebert Borgnis *v.* Nugent . . 627
Green *v.* Bartlett 960
— *v.* Baverstock . . . 476
— *v.* Brown . . . 1177
— *v.* Cresswell . . . 31
— *v.* Eales 753
— *v.* Elmslie 1178
— *v.* Farmer . . . 907, 962
— *v.* Greenbank . . 405, 406
— *v.* Haythorne . . . 612
— *v.* Howell 367
— *v.* Humphreys . . . 211
— *v.* Kopke 348
— *v.* Marsh 754
— *v.* Mules 960
— *v.* New River Co. . . 930
— *v.* Nixon 383
— *v.* Price 290
— *v.* Saddington . . 26, 71
— *v.* St. Kath. Dock Co. . . 796
— *v.* Sevin . . . 503, 507
— *v.* Smith 482
— *v.* Thompson . 406, 413, 939
— *v.* Wynn . . . 176, 1096
— *v.* Young 1170
Greenaway *v.* Adams . . 301, 668
— *v.* Hart . . . 654
Greene *v.* West Cheshire Ry. . 295
Greening, *Ex parte* . . . 270
Greenock S.S. Co. *v.* Maritime Ins. Co. 1162
Greenough *v.* McClelland 1082, 1095, 1267

PAGE

Greenshields & Co. *v.* Stephens & Sons 990, 1009
Greenslade *v.* Dower . . 361, 363
— *v.* Tapscott . . . 668
Greenward *v.* Hurd . . . 354
Greenwood *v.* Francis . . . 1092
— *v.* Sutcliffe . . . 170
— *v.* Turner . . . 519
Greer *v.* Poole 839
Gregg *v.* Coates 670
— *v.* Wells 592
Gregory *v.* Christie . . . 1145
— *v.* Mighell . . . 652
— *v.* W. Mid. Ry. . . 1047
— *v.* Wilson 715
Gregson *v.* Ruck 531
Grell *v.* Levy . . . 59, 80
Gresham *v.* Postan . . . 574
Gresley *v.* Mousley . . . 132
Gresty *v.* Gibson 311
Greville *v.* Attkins . . . 92
— *v.* Parker 142
Grey's Settlements, *In re* . . 421
Grey *v.* Smith 1387
— de Wilton (Lord) *v.* Saxon . 301
Grice *v.* Kenrick 346
— *v.* Richardson . 607, 608, 609
Griffenhoofe *v.* Daubuz . . 460, 677
Griffin, *In re* . . . 224, 1232
— *v.* Wetherby . . 309, 1376
Griffith, *In re* 170
— *v.* Hodges . . . 717
— *v.* Pope 156
— *v.* Tower Publishing Co. . 223
— *v.* Young . . 26, 469, 471
Griffiths *v.* Dudley (Earl) . 78, 928
— *v.* Fleming . . . 1224
— *v.* Gidlow . . . 923
— *v.* Hodges . . . 763
— *v.* Jenkins . . . 25
— *v.* Jones 502
— *v.* Owen 185
— *v.* Perry . . . 607, 612
— *v.* Puleston . . . 744
— *v.* Tombs 744
— *v.* Vezey 520
Griffiths Cycle Corporation *v.* Humber & Co. . . . 22
Griffiths' Policy, *In re* . . . 1224
Grill *v.* Gen. Iron Screw Collier Co. 988, 1183
Grimes *v.* Harrison . . . 403
Grimman *v.* Legge . . . 717
Grimoldby *v.* Wells . . . 606
Grimston *v.* Cuningham . . 302
— *v.* Innkeeper . . . 770
Grimwood *v.* Moss . . . 713
Grindell *v.* Godmond . . . 429
Grissell *v.* Bristowe . 343, 641, 951
— *v.* Robinson . . 415, 458
Grissell's Case 198
Grizewood *v.* Blane . . . 105
Gronin *v.* Mendham . . . 604
Grote *v.* Chester & Holyhead Ry. . 451, 1019, 1025, 1066
Grove, *Ex parte* 197
— *v.* Nevill 405
— *v.* Portal 668
Grover *v.* Mathews . . . 1213

PAGE

Groves *v.* Dubois 948
— *v.* Wimborne (Lord) . . 926
Grunnell *v.* Welch . . . 797
Grymes *v.* Bowcren . . . 697
Gudgen *v.* Bessett 21
Guepratte *v.* Young . . . 59
Guest *v.* Homfray 503
Guidon *v.* Robson 364
Guild & Co. *v.* Conrad . . 30, 1080
Gulliford *v.* De Cardonell . . 92
Gullischen *v.* Stewart . . 1007, 1008
Gumm *v.* Tyrie . . . 999, 1136
Gundry *v.* Sainsbury . . . 895
Gunmakers' Co. *v.* Fell . . . 95
Gunn *v.* Bolckow, Vaughan & Co. 153
— *v.* Roberts 339
Gunn's Case 15
Gunnis *v.* Erhart 64
Gunter *v.* Halsey . . . 480, 481
Gurney *v.* Behrend . . . 619
— *v.* Rawlins . . . 391
— *v.* Womersley . 136, 466, 1281
Gurr *v.* Cuthbert 903
Gurrin *v.* Kopera 311
Guthing *v.* Lynn 46
Guthrie *v.* North China Ins. Co. . 1186
Gutteridge *v.* Munyard . . . 686
Guy *v.* Churchill . . . 268, 964
Guyard *v.* Sutton 418
Gwendolen Land Soc. *v.* Wicks . 401
Gwilliam *v.* Twist 927
Gwillim *v.* Daniell . . . 553
Gwynne *v.* Davy 174
— *v.* Mainstone . . . 659
Gylbert *v.* Fletcher . . . 405

HAABET (The) 835
Hackwood *v.* Lyall . . . 342
Haddon *v.* Ayers 316
Hadgett *v.* Inland Rev. Com. . 1331
Hadkinson *v.* Robinson . . 1194
Hadley *v.* Baxendale . 281, 282, 626, 1074
— *v.* Green 193
— (F.) & Co. *v.* Hadley . 153
Hadwen *v.* Mendizabel . . . 155
Haedicke's Contract, *In re* . . 491
Hafod Lead Mining Co., *In re* . 641
Hagedorn *v.* Laing . . 599, 623
— *v.* Oliverson . . 1124, 1220
— *v.* Whitmore . . 1177, 1200
Hahn *v.* Corbett 1179
Haigh *v.* Brooks . . . 5, 12, 1337
— *v.* Kaye . . . 23, 42
Haines *v.* Welch . . . 746, 776
Halbot *v.* Lens . . . 328, 351
Halbronn *v.* International Horse Agency & Exchange . . 967
Haldane *v.* Johnson . . . 667
Hale *v.* Boustead 196
— *v.* Rawson 557
Hales *v.* Freeman 457
— *v.* L. & N. W. Ry. . 140, 283, 1021
Halestrap *v.* Gregory . . . 867
Haley *v.* Hammersley . . 839, 840

PAGE

Halford, *Ex parte* . . . 177
— *v.* Cameron's, &c. Co. . 1307
— *v.* Kymer . . 1223, 1225
Halhead *v.* Young 1146
Halifax *v.* Lyle 1266
Halket *v.* Mercht. Trad. Ins. Asoc. 391
Halkett *v.* Dudley (Earl of) . 503, 507, 515, 520
Hall, *Ex parte* . 24, 224, 225, 309
— *v.* Ashurst 313
— *v.* Bainbridge . . . 20
— *v.* Betty . . . 450, 484, 490
— *v.* Cazenove 977
— *v.* Chandless 191
— *v.* City of London Brewery Co. 665
— *v.* Conder . 136, 146, 562, 636
— *v.* Derby Urban Authority . 1359
— *v.* Dyson 84
— *v.* Ewin 304
— *v.* Featherstone . . . 1257
— *v.* Fuller 857
— *v.* Janson . . . 1011, 1136
— *v.* Jenkinson . . . 519, 520
— *v.* Johnson 922
— *v.* Laver 492
— *v.* Levy 177
— *v.* N. E. Ry. 1025
— *v.* Odber 194
— *v.* Potter 1310
— *v.* Swansea (Mayor) . 376, 464
— *v.* Taylor . . 397, 398, 442
— *v.* Warren . . . 323, 517
— *v.* Wright . . 149, 150, 1313, 1315
Hall & Wife *v.* Lees . . . 916
Hallen *v.* Runder 29
Hallett, *Ex parte* . . . 1100, 1104
— *In re* 957
— *v.* Dowdall . . 369, 391
— *v.* Wigram . . . 1011
Hallett's Estate, *In re* . . . 956
Halliday *v.* Holgate . . 828, 903
— *v.* Ward 214
Halsey *v.* Grant 498
Halstead *v.* Skelton . . . 1269
Hambidge *v.* De la Crouée . . 363
Hambro *v.* Burnand . . . 334
Hambro' *v.* Hull and Lond. Fire Ins. Co. 381
Hamburg (The) . . . 836, 983
Hamer, *Ex parte* 246
— *v.* Sharp 329
Hamerton *v.* Stead . . . 682
Hamilton, Fraser & Co. *v.* Pandorf & Co. . . 988
— *v.* Grainger . . . 435
— *v.* Hector . . 77, 120
— *v.* Incledon . . . 416
— *v.* Mendez . . . 1193
— *v.* Mohun . . . 1311
— *v.* Pardorf . . . 1174
— *v.* Spottiswoode . 1242, 1378
— *v.* Terry . . . 416
— *v.* Vaughan Elect. Engineering Co. . . 411
— *v.* Watson . . . 1099
Hamlet *v.* Richardson . . . 461

PAGE

Hamlin *v.* G. N. Ry. . . . 1024
Hamlyn *v.* Crown Accidental Ins. Co. . . . 1238
— *v.* Talisker Distillery . 59
— *v.* Wood 57
Hammersley *v.* De Biel . . . 3
Hammon *v.* Roll 9
Hammond, *Ex parte* . . . 197
— *v.* Anderson 598, 610, 614
— *v.* Bussey . 282, 284, 632
— *v.* Dufrene . . . 1280
— *v.* Messenger . . 221
— *v.* Schofield . . . 193
— *v.* Smith . . . 207
Hammonds *v.* Barclay . . . 961
Hampden *v.* Walsh . . 124, 467
Hampshire *v.* Wickens . . 57, 670
Hancke *v.* Hooper . . . 889, 898
Hancock *v.* Austin . . . 764
— *v.* Hancock . . . 421
— *v.* Hodgson . . . 356
Handford *v.* Palmer . 445, 810, 812
Handler *v.* Mutual Reserve Fund Assoc. 1230
Handley *v.* Moffatt . . . 941
Handman and Wilcox's Contract, *In re* 299
Hando *v.* L. C. & D. Ry. . . 926
Hands *v.* Burton 183
— *v.* Slaney 410
Hanington *v.* Du Chatel . . 86
Hankey, *In re* 252
Hankinson *v.* Hayter . . . 252
Hanley *v.* Cassan . . . 469, 956
Hannah *v.* Hodgson . . . 132
Hannuic *v.* Goldner . . . 603
Hansard *v.* Robinson . . . 1298
Hanson *v.* Armitage . . 533, 537
— *v.* Harrold . . . 1008
— *v.* Meyer . . . 584, 610
— *v.* Roberdeau . . 349, 350
Harbert's Case 456
Harburg India Rubber Comb Co. *v.* Martin . . . 30, 1080
Harcourt *v.* Ramsbottom . . 517
— *v.* Wyman . . . 733
Harding *v.* Cooper . . . 83
— *v.* Davies . . . 169
— *v.* Freeman . . . 560
— *v.* Harding . . . 472
— *v.* Wilson 656
Hardman *v.* Bellhouse . . . 184
— *v.* Booth . 134, 221, 822
— *v.* Child . . . 480
— *v.* Willcock . . 355, 954
Hardon *v.* Hesketh . . . 682
Hardoon *v.* Belilios . . 642, 644
Hardwick, *In re* 818
— *v.* Wright . . . 1098
Hardwicke (Lord) *v.* Vernon . 132
Hardy *v.* Bern 286
— *v.* Fothergill . . . 197
— *v.* Veasey 896
— *v.* Woodrooffe . . . 1269
Hare *v.* Barstow 1214
— *v.* Elms 738
— *v.* Henty 1290
— *v.* L. & N. W. Ry. . . 80
— *v.* Travis 1170

PAGE

Hare and O'More's Contract, *In re* 479
Harford *v.* Gardner . . . 5
— *v.* Purrier . . . 482
Hargreave *v.* Smee . . . 1089
Hargreaves *v.* Parsons . . 30, 32
— *v.* Spink . . . 593
Hargroves, Aronson & Co. *v.* Hartop 764
Harington *v.* Hoggart . . . 510
— *v.* Sendall . . . 396
Harkness' Contract, *In re* . . 423
Harland *v.* Binks 187
Harley *v.* King 230
Harlock *v.* Ashberry . . . 200
Harman *v.* Ainslie 710
— *v.* Anderson . . . 537
— *v.* Harman . . . 251
— *v.* Johnson . . . 851
— *v.* Kingston . . . 1133
— *v.* Vaux 1202
Harmann *v.* Powell . . . 695
Harmer *v.* Bean 676
— *v.* Bell . . . 835, 838
— *v.* Cornelius . . 889, 931
— *v.* Steele 1250
Harmonides (The) 869
Harmony and Montague Tin and Copper Mining Co., *In re* . 152
Harms *v.* Parsons 99
Harnett *v.* Baker 492
— *v.* Maitland . . . 689
— *v.* Yielding . . . 297
Harnor *v.* Groves . . . 64, 65
Harper *v.* Vigers . . . 346, 972
— *v.* Williams . . . 313
Harpur Cycle Fittings Co., *In re* . 792
Harratt *v.* Wise 1179
Harrhy *v.* Wall . . . 88, 188
Harries, *In re* 156
— *v.* Edmonds . . . 1014
Harriman *v.* Harriman . . . 428
Harrington *v.* Long . . . 80
— *v.* Vict. Grav. Dock Co. 5
Harris's Case 8
Harris, *Ex parte* 788
— *v.* Amery 379
— *v.* Birch . . 1346, 1373
— *v.* Boots Cash Chemists . 302
— *v.* Brisco 79
— *v.* Carter . . 4, 340, 936
— *v.* Cockermouth Ry. . . 1064
— *v.* Costar 1016
— *v.* Farwell 366
— *v.* G. W. Ry. . . . 866
— *v.* Hickman . . . 679
— *v.* Huntbach . . . 32
— *v.* Jacobs 1006
— *v.* Jones 686
— *v.* Lee 425
— *v.* London County Council 108
— *v.* Morris . . . 427, 428
— *v.* Nickerson . . . 13
— *v.* Pepperell . . . 134
— *v.* Quine . . 205, 219, 220
— *v.* Reynolds . . . 184
— *v.* Rickett . . .68, 71

PAGE

Harris *v.* Shipway . . . 777
— *v.* Truman 956
— *v.* Watkins 250
— *v.* Watson 3, 4
Harrison, *Ex parte* . 755, 774, 842
— *v.* Allen 280
— *v.* Alliance Assur. Co. . 1239
— *v.* Bank of Australasia . 1011
— *v.* Barnby . . 238, 781
— *v.* Cage 33
— *v.* Cotgreave . . 405, 1295
— *v.* Ellis 1150
— *v.* Gardner . . . 301
— *v.* Harrison . . . 1324
— *v.* Hart 839
— *v.* Jackson . . 325, 370
— *v.* L. B. & S. C. Ry. . 1022, 1034, 1046, 1047, 1048
— *v.* Muncaster (Lord) . 665
— *v.* North (Lord) . . 675
— *v.* Ruscoe . 1273, 1275
— *v.* Seymour . 1086, 1093
— *v.* Southampton . 1319
— *v.* Sykes 19
— *v.* Timmins . . . 389
— *v.* Wright . . . 287
Harriss *v.* Fawcett . . . 1099
Harrold *v.* Plenty 841
Harrop *v.* Fisher 1247
Harrow School *v.* Alderton . 705, 707
Harrower *v.* Hutchinson . 1119, 1173
Harse *v.* Pearl Assurance . . 1225
Hart *v.* Alexander 368
— *v.* Baxendale 1076
— *v.* Biggs 435
— *v.* Bush 533, 537
— *v.* Frontino & Bolivia, &c. Co. 649
— *v.* Hart 1338
— *v.* Miles 5
— *v.* Mills . . 538, 601, 602, 624
— *v* Nash 216
— *v.* Porthgain Harbour Co. . 880
— *v.* Prendergast . . . 213
— *v.* Stand. Mar. Ins. Co. . 45, 1128
— *v.* Stephens . . . 219, 262
— *v.* Swaine . . . 495, 523
— *v.* Windsor . . . 672, 673
Hartas *v.* Ribbons 967
Hartcup *v.* Bell 170
Hart-Dyke, *Ex parte* . . . 774
Hartford *v.* Jones 869
Hartland *v.* Jukes 209
Hartley *v.* Buggin 1169
— *v.* Case 1273
— *v.* Cummings . . 9, 98, 916
— *v.* Hudson . . . 679
— *v.* Moxham . . . 796
— *v.* Ponsonby . . . 5
— *v.* Rice . . 1310, 1312
Hartness *v.* Thompson . . . 412
Hartop *v.* Hoare . . . 820, 905
Hartshorne *v.* Watson . . . 713
Harvey *v.* Barnard's Inn . . 14
— *v.* Brydges . . . 736
— *v.* Facey 16
— *v.* Grabham . 27, 171, 505
— *v.* Johnston . 1312, 1314
— *v.* Kay 638

PAGE

Harvey *v.* Pocock 784
— *v.* Towers 1257
Harwood *v.* Law 389
Haselgrove *v.* House . . . 176
Haslam and Hier Evans, *In re* . 944
Hasleham *v.* Young . . . 1105
Hasluck, *Ex parte* 58
Hassell *v.* Long . . 1085, 1089
— *v.* Mercht. Trad. Ins. Assoc. 391
Hasser *v.* Wallis 463
Hastelow *v.* Jackson . . 124, 467
Hastie *v.* Couturier . . 540, 1137
Hastings, *In re* 250
— (Lady), *In re* . 204, 422
— (Lord), *Ex parte* . 681, 746
— Corporation *v.* Letton . 668 1099
— (Lord) *v.* N. E. Ry. . 236
— (Marquis) *v.* Thorley . 169
— *v.* Pearson . . . 823
Hatch *v.* Hale 801
— *v.* Hatch 132
— *v.* Searles 1249
Hatchwell *v.* Cooke . . . 984
Hatsall *v.* Griffith 316
Hatton *v.* Gray 37
Haugh *v.* North Bierley Union . 376
Havelock *v.* Geddes . 54, 977, 997
— *v.* Hancill . . . 1183
Havens *v.* Middleton . . . 139
Hawes *v.* Forster 532
— *v.* Smith 416
— *v.* Watson 612
Hawke *v.* Corri 1322
Hawken *v.* Bourne . . 369, 390
Hawkes, *In re* . . . 964, 966
— *v.* Smith 1028
Hawkesworth *v.* Chaffey . . 14
Hawkins, *In re* 273
— *v.* Cardy . . . 1252
— *v.* Coulthurst . . 1239
— *v.* Harwood . . . 893
— *v.* Holmes . . . 40
— *v.* Maltby . . . 645
— *v.* Pearse . . . 644
— *v.* Rutt 152
— *v.* Walrond . 746, 800, 803
— *v.* Warre . . . 1370
Hawley *v.* Beverley . . . 459
— *v.* Blake . . . 251, 252
Hawtayne *v.* Bourne . . 329, 389
Hawthorn *v.* Hammond . . 765
Hay *v.* Ayling 108
— *v.* Northcote . . . 1322
Hay's Case 957
Haycock's Policy, *In re* . 222, 224
Haydon *v.* Bell 491
— *v.* Miller 263
— *v.* Williams . . . 213
Hayes *v.* S. W. Ry. . 1053, 1070
Haylett *v.* Thompson . . . 937
Hayne *v.* Cummings . 48, 710, 713
— *v.* Maltby 72
Haynes *v.* Doman 96
— *v.* Hare 64
Hayselden *v.* Staff . . . 889
Hayton *v.* Irwin 69
Hayward *v.* Bennett . . . 147

PAGE

Hayward *v.* Scougall . . . 556
— *v.* Williams . . . 263
Haywood *v.* Bibby . . . 1353
— *v.* Brunswick Bldg. Soc. . 229, 240, 303, 304, 749
— *v.* Cope 299
— *v.* Rodgers . . 1116, 1119
Hazard *v.* Treadwell . . . 328
Head *v.* Tattersall . . . 556
Heald *v.* Hay 92
— *v.* Kenworthy . . . 162
Healey *v.* Story 1302
Heane *v.* Rogers 74
Heap *v.* Barton . . . 701, 703
— *v.* Dobson 361
Heard *v.* Pilley 22
— *v.* Stamford . . . 263
Hearn *v.* L. & S. W. Ry. . . 1030, 1041
Hearne *v.* Tenant 503
Heath *v.* Chilton 415
— *v.* Hall 224
— *v.* Pugh 202
Heathcote *v.* Crookshanks . . 187
Heather Bell (The) . . . 832
Heather *v.* Webb 197
Heathorne *v.* Darling . . . 836
Heaton, *Ex parte* 852
Heaven *v.* Pender . . 277, 291, 923
Heawood *v.* Bone 787
Hebb's Case 14, 15
Hebblethwaite *v.* Peever . . 200
Hebden *v.* Rutter 14
— *v.* West . . 1224, 1225
Hedburg *v.* Pearson . . . 1200
Hedley *v.* Bainbridge . . 362, 363
— *v.* Pinkney & Sons SS. Co. . . 927, 937, 1164
Heffield *v.* Meadows . . . 1090
Hegan *v.* Johnson 775
Hegarty *v.* Milne 1368
Heilbut *v.* Nevill 1247
Heilbutt *v.* Hickson . 558, 564, 582, 606
Heinekey *v.* Earle 616
Heinrich (The) 963
Helby *v.* Matthews . . . 824
Helder, *Ex parte* 348
Helen (The) 103
Helene (The) 1045
Helier *v.* Casebert 248
Hellawell *v.* Eastwood . . . 783
Hellier *v.* Silleox 682
Hellyer *v.* Grace 418
Helps *v.* Clayton . . . 410, 458
— *v.* Winterbottom . . 206, 624
Helsby, *In re* . . . 272, 420
— *v.* Mears 361
Helyear *v.* Hawke . . 334, 336
Hemming, *Ex parte* . . . 196
— *v.* Trenery . . . 189
Hemmings *v.* Sceptre Life Assoc. . 1227
Hemp *v.* Garland 206
Henderson *v.* Arthur . . 65, 777
— *v.* Austral. St. Nav. Co. . 376
— *v.* Eason 685
— *v.* Gilchrist 250

PAGE

Henderson *v.* L. & N. W. Ry. . 1030, 1041
— *v.* Mears 676
— *v.* N. E. Ry. . . . 1074
— *v.* Shankland . . . 1210
— *v.* Squire . . 732, 754
— *v.* Stevenson . . . 866
— *v.* Thorn . . 687, 751
— *v.* Williams . . . 821
Henfree *v.* Bromley . . . 189
Henkel *v.* Pape . . . 18, 339
Henkle *v.* Royal Ex. Assur. Corp. 1134
Henman *v.* Dickinson . . . 1297
Henniker *v.* Wigg 167
Henrich Bjorn (The) . . 835, 887
Henry, *Ex parte* 268
— *v.* Root 412
Hensey *v.* White 928
Henson *v.* Blackwell . . . 1223
— *v.* Coope 66
Henthorn *v.* Fraser . . 16, 18
Hentig *v.* Staniforth . . . 1159
Henty *v.* Schröder . . . 520
Henwood *v.* Oliver . . . 169
Hepworth *v.* Heslop . . . 414
— *v.* Pickles . . . 714
Heraud *v.* Leaf 370
Herbert *v.* Champion . . . 1206
— *v.* Salisb. & Yeovil Ry. . 288
— *v.* Sayer 274
Herdman *v.* Wheeler . . . 1250
Herefordshire Banking Co., *In re* 281
Herlakenden's Case . . . 692
Herman *v.* Jeuchner . . . 123
Hermann *v.* Charlesworth . . 1311
— *v.* Hodges 295
Hern *v.* Nicholls . . . 333, 335
Herne *v.* Bembow . . . 689, 693
Herne Bay Steam Boat Co. *v.* Hutton 147, 148
Hervey *v.* Smith 303
Heseltine *v.* Siggers . . 585, 643
Heselton *v.* Allnutt . . . 1170
Hesketh's Case 373
Hesse *v.* Stevenson . . . 273
Hetling's Contract, *In re* . . 504
Heugh *v.* L. & N. W. Ry. . . 1052, 1055, 1056
Heward *v.* Wheatley . . . 249
Hewison *v.* Guthrie . . . 905
— *v.* Negus 422
Hewitt *v.* Isham 693
Hewlett *v.* Allen 119
Hewlings *v.* Graham . . . 409
Hexter *v.* Pearce 295
Heyman *v.* Neale 531
Heys *v.* Tindall 954
Heywood *v.* Mallalieu . . . 516
— *v.* Pickering . . . 1290
Heyworth *v.* Hutchinson . 558, 571
— *v.* Knight . 15, 189, 532
Hibbert *v.* Carter 619
— *v.* Shee 571
Hibblewhite *v.* M'Morine . 20, 29, 105, 646, 841
Hibbs *v.* Ross 342
Hibernian (The) . . . 995, 999

PAGE
Hick *v.* Phillips 497
— *v.* Raymond and Reid . 140, 1003
Hickie & Co.'s Case, New Zealand Banking Corporation, *In re* 1300
— *v.* Rodocanchi . 1189, 1190
Hickley *v.* Hickley 132
Hickman *v.* Cambrian, &c. Ins. Co. 391
— *v.* Haynes . 67, 544, 545
— *v.* Machin . . . 757
Hickmot's Case 177
Hicks *v.* Beaufort (Duke) . . 1278
— *v.* Gregory 7
Higgen's Case 192
Higgins *v.* Aguilar . . . 1138
— *v.* Bretherton . . . 1058
— *v.* Hopkins . 314, 453, 868
— *v.* Livingstone . . . 397
— *v.* Pitt 122
— *v.* Scott 203
— *v.* Senior . . 324, 326, 349
— and Hitchman's Cont., *In re* 496
Higginson *v.* Clowes . . 64, 479
— *v.* Simpson . . . 105
Higgon *v.* Mortimer . . . 691
Higgons *v.* Burton 594
Higgs *v.* Northern Assam Tea Co. 223
— *v.* Scott . . . 460, 668
Higham *v.* Cookes 657
Highmore *v.* Primrose . . . 470
Hignett and Bird's Cont., *In re* . 491
Hildyard *v.* South Sea Co. . . 649
Hill, *Ex parte* . . . 167, 774
— *v.* Balls 576
— *v.* Begg 928
— *v.* Boyle 81
— *v.* Buckley 502
— *v.* Bullock 696
— *v.* Curtis 255
— *v.* Featherstonehaugh . . 890
— *v.* Grange 737
— *v.* Gray 576
— *v.* Halford 1285
— *v.* Heap 1279
— *v.* Johnson 1372
— *v.* Kitching 958
— *v.* Lane 300
— *v.* Lewis 1249
— *v.* Patten . . . 1129, 1135
— *v.* Perrott 454
— *v.* Ramm 1373
— *v.* Royds . . . 309, 356
— *v.* Schwarz 297
— *v.* Scott 1020
— *v.* Smith . . . 268, 571
— *v.* Tucker 316
— *v.* Walker 258
— *v.* Wilson 1202
Hill's Case 403
Hillary *v.* Morris 273
Hills *v.* Croll 515
— *v.* London Assur Co. . . 1199
— *v.* Mitson 84
— *v.* Street 464
— *v.* Sughrue . . . 148, 979
Hillyer *v.* St. Bartholomew's Hospital (Governors) . . . 898
PAGE
Hilton *v.* Eckersley . . 78, 96
Hilton *v.* Tucker 219
— *v.* Woods 80
Hinde *v.* Gray 95
— *v.* Liddell 627
— *v.* Whitehouse . 42, 538, 588
Hindley *v.* Westmeath . . 431, 1324
Hindmarsh, *In re* 213
Hine *v.* Alleley 1269
Hingeston *v.* Kelly . . . 868
Hingston *v.* Wendt . . . 966
Hinton *v.* Dibbin 1040
Hippesley *v.* Knee Bros. . . 943
Hipwell *v.* Knight . . . 503
Hire Purchase Furnishing Co. *v.* Richens 385
Hirschfield *v.* L. B. & S. C. Ry . 129
— *v.* Smith 1274, 1278, 1294, 1295
Hirschman *v.* Budd . . . 1295
Hirst *v.* Horn 734
— *v.* Smith 257
Hirth, *In re* 435
Hiscox *v.* Greenwood . . . 906
Hitchcock *v.* Coker . .12, 99, 100
— *v.* Giddings . . . 522
— *v.* Humfrey . . . 1089
Hitchings *v.* Thompson . . . 740
Hitchman *v.* Stewart . . . 1101
— *v.* Walton . . 701, 703
Hoad *v.* Grace 1082
Hoadly *v.* McLaine . 529, 585
Hoare *v.* Graham 65
— *v.* Niblett . . . 193, 419
— *v.* Parker 821
— *v.* Rennie . 142, 172, 543, 603
Hobbs *v.* Hannam 1111
— *v.* Henning 1168
— *v.* Hull 1326
— *v.* L. & S. W. Ry. 1024, 1074
Hobson, *In re* 262
— *v.* Bass 1104
— *v.* Cowley . . . 366
— *v.* Gorringe . 697, 783, 840
— *v.* Tulloch . . . 695
Hoby *v.* Built 891
— *v.* Roebuck 25
Hochster *v.* De la Tour . 3, 141, 148, 172, 207, 626, 934, 940
Hoddesdon Gas Co. *v.* Haselwood . 13, 38
Hodge *v.* Matlock Bath etc. Urban Co. 376
Hodges *v.* Hodges 417
— *v.* Litchfield (Earl) . 508, 514
Hodgkinson, *Ex parte* . . . 19
— *v.* Cooper . . . 490
— *v.* Crowe . . . 57
— *v.* Kelly . . . 641
Hodgman *v.* West Mid. Ry. . . 1043
Hodgson, *In re* 193
— *v.* Anderson . . 33, 309
— *v.* Coppard . . . 235
— *v.* Fullarton . . 900, 984
— *v.* Glover . . . 1143
— *v.* Johnson . . 23, 26
— *v.* Le Bret . . . 532
— *v.* Loy 607
— *v.* Malcolm . . 987, 1177
— *v.* Sidney . . . 268

PAGE

Hodgson *v.* Temple 113
Hodkinson *v.* L. & N. W. Ry. . 1053
Hodson *v.* Coppard . . 52, 301
— *v.* Heuland . . 294, 652
— *v.* Observ. Life Assur. Soc. . . . 1223, 1236
— *v.* Terrill 467
Hoffman *v.* Marshall . . . 1202
Hogarth *v.* Jennings . . . 781
— *v.* Latham . 363, 1249, 1305
— *v.* Wherley . . . 160
Hogg *v.* Brooks 731
— *v.* Skeen 1257
Hoggart *v.* Scott 507
Hoggarth *v.* Walker . . 1127, 1130
Hoggins *v.* Gordon . . . 873
Hohenzollern (The) . . . 869
Holcombe *v.* Hewson . . . 103
Holcroft *v.* Barber . . . 918
— *v.* Dickenson . . . 1311
Holden *v.* Liverpool Gas Co. . . 705
— *v.* Thompson . . . 79
Holder *v.* Dickeson . . . 14
— *v.* Soulby 761
— *v.* Taylor 449
— *v.* Williams . . . 252
Holderness *v.* Collinson . . . 907
— *v.* Shackells . . . 597
Holdgate *v.* Slight . . . 116
Holding *v.* Elliott 68
— *v.* Pigott 744
Holdsworth *v.* Lancashire & Yorkshire Ry. 1228
Holford *v.* Acton Urban Council . 57
— *v.* Hatch 231
— *v.* Pritchard . . . 635
Holgate *v.* Kay 665
Holl *v.* Griffin 537
Holland *v.* Bird 781
— *v.* Duffin 1337
— *v.* Hodgson 697, 702, 783, 840
— *v.* Holland . . . 51
— *v.* Lea 1084
— *v.* Russell . 152, 355, 463, 464, 470, 473, 1119
Holles *v.* Carr 51
Holliday *v.* Atkinson . . 5
Hollier *v.* Eyre 1095
Hollingshead, *In re* . . . 214
Hollis *v.* Clarige 965
Holliwell *v.* Seacombe . . . 513
Holloway Brothers *v.* Hill . 229, 694
Holman *v.* Johnson . 75, 112, 1181
— *v.* Loynes . . . 952
— *v.* Stevens . . . 168
Holme *v.* Brunskill . 732, 1084, 1092
— *v.* Guppy 147
Holmes *v.* Bell 192
— *v.* Buckley . . . 230
— *v.* G. N. Ry. . . . 928
— *v.* Hoskins . . . 535
— *v.* Jaques . . . 1244, 1285
— *v.* Kerrison . . 144, 208
— *v.* Kidd . . . 1260, 1261
— *v.* Mackrell . . 212, 216
— *v.* Mitchell . 22, 39, 1081
— *v.* N. E. Ry. . . . 927
— *v.* Sixsmith . . 850, 1337
— *v.* Tutton 163

PAGE

Holmes *v.* Walsh. 269
— *v.* Williamson . . . 456
— *v.* Wood 418
Holness *v.* Mackay and Davis . 928
Holroyd *v.* Marshall 292, 481, 629, 831
— *v.* Wyatt 479
Holst *v.* Pownal 614
Holt *v.* Ely 325, 462
— *v.* Ward . . . 14, 407
Holtby *v.* Hodgson . . . 420
Holyday *v.* Morgan . . 548, 549
Home Mar. Ins. Co. *v.* Smith . 1125, 1381
Homer *v.* Ashford 98
Homersham *v.* Wolverhampton Waterworks Co. . . . 379
Homfray *v.* Scroope . . . 205
Honck *v.* Muller . 143, 172, 543, 603
Honey, *Ex parte* . . . 320, 1285
Honeyman *v.* Marryat . . 14
Honner *v.* Morton 272
Hood-Barrs *v.* Cathcart . . 422
— *v.* Heriot . . . 421
Hooke *v.* Piper 386
Hoole *v.* Speak 128
Hooper, *In re* 429
— *v.* Clark . . . 232, 236
— *v.* Herts 841
— *v.* Keay 164
— *v.* Ramsbottom . . 821
— *v.* Smart 515
— *v.* Stephens . . . 216
— *v.* Treffry . . 459, 466
— *v.* Williams . . . 1286
Hopcroft *v.* Keys 773
Hope (The) 963
— *v.* Hope . . 59, 122, 307
— *v.* International Society . 81
— Johnstone, *In re* . . . 1325
Hopgood *v.* Parkin . . . 894
Hopkins *v.* Grazebrook . . . 513
— *v.* Hills 809
— *v.* Prescott . . 91, 121
— *v.* Richardson . . . 453
— *v.* Tanqueray . 546, 547, 553
— *v.* Ware . . 156, 162, 1290
Hopkinson *v.* Forster . . . 225
— *v.* Lee 316
— *v.* Lovering . . . 231
Hopper, *In re* 899
— *v.* Burness . . . 994
— *v.* Wear Mar. Ins. Co. . 1147
Hopson *v.* Trevor 298
Hopwood *v.* Whaley . . . 248
Hore *v.* Milner 623
— *v.* Whitmore 1166
Horford *v.* Wilson 960
Horlock, *In re* 157
Horlor *v.* Carpenter . . . 1089
Horn *v.* Anglo-Austral. Assur. Co. . 1229
Hornby *v.* Cardwell . . 284, 753
— *v.* Close 96
— *v.* Lacy . . . 323, 948
Horncastle *v.* Farran . . . 905
— *v.* Stewart . . . 1148
Horne *v.* Midland Ry. . . 1073, 1074
— *v.* Rouquette . . . 1278
— *v.* Wingfield . . . 485
Horner, *In re* 280

PAGE

Horner *v.* Franklin . . . 679
— *v.* Graves 99
Horneyer *v.* Lushington 1154, 1155, 1158
Hornidge *v.* Wilson . . . 248
Horrocks *v.* Rigby . . . 515
Horsefall *v.* Davy . . . 796
— *v.* Mather . . . 704
Horsey *v.* Graham . . 26, 68
Horsey Estate *v.* Steiger . 236, 668, 669, 714, 715, 737
Horsfall *v.* Handley . . . 355
— *v.* Key . . . 1345, 1368
— *v.* Thomas . . . 575
Horsford *v.* Webster . . 776, 786
Horsley *v.* Bell . . . 393, 398
— *v.* Price . . . 970, 1005
— *v.* Rush 325
Horton *v.* M'Murtry . . . 931
— *v.* Riley 458
— *v.* Sayer 81
Hoskins *v.* Pickersgill . . . 1127
Hotham *v.* East India Co. . 145, 987
Hotson *v.* Browne . . . 66, 68
Hough *v.* Head 1207
— *v.* Manzanos . . . 347
— *v.* May . . . 158, 169
Houghton, *In re* . . . 251, 252
— *v.* Matthews . . 961
— *v.* Emp. Marine Ins. Co. . . . 1138
Houlder *v.* Public Works Commrs. . 64
Houlder Brothers *v.* Merchant Mar. Ins. Co. 1150
Houlder *v.* Weir . . 1002, 1003
Houlditch *v.* Cauty . . . 1273
Houldsworth *v.* City of Glasgow Bank 128, 129, 573, 579
— *v.* Evans . . . 382
Houliston *v.* Smyth . . . 430
Hounsell *v.* Dunning . . . 204
House *v.* Petre (Lord) . . . 256
Household Fire Ins. Co. *v.* Grant . 18
Hovil *v.* Pack 331
How *v.* Greek . . . 313, 672
— *v.* Kennett 682
— *v.* Kirchner 1002
Howard's Case 1229
Howard *v.* Brownhill . . . 472
— *v.* Chapman . . . 160
— *v.* Crowther . . . 271
— *v.* Danbury . . . 852
— *v.* Fanshawe . . 714, 737
— *v.* Harris . . . 844, 864
— *v.* Lightfoot . . 200, 219
— *v.* Lovegrove . . 284, 632
— *v.* Maitland . . 524, 666
— *v.* Patent Ivory Co. . . 393
— *v.* Shaw . . . 662, 684
— *v.* Shepherd . . . 981
— *v.* Sheward . . 335, 554
— *v.* Tucker . . . 1001
— *v.* Wemsley . . . 724
— *v.* Wood 464
— *v.* Woodward . . 98, 301
Howarth *v.* Brearley . . . 115
Howatson *v.* Webb . . . 129
Howcutt *v.* Bonser . . . 211
Howden (Lord) *v.* Simpson . . 78

PAGE

Howe *v.* Scarrott 773
— *v.* Smith 509
— *v.* Synge 120
Howell, *In re* . . . 170, 774
— *v.* Batt 309
— *v.* Coupland . 150, 540, 583
— *v.* George 515
— *v.* Jackson . . . 765
— *v.* MacIvers . . . 224
— *v.* Maine 418
— *v.* Young . . . 209, 894
Howells *v.* Landore Steel Co. . 927
Howes *v.* Ball . . . 794, 831
Howgate and Osborn's Contract, *In re* . . . 190, 241, 424
Howlett *v.* Haswell . . . 405
Howley *v.* Knight . . . 244
Howse *v.* Webster . . . 247
Howson *v.* Hancock . . . 124
Hoyle, *In re* 1081
Hubbard, *Ex parte* . . . 818
— *v.* Glover . . . 1123
— *v.* Jackson . . . 1135
Hubbersty *v.* Ward . . 340, 981
Huber *v.* Steiner . . . 59, 219
Hubert *v.* Moreau 40
— *v.* Treherne . . 40, 41
Hucks *v.* Thornton . . . 1183
Hudd *v.* Ravenor 800
Huddlestone *v.* Briscoe . . . 515
Hudson *v.* Baxendale . . 1043, 1056
— *v.* Bertram . . . 503
— *v.* Bilton 994
— *v.* Brent 434
— *v.* Clementson . . . 978
— *v.* Cook 242
— *v.* Granger . . 323, 961
— *v.* Hill 56
— *v.* Hudson . . . 258
— *v.* Revett . . 190, 191
— *v.* Temple . . . 503
Hudspeth *v.* Yarnold . . . 1370
Hudston *v.* Mid. Ry. . . 1036, 1037
Huffell *v.* Armitstead . . 726, 763
Huggins *v.* Coates . . . 466
Hughes, *Ex parte* 1260
— *v.* Clark 672
— *v.* Done 110
— *v.* Græme . . 351, 968
— *v.* Hughes . . . 655
— *v.* Humphreys . . 109, 939
— *v.* Lenny . . . 452, 877
— *v.* Met. Ry. . . 67, 715
— *v.* Parker 487
— *v.* Pump House Hotel Co. . 225
— *v.* Statham . . . 83
— *v.* Sutherland . . . 832
— *v.* Twisden . . . 210
Hugill *v.* Masker 825
Hulbert *v.* Long 45
Hull *v.* Cooper 1140
Hull and Meux (Lady), *In re* . 754
Hull Dock Co. *v.* Browne . . 1138
Hull Ropeworks Co. *v.* Adams 824, 834
Hulse, *In re* 695
— *v.* Hulse 9
Hulthen *v.* Stewart 1002, 1003, 1005
Humble *v.* Hunter . 64, 72, 323
— *v.* Langston . . 231, 647

PAGE

Humble *v.* Mitchell . . 29, 639
Humby, *Ex parte* . . . 390
Hume *v.* Bentley . . . 490
— *v.* Pocock . . . 523, 525
Humfrey *v.* Dale 69, 324, 326, 349, 532
— *v.* Gery . . . 201, 791
Humphrey *v.* Lucas . . . 323
Humphreys, *In re* . . . 963
— *v.* Briant . . . 1372
— *v.* Green . . 24, 480
— *v.* Jones . . 207, 213
— *v.* Morten . . 714, 737
— *v.* Welling . . 83
Humphrys *v.* Polak . . . 77
— *v.* Pratt . . . 454
Hunsden *v.* Cheyney . . . 300
Hunt *v.* Allgood . . . 709
— *v.* Bate . . . 7
— *v.* Bishop . . . 712
— *v.* Colson . . . 653
— *v.* De Blaquiere . . 431
— *v.* Dowman . . 704, 706
— *v.* Fripp . . . 274
— *v.* Gunn . . . 642, 643
— *v.* Hecht . . . 533, 534
— *v.* Hort . . . 47
— *v.* Hunt . . . 1324
— *v.* Maniere . . . 954
— *v.* Roy. Ex. Assur. Co. . 1193
— *v.* Silk . . . 137
— *v.* Wimbledon Local Board 375, 378, 399
Hunter, *Ex parte* . . . 511
— *v.* Beale . . . 613
— *v.* Caldwell . . . 891
— *v.* Fry . . . 996
— *v.* Hunt . . . 456
— *v.* Leathley . 1128, 1133, 1147, 1153, 1173
— *v.* McTaggart . . . 617
— *v.* Nockolds . . 201
— *v.* Northern Marine Ins. Co. . . 994, 1138, 1154
— *v.* Parker . . . 21
— *v.* Potts . . 269, 989, 1176
— *v.* Welsh . . . 468, 947
— *v.* Wilson . . . 1258
— *v.* Wright . . . 1159
Huntington *v.* Inland Rev. Com. . 1341
Huntley (The) . . . 834
— (Marchioness) *v.* Gaskell . 422
— *v.* Sanderson . . 208
Huntocke *v.* Blacklowe . . 98
Huntsman (The) . . . 343
Hupe *v.* Phelps . . . 890
Hurley *v.* Baker . . 469, 510
Hurry *v.* Roy. Ex. Assur. Co. . 1146, 1149, 1209
Hurst *v.* G. W. Ry. . . 1024
— *v.* Hurst . . . 287
— *v.* Orbell . . . 466
— *v.* Usborne . . 975, 978
Husband *v.* Davis . . 163, 164
Hussey *v.* Crickitt . . 456
— *v.* Horne Payne . 15, 46
Hutcheson *v.* Eaton . . 194, 532
Hutchings *v.* Humphrey . . 520
— *v.* Nunes . . 618
Hutchins *v.* Chambers . . 797

PAGE

Hutchins *v.* Scott . . . 190
Hutchinson *v.* Guion . . 902
— *v.* Heyworth . . 182
— *v.* Morley . . 552
— *v.* Tatham . . 70
— *v.* Wright . . 1113
— *v.* York, Newc. & Ber. Ry. . . . 922, 926
Hutchison *v.* Bowker . . 71
Huth *v.* Lamport . . . 1013
Hutley *v.* Hutley . . . 79
Huttman *v.* Boulnois . . 935
Hutton *v.* Bragg . . 971, 998
— *v.* Bullock . . 324
— *v.* Eyre . . 175, 177, 178
— *v.* Mansell . . 16, 1312
— *v.* Warren . 69, 733, 743. 745
Huxley *v.* O'Connor . . 1371
Hyams *v.* Stuart King . 10, 12, 106, 1257
Hyatt *v.* Griffiths . . 733
Hybart *v.* Parker . . 390
Hyde *v.* Hyde . . . 1318
— *v.* Johnson . . 40
— *v.* Trent & Mersey Nav. Co. . 1027, 1051, 1070
— *v.* Warden . . 491, 710
— *v.* Watts . . 140
Hyderabad (Deccan) Co. *v.* Willoughby . . 1107
Hydraulic Engineering Co. *v.* McHaffie . . 141
Hyman *v.* Nye . . 1015
Hyne *v.* Dewdney . . 1370

Ibbett *v.* De La Salle . . 967
Ibbs *v.* Richardson . . 683
Ida (The) . . . 835
Idle *v.* Roy. Ex. Assur. Co. . 1187
Iley *v.* Frankenstein . . 585
Imperial Bank *v.* London and St. Kath. Docks Co. . 608, 610
Imperial Bank of Canada *v.* Bank of Hamilton . 1250, 1289, 1294
Imp. Gas Co. *v.* Lond. Gas Co. . 210
Imperial Land Co. of Marseilles, *In re* . . 223
Imperial Loan Co. *v.* Stone . 436
Imray *v.* Oakshette . . 715
Ince Hall Mills Co. *v.* Douglas Forge Co. . . 385
Inchbald *v.* Western Neilgherry Coffee Co. 147, 453, 874, 914, 961
Inchmaree (The) . . . 871
Ind's Case . . . 646
Indomitable (The) . . 835
Industrie (The) . . . 341
Ingham, *In re* . . 254, 258
— *v.* Primrose . 191, 857, 1283, 1294
Inglis *v.* Buttery . . 46
— *v.* Robertson . . 823, 824
— *v.* Stock . 1109, 1110, 1133
— *v.* Usherwood . . 63
— *v.* Vaux 1151, 1152, 1153, 1155
Ingram *v.* Barnes . . 117

PAGE

Ingram *v.* Lea 67
Inland Rev. Com. *v.* Angus 1341, 1345
— *v.* Glasgow & S. W. Ry. . 1341
— *v.* Maple & Co. . 1339
— *v.* Muller's Margarine Co. . 1361
— *v.* Oliver . . . 1354
— *v.* Tod . 1341, 1342
Inman, *In re* 244
— *v.* Inman 244
— *v.* Stamp 24
— Steam Co. *v.* Bischoff . 1207
Innes *v.* Dunlop 221
— *v.* Stephenson . 163, 318, 855
Inns of Court Hotel Co., *In re* . 815
International Contract Co., *In re* . 315, 646
Internationale Guano, &c. Werken *v.* Macandrew . . 988
Iona (The) 992
Ionides *v.* Pacific Ins. Co. 1117, 1124, 1125, 1127, 1133
— *v.* Pender 1117
— *v.* Un. Mar. Assur. Co. . 1175
Iredale *v.* China Trader's Ins. Co. . 1009, 1010, 1011, 1179, 1186
Ireland *v.* Livingston . 353, 601, 948
— *v.* Thompson . . 956, 983
Ireson *v.* Pearman 894
Iron Duke (The) 992
Irvine *v.* Union Bank of Australia . 382, 815
— *v.* Watson . . . 162, 327
Irving *v.* Clegg 978
— *v.* Greenwood 1315
— *v.* Manning . 1132, 1191
— *v.* Richardson . 1109, 1112
— *v.* Veitch . . 206, 213, 216
— *v.* Wilson 465
Isaack *v.* Clark . . . 820, 850
Isaacs, *In re* 615
— *v.* Reginall 1214
— *v.* Royal Ins. Co. . 58, 1218
— *v.* Towell 506
Isaacson *v.* Harwood . . . 50
Isherwood *v.* Oldknow . . . 233
— *v.* Whitmore . . 146, 605
Isis (S.S.) Co. *v.* Bahr . . . 978
Isitt *v.* Ry. Pass. Assur. Co. . . 1237
Israel *v.* Douglas 182
— *v.* Israel 1370
— *v.* Simmons 321
Ivans *v.* Draper 316
Ivens *v.* Elwes . . . 51, 203
Iveson *v.* Conington . . . 313
Izon *v.* Gorton 682

JACKMAN *v.* Mitchell . . . 87
Jackson, *Ex parte* 754
— *v.* Cator 707
— *v.* Cobbin 4
— *v.* Cocker 650
— *v.* Collins 1278
— *v.* Cummins 904
— *v.* Davison 84
— *v.* Duchaire 1098

PAGE

Jackson *v.* Forster 1233
— *v.* Galloway 1006
— *v.* Hill 936
— *v.* Lever 482
— *v.* Lomas 87
— *v.* Lowe 36, 530
— *v.* Mumford . 1175, 1176
— *v.* Nichol . . . 613, 617
— *v.* N. E. Ry. . . 51, 185
— *v.* Ogg 209
— *v.* Price 809
— *v.* Rotax Motor and Cycle Co. . . 625, 626
— *v.* Tollett 1016
— *v.* Turquand 17
— *v.* Union Mar. Ins. Co. . 978, 1207
— *v.* Watson & Sons . 565, 569, 625
— *v.* Whitehead . . . 525
— *v.* Woolley 218
Jackson & Co., *In re* . . . 638
Jackson and Haden's Cont., *In re* . 486, 498, 513
Jacob *v.* Down 714
— *v.* Gaviller 1177
— *v.* Hart 1336
— *v.* Kirk 40
— *v.* Lindsay 1337
Jacobs, *Ex parte* . . 198, 1096, 1104
— *In re* 177
— *v.* Credit Lyonnais . 59, 60
— *v.* Latour . . 535, 888, 909
— *v.* Morris 329
— *v.* Revell . . 489, 494, 495
— *v.* Seward 685
Jacomb *v.* Harwood . . . 254
Jacques *v.* Millar 282
Jaederen (The) 1005
Jakeman *v.* Cook 197
James *v.* Catherwood . . . 1338
— *v.* Child 166
— *v.* Cochrane . . . 50
— *v.* David 184
— *v.* Dean 662
— *v.* Emery 316
— *v.* Griffin . . . 613, 616
— *v.* Isaacs . . . 157, 179
— *v.* Jones 972
— *v.* Kerr . . . 80, 413
— *v.* Lichfield 498
— *v.* May 644
— *v.* Morgan 285
— *v.* Shore 478
— *v.* Smith 42
— *v.* Thomas 286
— *v.* Williams . . . 9, 154
Jameson *v.* Brick and Stone Co. . 274
— *v.* Swainstone . . . 950
Jamieson, *In re* 191
— *v.* Laurie 1006
— *v.* Newcastle S.S. Freight Ins. Assoc. . . 1177
Jane (The) 1169
Janson *v.* Driefontein Consolidated Mines 103
Jaques *v.* Miller 657
— *v.* Withy 468
Jardine *v.* Leathley . . . 1188

PAGE

Jardine, Mathieson & Co. *v.* Clyde Shipping Co. 978
Jarman *v.* Hale 663
Jarrett *v.* Hunter 37
Jarvis *v.* Wilkins 48
Jay, *Ex parte* 435
— *v.* Richardson 229
— *v.* Robinson . . . 265, 267
Jaynes *v.* Hughes 200
Jeakes *v.* White 488
Jeavons, *In re* 84
Jebsen *v.* E. & W. India Dock Co. . 285
Jee *v.* Thurlow 1326
Jeffery, *In re* 320
— *v.* Walton 68
Jefferyes *v.* Legendra 1167
Jefferys *v.* Jefferys 297
Jeffrey *v.* Neale 678
Jeffs *v.* Day 227
Jell *v.* Douglas 260
Jendwine *v.* Slade . . . 523, 550
Jenkins *v.* Betham 896
— *v.* Blizard . . . 368, 1371
— *v.* Comber . . . 1266, 1302
— *v.* Emmett 211
— *v.* Gething 697
— *v.* Heycock 1162
— *v.* Hutchinson . . . 348, 352
— *v.* Jackson 665
— *v.* Jones 525
— *v.* Morris 436, 1265
— *v.* Price 669
— *v.* Tucker 452
— *v.* Usborne 608
Jenkyns *v.* Brown . . . 169, 589
Jenner *v.* Clegg 732, 773
— *v.* Morris 425, 429
— *v.* Smith 588
Jennings *v.* Broughton 550
— *v.* Brown 7
— *v.* G. N. Ry. 1065
— *v.* Johnson 895
— *v.* Rigby 251
— *v.* Roberts 1275
— *v.* Rundall 406
— *v.* Throgmorton 77
Jeremy *v.* Goochman 7
Jersey (Earl of) *v.* Briton Ferry Floating Dock Co. . . . 525
Jervis *v.* Tomkinson 675
Jessel *v.* Bath 981
Jessen *v.* Solly 1007
Jeune *v.* Ward 1261
Jevens *v.* Harridge 248
Jewell *v.* Parr 1378
Jewish Colonial Trust, *In re* . . 379
Jewry *v.* Busk 873
Jinks *v.* Edwards 664
Job, *In re* 271
— *v.* Job 845
— *v.* Langton 1012
Joel *v.* Law Union and Crown Insur. Co. 1227
John *v.* Bacon 1025, 1054
— *v.* Jenkins 795
Johns *v.* Simons 339
Johnson, *In re* 956
— *v.* Baker 21
— *v.* Blenkensop 919

PAGE

Johnson *v.* Chapman 1010
— *v.* Credit Lyonnais . . . 73
— *v.* Dodgson 39
— *v.* Faulkner . . . 785, 794
— *v.* Gandy 1090
— *v.* Hudson 112
— *v.* Johnson 423, 521
— *v.* Jones 758
— *v.* Kearley 968
— *v.* Lanc. & Y. Ry. . . . 828
— *v.* Lindsay 927
— *v.* Lucas 418
— *v.* Macdonald 556
— *v.* Medlicott 125
— *v.* Midland Ry. 1022
— *v.* Ogilby 313
— *v.* Raylton 569
— *v.* Sheddon 1210
— *v.* Stear 828, 909
— *v.* Upham 801
— *v.* Whitechott 416
— *v.* Wild 456
— & Sons *v.* Brock 200
— and Tustin, *In re* . . . 494
Johnston *v.* Boyes . . . 168, 477
— *v.* Hogg 1181
— *v.* Kershaw 948
— *v.* Renton 649, 897
— *v.* Sumner 429, 430
— *v.* Sutton 1159
Johnston's Claim 844
Johnstone *v.* Hall 301
— *v.* Hudlestone . . . 717, 735
— *v.* Marks 409, 410
— *v.* Milling . . . 142, 173, 207
Joint Stock Disct. Co., *In re* . . 1300
Joliffe *v.* Baker 502, 547
Jollie & Broad's Case 97
Jolly *v.* Arbuthnot . . . 654, 773
— *v.* Rees 425
— *v.* Young 58, 997
Jonassohn *v.* Young . . . 173, 603
Jones, *Ex parte* 18, 404
— *In re* 116, 241, 270, 895, 964
— *v.* Arthur 168
— *v.* Ashburnham 6, 11
— *v.* Barkley . . . 142, 145, 147, 465, 504
— *v.* Beirnstein 798
— *v.* Bird 897
— *v.* Bone 229
— *v.* Bowden 575
— *v.* Boyce 1016
— *v.* Bright . 526, 548, 565, 567, 568, 576
— *v.* Broadhurst 1256
— *v.* Carmarthen (Mayor) 453, 874
— *v.* Carter . 221, 462, 710, 713
— *v.* Chapman 736
— *v.* Chappell 693
— *v.* Clifford 135, 522
— *v.* Consol. Ins. Co. . . . 1233
— *v.* Coventry 1241
— *v.* Daniel 15
— *v.* Dixon 658
— *v.* East. Counties Ry. . . . 1064
— *v.* Edney . . . 103, 479, 500
— *v.* Farrell 225
— *v.* Flint 28

PAGE

Jones *v.* Foley 736
— *v.* Frost 963
— *v.* Gardiner . . . 513
— *v.* Gibbons 174
— *v.* Green 288
— *v.* — & Co. . . 977, 978
— *v.* Heavens 101
— *v.* Hill 689
— *v.* Hough 972
— *v.* How 149
— *v.* Hughes 218
— *v.* Humphreys . . . 224
— *v.* Ingham . . . 254, 258
— *v.* Inland Rev. Com. . . 1353
— *v.* Jones . . . 618, 1336
— *v.* Just. . . 564, 565, 568
— *v.* Keene 575
— *v.* King . . 56, 228, 243
— *v.* Lavington . 238, 449, 667
— *v.* Lees 98
— *v.* Lewis 845
— *v.* Littledale . . . 349
— *v.* Marsh 730
— *v.* Marshall 829
— *v.* Merioneth Building Soc. 83, 133
— *v.* Mills . 708, 709, 726, 763
— *v.* Morris 677
— *v.* Neptune Mar. Ins. Co. . 1148
— *v.* Newman . . . 47
— *v.* Nicholson . . . 1183
— *v.* Ogle 170
— *v.* Padgett 568
— *v.* Pearle . . . 772, 909
— *v.* Peppercorne . . 821, 860
— *v.* Phipps 722
— *v.* Prov. Ins. Co. . 1227, 1231
— *v.* Reynolds. . . . 652
— *v.* Rimmer 496
— *v.* Robin 634
— *v.* Robinson . . . 13
— *v.* Ryde . . . 136, 466
— *v.* Ryder . . . 215, 1372
— *v.* St. John's Coll., Oxford 148, 884
— *v.* Sawkins 805
— *v.* Shears 732
— *v.* Simpson 1379
— *v.* Thorne 711
— *v.* Thurloe 772
— *v.* Tyler 768
— *v.* Victoria Graving Dock Co. . . . 37, 41
— *v.* Waite 1325
— *v.* Yates 363
— and Roberts, *In re* . . 964
Jordan *v.* Norton . . 17, 531, 534
Joseph *v.* Knox 1068
Josling *v.* Irvine . . . 284, 626
— *v.* Kingsford . . 139, 563
Josolyne *v.* Roberts . . . 1288
Joule *v.* Jackson . . . 790, 793
Jourdain *v.* Wilson . . 230, 232
Jowett *v.* Spencer 54
Joy *v.* Kent 835
Joyce *v.* Fowkes 786
— *v.* Realm Ins. Co. . 1136, 1147
— *v.* Swann . 529, 584, 585, 589
Joyner *v.* Weeks . . . 687, 751

PAGE

Judson *v.* Bowden 55
— *v.* Etheridge . . . 904
Jump *v.* Payne 660
Jung *v.* Phosphate of Lime Co. . 325
Jupp, *In re* 422
Jury *v.* Baker 1285

K— *v.* Raschen 922
Kaltenbach *v.* Lewis . . 356, 956
— *v.* Mackenzie . . 1187
Kannen *v.* McMullen . . . 890
Karnak (The) . . . 341, 836
Kate (The) 313
Kaufman *v.* Gerson . 59, 122, 307
Kavanagh *v.* Gudge . . . 736
Kay, *In re* . . . 251, 252
— *v.* Field 1005
— *v.* Groves 1090
— *v.* Wheeler . . 865, 984, 1174
Kaye *v.* Bolton 85
— *v.* Brett 159
— *v.* Dutton 8, 12
— *v.* Waghorn 174
Keable *v.* Payne 1337
Keane, *In re* 963
— *v.* Robarts 414
Kearley's Contract, *In re* . . 199
Kearley *v.* Thomson . . 123, 467
Kearne *v.* West Grenada Mining Co. 1283
Kearney *v.* L. B. & S. C. Ry. . 1066
Kearon *v.* Pearson 977
Kearsey *v.* Carstairs . . . 56
Kearsley *v.* Cole 176, 1095, 1097, 1100
— *v.* Phillips . 755, 758, 773
Keat *v.* Allen 1311
Keates *v.* Cadogan (Earl) . 576, 672
— *v.* Lyon . . . 229, 303
Keating *v.* Marsh 851
Keats *v.* Keats 427
Keech *v.* Hall . . . 721, 758
Keele *v.* Wheeler . . . 191, 643
Keen *v.* Henry 915
— *v.* Priest 784
Keene *v.* Beard 1293
— *v.* Thomas 905
Keeping *v.* Broom 166
Keighley Maxsted & Co. *v.* Durant . . . 157, 331, 1122
Keightley *v.* Watson . . . 316
Keir *v.* Leeman 82
Keith *v.* Burke 1279
— *v.* Burrows . . . 833, 834
— *v.* Gancia & Co. . . 73, 715
Kekewich *v.* Manning . . . 19
Kell *v.* Anderson 1006
Kellner *v.* Le Mesurier . . . 1179
Kellock *v.* Enthoven . . . 645
Kelly *v.* Rogers . . . 664, 666
— *v.* Selwyn . . . 60, 227
— *v.* Solari 460
— *v.* Paterson 727
— *v.* Webster . . . 22, 719
Kelner *v.* Baxter . . 332, 351, 393
Kemble *v.* Farren 290
Kemp *v.* Baerselman . . . 223

	PAGE
Kemp *v.* Balls	157
— *v.* Bird	694
— *v.* Burt	894
— *v.* Clark	1000
— *v.* Coleman	1317
— *v.* Derrett	661, 726
— *v.* Falk	618, 620
— *v.* Finden	1101
— *v.* Halliday	1011, 1012, 1191, 1192
— *v.* Inland Rev. Com.	1344
— *v.* Rose	879
— *v.* Sober	306, 711
— *v.* Westbrook	825, 839
Kempson *v.* Ashbee	413
— *v.* Boyle	65, 532
— *v.* Saunders	136, 466
Kempster, *In re*	247, 251
— *v.* Kempster	247, 251
Kendal *v.* L. & S. W. Ry.	1028
— *v.* Wood	363
Kendall *v.* Hamilton	193, 319
— *v.* Hill	57
— *v.* King	397, 442
— *v.* Marshall Stevens & Co.	612, 615
— *v.* Webster	1325
Kendray *v.* Hodgson	349
Kendrick *v.* Lomax	155
Kennaway *v.* Treleavan	12
Kennedy *v.* Broun	471, 873
— *v.* Kennedy	1326
— *v.* Lyell	525
— *v.* Panama R. M. Co.	126
— *v.* Thomas	1271, 1272, 1274
Kennerley *v.* Nash	1336
Kensington *v.* Inglis	138, 1135
Kent *v.* Freehold Land Co.	128
— *v.* G. W. Ry.	463, 1067
— *v.* Midland Ry.	1038
— *v.* Shuckard	767
Kent County Gas Light and Coke Co., *In re*	274
Kenworthy *v.* Schofield	36
Keppell *v.* Bailey	228, 305
Kerby *v.* Harding	800, 802
Kerford *v.* Mondel	903
Kerkin *v.* Kerkin	739
Kern *v.* Deslandes	1002
Kerr's Policy, *In re*	280
Kerridge *v.* Hesse	393
Kerrison *v.* Cole	121
— *v.* Smith	634
Kershaw *v.* Cox	1286
— *v.* Ogden	532
Kerslake *v.* White	656
Ketsey's Case	412
Kewley *v.* Ryan	1128
Key *v.* Bradshaw	1311
— *v.* Cotesworth	621
— *v.* Flint	904, 907
Keys *v.* Harwood	623
Kibble, *Ex parte*	411
— *v.* Gough	533
Kiddell *v.* Burnard	548, 554
Kidder *v.* West	666
Kiddle *v.* Lovett	284
Kidner *v.* Keith	21
Kidston *v.* Emp. Ins. Co.	1196, 1199, 1203
Kidwelly *v.* Brand	737
Kilham *v.* Collier	316
Kilsby *v.* Williams	854
Kilshaw *v.* Jukes	360, 364
Kimber *v.* Barber	943
Kimberley *v.* Dick	879
Kinahan & Co. *v.* Parry	334
Kinder *v.* Howarth	435
King & Beesley, *In re*	192
— *In re*	250
— *v.* Bassingham	418
— *v.* Bird	759
— *v.* Dickeson	694
— *v.* England	800, 805
— *v.* Eversfield	725
— *v.* Gillett	1315
— *v.* Glover	1144
— *v.* Hansell	100
— *v.* Hoare	192, 193, 319, 320
— *v.* Hobbs	9
— *v.* Jones	524
— *v.* London Improved Cab Co.	915
— *v.* Meredith	1067, 1068
— *v.* Milsom	1309
— *v.* Victoria Ins. Co.	1221
— *v.* Wilson	502, 507
Kingdom *v.* Cox	602, 883
Kingsford *v.* Marshall	1202
— *v.* Merry	594, 821
Kingsmill *v.* Millard	748
Kingston, *Ex parte*	856, 1258
— *v.* Knibbs	1140
— *v.* Phelps	14
— *v.* Preston	53, 504, 884
Kingston-upon-Hull *v.* Harding	1092, 1094
— *v.* Petch	14
Kinloch *v.* Craig	961
Kinnaird *v.* Webster	164, 166
Kinnerley *v.* Hossack	152
Kinsman *v.* Rouse	204
Kintrea *v.* Preston	490
Kirby *v.* Banister	400
— *v.* Marlborough (Duke)	166, 1089
— *v.* Smith	1119
Kirchner *v.* Gruban	302, 930, 934
— *v.* Venus	70, 1001, 1002, 1142
Kirk *v.* Blurton	1305
— *v.* Gibbs	979
Kirkby *v.* Taylor	44
Kirkham *v.* Attenborough	585
— *v.* Marter	30
Kirkland *v.* Peatfield	200
Kirkman *v.* Shawcross	907, 1033
Kirkpatrick *v.* So. Australia Ins.	165
Kirkwood *v.* Carroll	1284
— *v.* Gadd	809
— *v.* Smith	1284
Kirtland *v.* Pounsett	494, 684
Kirton *v.* Braithwaite	168
— *v.* Eliott	409, 412
Kirwan *v.* Kirwan	366
Kisch *v.* Venezuela Ry.	128

PAGE

Kish *v.* Cory 1007
— *v.* Taylor . . . 996, 1009
Kitchen *v.* Bartsch . . . 273
— *v.* Buckly . . 238, 317
— *v.* Campbell . . . 192
Kitchin, *In re* 1104
— *v.* Hawkins . 15,1 177, 187
Kitson *v.* Hardwick . . . 271
Kleinwort *v.* Shepard . . . 1193
Kleinwort & Co. *v.* Cassa Maritima of Genoa 836
Knapp *v.* Harden 67
Knatchbull *v.* Grueber . . . 516
— *v.* Hallett . . . 956
Knight *v.* Barber . . . 337, 639
— *v.* Bennett . . 660, 776
— *v.* Bowyer 952
— *v.* Burgess 269
— *v.* Clements . . . 1297
— *v.* Crockford . . . 507
— *v.* Faith . 1154, 1187, 1191
— *v.* Hopper 582
— *v.* Hunt 88
— *v.* Simmonds . . . 304
— *v.* Williams . . . 718
Knight of St. Michael (The) . 1184
Knight's Deep *v.* Inland Rev. Com. . . . 1347, 1350
Knights *v.* Quarles . . 245, 894
— *v.* Wiffen 612
Knill *v.* Williams . . 1294, 1336
Knowles *v.* Michel . . . 470
Knowlman *v.* Bluett . . . 34
Knox *v.* Bushell 424
— *v.* Gye 220
— *v.* Walley 473
Knye *v.* Moore 76
Koebel *v.* Saunders 1165, 1176, 1177
Kooystra *v.* Lucas . . . 656
Kopitoff *v.* Wilson . . . 985
Koster *v.* Reed 1177
Kraus *v.* Arnold 169
Krell *v.* Henry 149
Kreuger *v.* Blanck 601
Kronheim *v.* Johnson . . 39, 40
Kruger *v.* Moel Tryvan Ship Co. . 972
— *v.* Wilcox 961
Kusel *v.* Watson 658
Kymer *v.* Laurie 855
— *v.* Suwercropp . . . 327
Kynnaird *v.* Leslie . . . 439

La Cave *v.* Credit Lyonnais . 1293
Lacey, *Ex parte* 132
— *In re* 200, 219
Lachlan *v.* Reynolds . . . 500
Lackington *v.* Atherton . . 536
Laclouch *v.* Towle . . . 1078
Lacons *v.* Warmoll . . . 202
Lacy *v.* Kinaston . . . 175, 178
— *v.* M'Neile . . . 33, 181
— *v.* Osbaldiston . . . 932
— *v.* Woolcott 368
Ladbroke *v.* Crickett . . . 835
Ladd *v.* Lynn 429
— *v.* Thomas . . . 798, 801
Ladywell Mining Co. *v.* Brookes . 948

PAGE

Laertes (The) 806
— *Cargoex* 871
Laidler *v.* Burlinson . . 585, 586
— *v.* Elliott . . . 891, 894
Laing *v.* Holloway . . . 1006
— *v.* Meader 170
— *v.* Reed 402
— *v.* Zeden 850
Laing & Sons *v.* Barclay & Co. . 586
Laird *v.* Birkenhead Ry. . . 635
— *v.* Pim 145, 512
— *v.* Robertson . 1135, 1172
Lake *v.* Argyll (Duke) . . . 393
— *v.* Butler 99
— *v.* Campbell 940
— *v.* Smith 734
Lakeman *v.* Mountstephen . . 31
Lamare *v.* Dixon 293
La Marquise de Ribeyre *v.* Barclay 852
Lamb *v.* Brewster 678
— *v.* Bunce 400
— *v.* Evans 930
— *v.* G. N. Ry. . . . 119
Lambe *v.* Orton 224
Lambert *v.* Atkins . . . 423
— *v.* Buckmaster . . 963
— *v.* Knott . . . 398
— *v.* Liddard . 1139, 1172
— *v.* Robinson . . . 1058
Lambert's Case 358
— Estate, *In re* . . 433
Lambourn *v.* McLellan 701, 704, 839
Lambourne *v.* Cork . . . 176
Lamburn *v.* Cruden . . 930, 935
Lamert *v.* Heath . 136, 468, 643, 951
Lamine *v.* Dorrell . . . 462, 463
Lamlee *v.* Hanman . . . 1318
Lamond *v.* Davall . . . 623
— *v.* Richard 765, 766, 770, 772
Lampleigh *v.* Brathwait . 5, 8, 868
Lampon *v.* Corke 74
Lamprell *v.* Billericay Union 166, 377, 379
Lancashire Cotton Co., *In re* . 792
— Ins. Co. *v.* Inland Rev. Com. . . . 1384
— *v.* Killingworth . 142, 146
— Waggon Co. *v.* Fitzhugh . . . 808
— & Yorks. Ry. *v.* Greenwood . . . 1063
Lancaster *v.* Eve . . . 692, 697
Land Credit Co. of Ireland, *In re* 1307
Landaner *v.* Asser . . . 1114
Lander *v.* Lander . . . 1324
Lander's Contract, *In re* . . 657
Landman *v.* Entwistle . 50, 314, 394
Lane, *In re* 647
— *v.* Burghart 32
— *v.* Cotton 845
— *v.* Dixon . . . 736, 761
— *v.* Drinkwater . . . 316
— *v.* Goodwin . . . 1322
— *v.* Hill 470
— *v.* Ironmonger . . 426, 429
— *v.* Nixon 1150
Lang *v.* Anderdon . . . 1167
— *v.* Gale 58

PAGE

Langdale *v.* Mason . . . 1217
— *v.* Parry . . . 314
Langden *v.* Stokes . . . 174
Langdon *v.* Goole . . . 48
— *v.* Wilson . . . 1371
Langford *v.* Selmes . . . 773
Langfort *v.* Tiler 539
Langhorn *v.* Alnutt . . . 1140
— *v.* Cologan . . . 1135
Langmead *v.* Maple . . . 192
Langrish *v.* Watts . . 165, 212
Langton *v.* Carleton . . . 919
— *v.* Higgins . . . 587
— *v.* Waite 903
— *v.* Waring . . . 587
Lanphier *v.* Phipos . . 889, 898
Lansdale *v.* Clarke . . . 110
Lant *v.* Norris 687
Lanyon *v.* Blanchard . . . 963
L'Apostre *v.* L'Plaistrier . . 559
Lara *v.* General Apothecaries Co. . 868
Laroche *v.* Oswin . . 1152, 1170
Larocque *v.* Beauchemin . . 152
Larsen *v.* Sylvester & Co. . . 979
Last *v.* Dinn 317
Latch *v.* Rumner Ry. . 1017, 1018
Latham *v.* Rutley 1369
— *v.* Spedding . . . 739
Lathropp *v.* Marsh . . . 706
Laughton *v.* Port Erin Commrs. . 297
Laurel (The) 836
Laurie *v.* Douglas 987
— *v.* Scholefield . . . 1090
— *v.* West Hartlepool Indemnity Assoc. . . . 1115
Lavabre *v.* Wilson . . . 1172
Lavelette *v.* Riches & Co. . . 36
Lavell *v.* Ritchings . . 785, 787
Laver *v.* Fielder . . . 69, 1316
Laveroni *v.* Drury . 865, 984, 988, 1174
Lavery *v.* Pursell 27
— *v.* Turley 184
Law *v.* Law 130, 575
— *v.* Lond. Indisp. Policy Co. . 1225, 1233
— *v.* Parnell . . 1254, 1256
— *v.* Redditch Local Board . 288
— *v.* Wilkin 10
Law Guarantee and Trust Soc. *v.* Russian Bank for For. Trade . 832
Lawes *v.* Purser 636
Lawford *v.* Billericay Rural Co. . 376
Lawler *v.* Linden 919
Lawrance, *In re* . . . 966
Lawrence *v.* Aberdein . 987, 1136, 1177
— *v.* Accid. Insur. Co. . 1237
— *v.* Fletcher . . . 964
— *v.* Walmsley 1082, 1091, 1267
— *v.* Willocks . . . 1298
Laws *v.* Rand 1290
v. Telford 736
Lawson *v.* Burness . . . 1006
— *v.* Dickenson . . . 965
— *v.* Weston 1309
Lawton *v.* Lawton . . . 699
— *v.* Newland . . . 827
— *v.* Salmon 699
Laxton *v.* Peat 1094
Lay *v.* Mottram 51

PAGE

Laycock *v.* Pickles . 470, 472, 473
La Ysabel (The) 836
Laythoarp *v.* Bryant . . . 2, 37
Layton *v.* Hurry 799
— *v.* Pearce 140
Lazarus *v.* Cowie . 1250, 1261, 1378
Lea *v.* Hinton 1224
— *v.* Whitaker 509
Leach *v.* Mullett 590
— *v.* Thomas . . . 696, 699
Leadbitter *v.* Farrow . . 349, 1302
Leader *v.* Homewood . . 701, 703
Leadley *v.* Evans 1085
Leak *v.* Babington . . . 94
Learoyd *v.* Brook 939
Leask *v.* Scott . . . 223, 620
Leatham *v.* Terry 1189
Leather *v.* Simpson . . . 353
Leather Cloth Co. *v.* Hieronimus . 544
— *v.* Lorsont . 98
Leatherdale *v.* Sweepstone . . 169
Lebel *v.* Tucker 61
Le Blanch *v.* Granger . . . 303
Le Blanche *v.* L. & N. W. Ry. . 765, 1024, 1071
Lebrasseur & Oakley, *In re* . . 873
Le Cheminant *v.* Pearson . . 1204
Lechmere *v.* Fletcher . . . 214
Leck *v.* Maestaer 900
Le Conteur *v.* L. & S. W. Ry. . 1031, 1037, 1038
Le Cras *v.* Hughes . 1109, 1144
Leduc *v.* Ward . . . 591, 1169
Lee *v.* Abdy . . . 60, 61, 227
— *v.* Butler 824
— *v.* Coleshill 91
— *v.* Cooke 797
— *v.* Gaskell . . . 29, 633
— *v.* Griffin . . 28, 587, 867
— *v.* Jones 1098
— *v.* Lanc. & Yorks. Ry. 74, 158, 176
— *v.* Merrett . . . 463, 473
— *v.* Page 81
— *v.* Risdon . . 29, 625, 703
— *v.* Smith 688, 777
— *v.* Southern Ins. Co. . 1203
— *v.* Walker . . . 889, 893
— *v.* Wilmot 213
Leeds *v.* Cheetham . . . 674
— *v.* Cook 1314
— *v.* Wright . . . 613, 615
Leeds and County Bank *v.* Walker 190, 1294, 1298
Leeman *v.* Lloyd 561
Leeming *v.* Snaith . . 553, 601
Lees *v.* Bayes . . . 910, 912
— *v.* Mosley 45
— *v.* Whitcomb 9
— *v.* Whiteley 1214
Leese *v.* Martin 860
Leeson *v.* Holt 1034
Leetham *v.* Johnstone-White 99, 102
Lefevre *v.* Boyle 359
Legal *v.* Miller 299
Legg *v.* Benion 721
— *v.* Evans 909
— *v.* Strudwick . . . 658
Legge *v.* Harlock . . . 290, 884
Leggott *v.* Barrett 102

PAGE
Leggott *v.* G. N. Ry. . . . 245
Legh *v.* Legh 222
— *v.* Lillie . . . 287, 746
Lehain *v.* Philpott . . . 805
Lehmann *v.* McArthur . . 669, 670
Leicester *v.* Rose 88
Leidemann *v.* Schultz . . . 1006
Leifchild's Case 19
Leigh *v.* Banner 1364
— *v.* Dickeson 685
— *v.* Lillie 139
— *v.* Mather . 1151, 1153, 1155
— *v.* Paterson 628
— *v.* Shepherd 780
— *v.* Smith 865
— *v.* Taylor . . 695, 696, 699
— *v.* Thornton 202
Leighton *v.* Wales . . . 98, 289
Leitrim (The) . . 1012, 1197
Le Jouet (The) 870
Lekeux *v.* Nash 231
Leman *v.* Fletcher . . . 115
— *v.* Houseley . . . 115
Lemcke *v.* Vaughan . . . 103
Lemerc *v.* Elliott 471
Le Mesurier *v.* Vaughan . 1127
Lempriere *v.* Lange . . . 406
— *v.* Pasley . . . 905
Leng, *In re* 423
Lennard *v.* Robinson . . 314, 347
Lenzberg's Policy, *In re* 87, 123, 465, 468
Leonard Lovie's Case . . . 244
Leonis S.S. Co. *v.* Rank . . 994, 1004
Le Peinteur *v.* S. E. Ry. . . 1074
Lepla *v.* Rogers 751
Leroux *v.* Brown . . . 59, 219
Leschallas *v.* Woolf . . . 703
Leslie *v.* Fitzpatrick . . . 406
— *v.* Managers of Met. Asylum Dist. 883
— *v.* Wilson 973
Lester, *Ex parte* 420
— *v.* Garland 58
Letchford *v.* Oldham . . . 1202
Lethbridge *v.* Phillips . . . 844
Lett *v.* Morris . . . 224, 225
Leuckhart *v.* Cooper . . 907, 908
Leventhorpe *v.* Ashbre . . . 244
Lever *v.* Koffler 15
Leverson *v.* Lane 363
Levi *v.* Abbott 891
Levin *v.* Newnham . . . 1182
Levitt *v.* Hamblet . . . 642, 951
Levy *v.* Alexander . . . 1387
— *v.* Baillie 1219
— *v.* Green 601
— *v.* Lewis . . . 655, 682
— *v.* Scottish Employers' Ins. Co. 1228
— *v.* Vaughan 1182
— *v.* Warburton . . 104, 107
Lewes *v.* Ridge . . . 233, 237
Lewin *v.* Guest 497
Lewis, *In re* 895
— *v.* Baker . 661, 708, 725, 773
— *v.* Brass 15
— *v.* Campbell . 228, 459, 524
— *v.* Clay 129, 1255, 1259, 1267
PAGE
Lewis *v.* Davidson . . . 76
— *v.* Gompertz . . . 1273
— *v.* G. W. Ry. 1046, 1048, 1049
— *v.* Hammond . . . 465
— *v.* Harris 779
— *v.* Hillman 132
— *v.* Inland Rev. Com. . . 1353
— *v.* James 520
— *v.* Jones . . 88, 188, 1096
— *v.* L. C. & D. Ry. . . 1026
— *v.* McKee 1001
— *v.* Marshall 71
— *v.* Nicholson . . . 353
— *v.* Peachey 941
— *v.* Peake 632
— *v.* Read . . . 331, 782
— *v.* Rucker . 1132, 1205, 1209
— *v.* Samuel 953
Lexington *v.* Clarke . . . 122
Leyland *v.* Illingworth . . . 500
Leyland and Taylor's Cont., *In re* 525
Lichfield Union *v.* Greene . 153, 1097
Lickbarrow *v.* Mason . 612, 615, 619
Liddard *v.* Kain . . . 547, 548
Lidderdale *v.* Montrose (Duke) . 92
Liddiard *v.* Gale 1370
Liddlow *v.* Wilmot . . . 429
Liddy *v.* Kennedy . . . 707
Lidgett *v.* Secretan 1154, 1195, 1205, 1206
— *v.* Williams . . . 970
Lievesley *v.* Gilmore . . . 14
Life and Health Assur. Assoc. *v.* Yule 1228
Lightfoot *v.* Heron . . . 516
— *v.* Keene . . . 965
— *v.* Tenant . . . 112
Lightly *v.* Clouston . . 446, 453
Lilley *v.* Barnsley 913
— *v.* Doubleday . . . 1074
— *v.* Elwin . 918, 919, 932, 935
Lilly *v.* Ewer 1167
— *v.* Hays 309
— *v.* Hodges 320
— *v.* Smales 351
Limmer Asphalte Co. *v.* Inland Rev. Com. . . 1342, 1346
Lincoln *v.* Wright 42
Lindenau *v.* Desborough . . 1227
Lindley *v.* Lacey . . . 66, 71
Lindon *v.* Hooper 465
Lindsay *v.* Janson . . 1148, 1153
Lindus *v.* Bradwell . . 424, 1265
— *v.* Melrose . . 1302, 1307
Line *v.* Stephenson . . 449, 666
Linford *v.* Prov. Horse Ins. Co. 329, 391
Linley *v.* Bonsor 212
Linnegar *v.* Hodd 6
Linton *v.* Blakeney Industrial School 402
Lintott, *Ex parte* 280
Lion (The) 991
Lion Mutual Mar. Ins. Co. *v.* Tucker 1106
Lisburne (Earl) *v.* Davies . . 748
Lishman *v.* Christie . . . 981
— *v.* Northern Mar. Ins. Co. 1122, 1124
Lister *v.* Lanc. & Yorks. Ry. . . 1028
— *v.* Lane 686

PAGE
Lister *v.* Stubbs 220
— *v.* Van Haansbergen . . 1007
Litchfield *v.* Dreyfus . . . 809
— *v.* Ready . . . 760
Litt *v.* Cowley 618
Little *v.* Poole 110
— *v.* Spreadbury . . . 344
Littledale, *Ex parte* . . . 842
Littlehampton, Havre and Honfleur S.S. Co., *In re* . . 645
Littler *v.* Holland . . . 174, 883
Littleton *v.* Hibbins . . . 251
Liver Alkali Co. *v.* Johnson . 973, 1020
Liverpool Boro. Bank *v.* Eccles 36, 37, 374
— *v.* Turner . 831
Liverpool Mar. Credit Co. *v.* Hunter 133
— *v.* Wilson 834
Liverpool Water Co. *v.* Atkinson . 1084
Liversidge *v.* Broadbent . . 180
Livie *v.* Janson . . 1195, 1211
Livingstone *v.* Whiting . . . 152
Llanelly Ry. and Dock Co. *v.* L. & N. W. Ry. . . . 19, 173
Llewellyn *v.* Llewellyn . . . 11
— *v.* Williams . . . 657
Lloyd, *In re* 201
— *v.* Ashby 1303
— *v.* Collett . . . 503, 515
— *v.* Crispe 491
— *v.* Fleming 1114
— *v.* Gen. Iron Screw Col. Co. 986
— *v.* Guibert . 59, 341, 839, 971
— *v.* Howard . 1253, 1260, 1261
— *v.* Johnson 77
— *v.* Lee 3
— *v.* Lloyd . . 201, 297, 1310
— *v.* Loaring 629
— *v.* L. C. & D. Ry. 294, 304, 306
— *v.* Nowell 15
— *v.* Rosbee 734
— *v.* Rowland . . . 364
— *v.* Sandilands . . . 470
— *v.* Sigourney . . . 1252
— *v.* Waterford & Lim. Ry. . 1046
Lloyd-Edwards, *In re* . . . 280
Lloyds *v.* Harper 1099
Lloyds Bank *v.* Cooke . 968, 1250, 1255
Load *v.* Green . . . 124, 906
Lobb *v.* Stanley 39
Lock *v.* Furze . . . 750, 751
— *v.* Pearce 715
— *v.* Wright 608
Locke *v.* Matthews . . . 662
Lockett *v.* Nicklin 66
Lockhart *v.* Barnard . . . 6
Lockier *v.* Smith 258
Lockwood *v.* Ewer . . 826, 839
— *v.* Levick . . . 959
— *v.* Salter . . . 264
Lockyer *v.* Internat. Sleeping Car Co. 1024
— *v.* Offley 1155
Lodder *v.* Slowey 887
Loder *v.* Kekulé 628
Lodge *v.* National Union Investment Co. 809
PAGE
Loe's Case 854
Loeschman *v.* Machin . . . 847
Lofft *v.* Dennis 674
Logan, *Ex parte* 934
— *v.* Birkett 1324
— *v.* Hall 753
— *v.* Highland Ry. 1049, 1053, 1070
— *v.* Le Mesurier . . 584, 585
Lohre *v.* Aitchison 1195, 1203, 1206
Lomi *v.* Tucker 550
London Assur. Co. *v.* Bold 1085, 1087
— *v.* Buckle . . 1094
— *v.* Mansel . 1226
London, Birmingham & South Staffordshire Bank, *In re* . . . 153, 186
— Brighton & South Coast Ry., *In re* . . . 964
— Chartered Bank of Australia, *In re* 1096, 1104
— Chartered Bank of Australia *v.* McMillan . 859
— Chartered Bank of Australia *v.* White . 860, 1258
— Chatham & D. Ry. *v.* S. E. Ry. . . 280, 281
— (City of) *v.* Pugh . . 706
— Clearing Bank *v.* Inland Rev. Com. . . . 1375
— Corporation *v.* G. W. Ry. 686
— Corporation *v.* London Joint Stock Bank 162
— Corporation's Contract, *In re* 504
— Dock Co. *v.* Sinnot . 376
— Financial Ass. *v.* Kelk . 382
— Founders' Assoc. *v.* Clarke 642
— Freehold and Leasehold Prop. Co. *v.* Suffield . 159
— Gas Co. *v.* Chelsea Vestry 142
— General Omnibus Co. *v.* Booth 917
— Joint Stock Bank *v.* Simmons . 1241, 1255, 1289
— (Mayor) *v.* Southgate . 296
— & Blackwall Ry. *v.* Cross 722
— & County Bank *v.* Groome . . . 1288
— & County Bank *v.* London & River Plate Bank . . 1255, 1257
— & County Contracts *v.* Tallack . . . 274
— & Globe Finance Corporation, *In re* . . 860
— & India Docks Co. *v.* Att.-Gen. 1347
— & Lancashire Life Assur. Co. *v.* Fleming . . 1230
— & Mediterranean Bank, *In re* . . . 386, 1308
— & Midland Bank *v.* Mitchell . . . 203
— & N. W. Ry. *v.* Bartlett . 1051, 1055

PAGE
London & N. W. Ry. *v.* Dunham 1045, 1047
— & N. W. Ry. *v.* Evershed 1061
— & N. W. Ry. *v.* Glyn . 1213, 1220, 1221
— & N. W. Ry. *v.* Hellawell . . 1025, 1026
— & N. W. Ry. *v.* Hinchcliffe 1065
— & N. W. Ry. *v.* Sharp . 953
— & Northern Bank, *In re* 18
— & Prov. Bank *v.* Bogle . 264
— & River Plate Bank *v.* Bank of Liverpool . 136, 1274
— & South African Exploration Co. *v.* De Beers Consolidated Mines . 700
— & S. West. Bank *v.* Wentworth. . . . 1249
— & S. W. Ry. *v.* Blackmore 176
— & S. W. Ry. *v.* Flower . 685
— & S. W. Ry. *v.* Gomm . 304
— & S. W. Ry. *v.* James . 1031
— & Univ. Bank *v.* Clancarty 1298
— & Westminster Bank *v.* Inland Rev. Com. . 1385
— & Westminster Loan Co. *v.* Drake . . . 702
— & Westminster Loan Co. *v.* L. & N. W. Ry. . 777
— & Yorkshire Bank *v.* Belton 789
— Transport Co. *v.* Trechmann Bros . . . 996
Long *v.* Allen 1159
— *v.* Bowring 298
— *v.* Fletcher 497
— *v.* Millar . . . 37, 529
— *v.* Orsi 892, 894
Longbottom *v.* Berry . . 697, 702, 783, 840
Longchamp *v.* Kenny . . 458, 464
Long Eaton, &c. Co. *v.* Midland Ry. 305
Longman *v.* Bath Electric Tramways 648
Longmeid *v.* Holliday . . . 292
Longmore *v.* Gt. W. Ry. . . 1066
Longridge *v.* Dorville . . . 11
Looker *v.* Wrigley 403
Loosemore *v.* Radford . . 278, 1100
Lord *v.* Hall 329, 424
— *v.* Mid. Ry. 1048
Lord Advocate *v.* Caledonian Ry. . 1340
Lorimer, *In Goods of* . . . 256
Loring *v.* Davis . . 641, 644, 951
— *v.* Warburton . . . 801
Lorymer *v.* Smith . . . 571, 605
Lothian *v.* Henderson . . . 1166
Lougher *v.* Williams . . . 241
Louis *v.* Smellie 930
Lound *v.* Grimwade . . 81, 121
Lovatt *v.* Hamilton . . 556, 974
Lovegrove *v.* L. B. & S. C. Ry. 922, 927
— *v.* White 891
Lovell, *Ex parte* 268
— *v.* Martin 1308
PAGE
Lovell and Callard's Contract, *In re* 1341
Lovelock *v.* Franklyn . . 141, 1313, 1330, 1332
— *v.* King 886
Loveridge *v.* Cooper . . . 226
Lovett *v.* Hobbs . . . 1020, 1076
Lovie's (Leonard) Case . . . 244
Lowe *v.* Adams . . . 635, 720
— *v.* Chester (Bishop) . . 94
— *v.* Copestake. . . . 1248
— *v.* Dorling 788
— *v.* Eginton 186
— *v.* Fox 204
— *v.* Griffith . . . 406, 409
— *v.* L. & N. W. Ry. . 375, 683
— *v.* Pearson 928
— *v.* Peers . . 278, 289, 1310
— *v.* Peskett 258
— *v.* Peters 287
— *v.* Ross 682
Lowenthal, *Ex parte* . . . 1273
Lowndes *v.* Bray 508
— *v.* Fountain . . 746, 754
— *v.* Garnett & Moseley Gold Mining Co. . 213
— *v.* Lane 573
Lowry *v.* Bourdieu . . . 468
— *v.* Guildford . . . 893
Lowther *v.* Heaver 165, 294, 660, 775
— *v.* Lowther . . . 629
Lloyd *v.* Freshfield . . . 814
Lozano *v.* Janson . . . 1181, 1193
Lubbock *v.* Inglis 913
— *v.* Potts 1159
— *v.* Tribe 471
Lucas *v.* Beach 1373
— *v.* Beale 316
— *v.* Bristow . . . 69, 564
— *v.* De la Cour . . . 358
— *v.* Dixon 28
— *v.* Dorrien 962
— *v.* Godwin . . 875, 881, 883
— *v.* Harris 92
— *v.* Novosilieski . . . 158
— *v.* Tarleton 804
— *v.* Wilkinson . . . 157
— *v.* Worswick . . 460, 473
Lucena *v.* Crauford . . 1109, 1110
Luckie *v.* Bushby 1206
Lucy *v.* Levington . . . 243
— *v.* Mouflet 534
Ludlow (Baron) *v.* Pike . 90, 678
— (Mayor) *v.* Charlton 376, 378
Luff *v.* Lord 131
Luker *v.* Dennis . 103, 229, 303, 305
Lukin *v.* Godsall 706
Lumley, *In re* 422
— *v.* Desborough . . . 963
— *v.* Gye 932
— *v.* Hodgson . . 683, 756
— *v.* Musgrave . . . 155
— *v.* Ravenscroft . . 297
— *v.* Wagner . . . 302
Lumsden *v.* Buchanan . . . 417
Lumsden's Case 647
Lundy Granite Co., *In re* . 774, 792
Lush *v.* Russell 931
Luttges *v.* Sherwood . . . 152

PAGE

Lyall *v.* Edwards 176
Lybbe *v.* Hart 746
Lyde *v.* Russell . . . 701, 703
Lyell *v.* Kennedy 947
Lyle Shipping Co. *v.* Cardiff Corporation . . 1002, 1003, 1005
Lyme Regis (Mayor) *v.* Henley . 670
Lynch, *Ex parte* 404
— *v.* Dunsford . 1117, 1119
— *v.* Hamilton 1117, 1118, 1119
— *v.* McKenny . . . 199
Lynes, *In re* 272
— *v.* Snaith 663
Lynn *v.* Bruce 186
Lynne's (Mayor of) Case . . 373
Lyon *v.* London, City & Midland Bank 840
— *v.* Mells . . 806, 985, 1033
— *v.* Reed . . . 716, 718
Lyons *v.* De Pass 593
— *v.* Elliott 791
Lysaght *v.* Coleman . 1177, 1200
Lysney *v.* Selby . . . 496, 545
Lyte *v.* Peny 310
Lyth *v.* Ault 180, 185
Lythgoe *v.* Vernon . . . 331
Lyttleton *v.* Cross 252

Maanss *v.* Henderson . . . 963
Maber *v.* Maber 218
Maberley *v.* Robins . . 487, 507
— *v.* Sheppard . . . 535
M'Andrew *v.* Bell 1119
McAndrew *v.* Chapple . . . 974
M'Andrews *v.* Vaughan . . . 1198
M'Ardle *v.* Irish Iodine Co. . . 326
M'Arthur *v.* Seaforth (Lord) . . 816
Macau *v.* Macau 1326
Macaulay *v.* Polley . . 314, 893
Macbeath *v.* Ellis 891
— *v.* Haldimand . . 354
Macbeth *v.* Ellis 344
Macbryde *v.* Weekes . . . 503
M'Call *v.* Taylor . . 1244, 1285
M'Callum, *In re* 209
— *v.* McCallum . . 209
— *v.* N. B. Ry. . . . 1016
M'Cance *v.* L. & N. W. Ry. . . 72, 1031, 1047, 1072
M'Carthy *v.* Abel 1190
MacCarthy *v.* Young . . . 814
McCawley *v.* Furness Ry. . . 1025
M'Clean *v.* Nicolle . . . 529
Macclesfield (Earl) *v.* Davis . . 629
McCollin *v.* Gilpin . . . 351
McConnel *v.* Murphy . . . 553
McConnell *v.* Hector . . . 437
McCowan *v.* Baine . . . 45
Macdonald, *In re* . . . 214, 218
— *v.* Carington . . 415
— *v.* Law Union Ins. Co. 1226
— *v.* Longbottom . 46, 68
— *v.* Ramsey . . 259, 439
— *v.* Whitfield . 456, 1302
M'Donnell *v.* Pope 719
M'Dougall *v.* Jersey Imp. Hotel Co. 815
Macdougle *v.* R. Ex. Assur. Co. . 1202

PAGE

Macdowall *v.* Fraser . . . 1123
MacDowall's Case . . 386, 477, 931
Mace *v.* Cammell 433
M'Eacharn *v.* Colton . . . 668
McEniry *v.* Waterford . . . 926
M'Ewan *v.* Smith 611
M'Ewen *v.* Woods 946
McFadden *v.* Blue Star Line . 974, 985
Macfarlane *v.* Norris . . 59, 60
M'Gahey *v.* Alston . . . 1085
M'George *v.* Egan 424
McGowan, *Ex parte* . . . 435
Macgregor *v.* Dover & Deal Ry. 84, 353
McGregor *v.* McGregor . . 35, 1324
McGruther *v.* Pitcher . . 311, 528
Machu *v.* L. & S. W. Ry. . . 1042
McIlreath *v.* Margetson . . 456
McIlwraith *v.* Dublin Trunk Connecting Ry. 645
M'Intyre *v.* Belcher . 57, 448, 916
M'Iver *v.* Henderson . . . 1194
— *v.* Humble 368
McIver *v.* Richardson . . 14, 1083
— *v.* Tate Steamers . . 975
Mackay, *Ex parte* . . . 84
— *v.* Dick . . . 126, 624
— *v.* Judkens . . . 1278
McKean *v.* M'Ivor . 1051, 1055
Mackenzie, *In re* 778
— *v.* British Linen Co. . 73
— *v.* Childers . . 307, 694
— *v.* Hancock . . . 631
— *v.* Hesketh . . . 135
— *v.* M'Leod . . 690, 704
— *v.* Pooley . . . 342
— *v.* Scott . . . 948
— *v.* Shedden . . . 1148
— *v.* Whitworth 1127, 1145
Mackersay *v.* Ramsays . . . 956
McKewan *v.* Sanderson . . 87
Mackill *v.* Wright Bros. . 976, 978
M'Kinnell *v.* Robinson . . 77, 108
Mackintosh *v.* Marshall . . 1124
— *v.* Mitcheson . . 340
Mackrell *v.* Hunt 483
M'Kune *v.* Joynson . . 39, 310
MacKusick *v.* Fleming . . . 165
Maclae *v.* Sutherland . . . 392
McLaren *v.* Baxter . . . 311
McLaughlin *v.* Penny . . . 206
M'Lean *v.* Clydesdale Bank Co. . 1242, 1243, 1255, 1291
Maclean *v.* Dunn . 41, 331, 332, 531, 542, 621, 623
Macleay *v.* Tait 128
M'Leish *v.* Tate 776
McLeod *v.* Power 193
McMahon *v.* Field . . 281, 1074
M'Manus *v.* Cooke . . . 24
— *v.* Crickett . . . 846
— *v.* Fortescue . . 350, 633
— *v.* Lanc. & York. Ry. . 1022, 1045, 1046, 1047
M'Mullen *v.* Sir Alfred Hickman Steamship, Ltd. . . . 1335
Macnee *v.* Persian Corporation . 107
M'Neilage *v.* Holloway . . . 261
M'Neill *v.* Cahill 84
M'Niell's Case 128

PAGE

Macoun *v.* Erskine, Oxenford & Co. 952
McQueen *v.* G. W. Ry. . . . 1042
Macrow *v.* G. W. Ry. . 1036, 1037
McSwiney *v.* R. Ex. Assur. Co. . 1109
Maddeford *v.* Austwick . . . 575
Maddick *v.* Marshall . . . 394
Maddison *v.* Alderson . . . 652
Maddon *v.* White 407
Maddox *v.* L. C. & D. Ry. . . 1026
Madras (The) 886
Magdalena Steam Navig. Co., *In re* 815
Magee *v.* Atkinson . . . 349
— *v.* Lavell 290
Maggennis *v.* Fallon . . . 502
Magnay *v.* Edwards . . . 238
Magnus *v.* Buttemer . . . 1176
Mahony *v.* East Holyford Mining Co. 382
— *v.* Kekulé . . . 348
— *v.* Waterford, Limerick. &c. Ry. . . . 1071
Maillard *v.* Argyll (Duke) . 153, 154, 156
Main (The) 1205
— *v.* Melbourne . . . 480
Mainprice *v.* Westley . . . 477
Mainwaring *v.* Brandon . 283, 947
— *v.* Leslie . . . 428
Maitland, *Ex parte* . . . 393
— *v.* Mackinnon . . 656
Major *v.* White 972
Makin *v.* Watkinson . . . 685
Malam, *In re* 170
Malcolm *v.* Scott 309
Mallam *v* Arden 778
Mallan *v.* May . . 45, 99, 121
Mallet *v.* Bateman . . 31, 1080
Mallett *v.* G. E. Ry. . . . 1054
Mallough *v.* Barber . . . 949
Malpas *v.* L. & S. W. Ry. . . 68
Maltass *v.* Siddle 1274
Manby *v.* Bewicke . . . 436
— *v.* Scott . . . 425, 428
Manchester & Liverpool Dist. Bk., *Ex parte* . . 198
— Bonded Warehouse Co. *v.* Carr . 673, 685, 690
— Brewery Co. *v.* Coombs 235, 672
— Sheff. & L. Ry. *v.* Anderson . 665, 686
— Sheff. & L. Ry. *v.* Brown . . . 1035
— Sheff. & L. Ry. *v.* North Central Wagon Co. . 818, 1058
— Ship Canal. Co *v.* Manchester Racecourse Co. . . 46, 302
— Trust *v.* Furness 342, 1008
Mander *v.* Falcke 304
Manfield *v.* Maitland . . . 994
Maniram *v.* Seth Rupchand . . 211
Manley *v.* Boycot . . 319, 1082
Manly *v.* Peel 1337
Mann, *Ex parte* 1300
— *v.* Forrester . . . 963
— *v.* Lovejoy 659

PAGE

Mann *v.* Stephens 303
Mann's Case 411
Manners (Lord) *v.* Johnson . . 305
— *v.* St. David's Gold, &c. Mines 386
Manning, *Ex parte* . . . 482
— *v.* Cox 177
— *v.* Lunn 170
— *v.* Phelps . . . 199
Manor (The) 832
Mansel *v.* Norton 745
Mansell *v.* Burredge . . . 321
— *v.* Hoade 1180
Manser *v.* Dix 737
Mansfield *v.* Relf . . . 677, 678
— *v.* Stephen . . . 14
— Union *v.* Wright . . 1092
Mansion House Assoc. *v.* L. & S. W. Ry. 1061
Manson *v.* Baillie 872
Maori King *v.* Hughes . . . 806
Maples *v.* Wightman . . . 405
March *v.* Culpepper . . . 6
Marchant *v.* Evans . . . 114
— *v.* Morton . 222, 226, 371
Mardorf *v.* Accident Assur. Co. . 1237
Mare *v.* Charles . . . 403, 1302
— *v.* Earle 87
— *v.* Warner 87
Margetson, *In re* 963
— *v.* Wright . . 545, 550
Marguerite Molinos (The) . . 870
Maria *v.* Hall 438
Marianne (The) 835
Marie Joseph (The) . . . 619
Marine Ins. Co. *v.* China SS. Co. . 1192
— *v.* Haviside . 1334, 1338
Mariposa (The) 872
Maritime Ins. Co. *v.* Alliance Insur. Co. . . 1138
— *v.* Stearns . . 1140
— *v.* Alianza Ins. Co. . . 1139
Market Overt Case . . 593, 594
Markham *v.* Gonaston . . . 191
— *v.* Paget 666
Mark Lane (The) 871
Marks *v.* Hamilton . . . 1213
Marlborough (Duke) *v.* Osborn . 142
Marpessa (The) 1013
Marquand *v.* Banner . . . 1002
Marquise de Ribeyre, la, *v.* Barclay 852
Marreco *v.* Richardson . . . 216
Marriott *v.* Anchor Reversionary Co. 832
— *v.* Hampton . . . 461
— *v.* L. & S. W. Ry. . . 1063
— *v.* Yeoward Bros. . 866, 986
Marryat *v.* Broderick . . 124, 849
— *v.* Marryat . 51, 185, 192
Marryatts *v.* White . . . 165
Marsack *v.* Webber . . . 456
Marsden *v.* Goole . . . 170
— *v.* Reid 1172
Marseilles Extension Ry. Co., *In re* 62
Marsh, *In re* 488
— *v.* Davies 400
— *v.* Dewes 739
— *v.* Joseph 331

PAGE
Marsh *v.* Pedder 161
— *v.* Wood 56
Marshall *v.* Berridge . . 282, 657
— *v.* Broadhurst . . . 246
— *v.* Green . . . 27, 28, 597
— *v.* Hopkins . . . 462
— *v.* Lynn . . 64, 171, 544
— *v.* Parsons . . . 958
— *v.* Poole 279
— *v.* Powell . . . 1371
— *v.* Schofield & Co. . . 762
— *v.* York. & Newc. Ry. . 291, 970, 1017, 1029, 1069
Marson *v.* Short . . . 29, 1364
Marston *v.* Allen 1256
Marten *v.* Steamship Owners Underw. Assoc. . . . 1185
Martin *v.* Andrews . . . 466
— *v.* Boulanger . . . 194
— *v.* Coulman . . . 745
— *v.* Crompe 238
— *v.* Gale 409
— *v.* Gilham 693
— *v.* G. Indian Pen. Ry. . 1022, 1045
— *v.* Hewson 123
— *v.* Knowles . . . 213
— *v.* Nutkin . . . 302, 400
— *v.* Pycroft 294
— *v.* Reid . . . 535, 826
— *v.* Sitwell 1158
— *v.* Smith . . . 510, 660
— *v.* Whitmore . . . 831
— *v.* Wright . . . 1090, 1365
Martindale *v.* Smith . 539, 542, 543, 620, 621
Martineau *v.* Kitching . 583, 584, 592, 1213
Martingell, *Ex parte* . . 105, 1257
Martyn *v.* Clue . . 54, 235, 687
— *v.* Hind 308
— *v.* Williams . . 232, 235
Martyr *v.* Bradley . . . 700, 703
— *v.* Lawrence . . . 656
Marvin, *In re* 252
— *v.* Wallis 536
Mary Thomas (The) . . . 1202
Maryon *v.* Carter . . 675, 883
Marzetti *v.* Williams . 277, 445, 447, 450, 854
Mascal's Case 237
Mashiter *v.* Buller . . . 994
Mason *v.* Bradley . . . 1295
— *v.* Broadbent . . . 201
— *v.* Cole 51
— *v.* Corder . . . 491, 500
— *v.* Harvey . . . 1218
— *v.* Mitchell . . . 432
— *v.* Morgan 262
— *v.* Motor Traction Co. 386, 1334
— *v.* Pritchard . . . 1089
— *v.* Rumsey . . . 1304
— *v.* Sainsbury . . . 1221
— *v.* Skurray . . . 1135, 1198
Massey *v.* Banner . . . 857
— *v.* Sladen 141
Massy *v.* Nanney . . . 1345
Master *v.* Hansard . . . 694
— *v.* Miller . 189, 221, 222, 1295
PAGE
Master Butchers', &c. Co. *v.* Bullock 144
Masters, *In re* 80
— *v.* Baretto . . . 1286
— *v.* Ibberson . . . 1255
— *v.* Green 789
Masterton *v.* Brooketyre (Mayor) . 914
Mather *v.* Fraser . . . 783, 840
— *v.* Maidstone (Lord) . 11, 137, 1256, 1257, 1265
Matheson *v.* Ross . . . 1337
Mathews *v.* Gibbs . . . 983
— *v.* Sawell . . . 719
Mathison *v.* Clark . . . 358
Matson *v.* Booth . . . 190
— *v.* Wharam . . . 31
Matthew, *Ex parte* . . . 153
— *In re* 153
Matthews *v.* Baxter . . . 435
— *v.* Brown & Co. . . 1293
— *v.* Hopping . . 982, 1019
— *v.* L——e . . . 76
— *v.* Smallwood . 66, 715
— *v.* Usher . . . 757
Matthias *v.* Mesnard . . 790
Matthie *v.* Potts . . . 1149
Mattock *v.* Kinglake . . 55, 505
Matures *v.* Westwood . . 233
Maudslay *v.* Le Blanc . . 393
Maugham *v.* Hubbard . . 1337
Maughan *v.* Sharpe . . 312, 818
Maund's Case 239
Maunsell *v.* White . . . 1318
Maving *v.* Todd . . . 1033
Mavor *v.* Pyne . . . 36, 454
Mavro *v.* Ocean Mar. Ins. Co. . 1013, 1202
Maw *v.* Jones 935
Maxted *v.* Paine . . . 343, 641
Maxwell *v.* Brain . . . 1273
— *v.* British Thomson Houston Co. . . 284
— *v.* Deare . . . 153, 186
— *v.* Jameson . . . 460
May, *In re* 423
— *v.* Chapman . . 363, 1255, 1258
— *v.* Harvey . . . 848
— *v.* May 318
— *v.* Platt . . . 64, 69, 135
— *v.* Thomson . . . 14, 296
— *v.* Woodward . . . 320
Mayall *v.* Mitford . . . 1216
Maydew *v.* Forrester . . 459
Mayer *v.* Isaac . . . 1089
Mayfield *v.* Wadsley . . 27
Mayhew *v.* Crickets . . 1100
— *v.* Eames . . . 1029
— *v.* Nelson . . . 1030
— *v.* Suttle . . . 653, 721, 819, 930
Maynard *v.* Consolidated Kent Collieries Corp. . . 646
— *v.* Moseley . . . 521
Mead *v.* Davison . . . 1137
Meadows, *In re* 860
— *v.* Tanner . . . 477
Meager *v.* Pellew . . . 420
Meakin *v.* Morris . . . 406, 938
Mearing *v.* Hellings . . . 467

PAGE
Mears *v.* Callender 699
— *v.* L. & S. W. Ry. . . . 808
Measures Bros. *v.* Measures . . 935
Mechelen *v.* Wallace 776
Medawar *v.* Grand Hotel Co. . . 766, 769, 770
Medina (The) 871
— *v.* Stoughton 560
Mediterranean and New York S.S. Co. *v.* Mackay . . . 997
Meek *v.* Kettlewell 224
— *v.* Wendt . . . 351, 968
Meering *v.* Duke 1364
Meert *v.* Moessard 181
Megginson *v.* Harper . . 219, 359
Megrath *v.* Gray 198
Melan *v.* de Fitzjames (Duke) . 61
Melanotte *v.* Teasdale . . . 1370
Melbourne Banking Corporation *v.* Brougham 374
Melhado *v.* Porto Alègre Ry. . . 832
Mellersh *v.* Rippen 1275
Melling *v.* Leak 662
Mellish *v.* Allnutt 1146
— *v.* Andrews 1188
— *v.* Motteux 578
— *v.* Staniforth . . . 1182
Melliss *v.* Shirley Local Board 89, 112
Mellona (The) 991
Mellor *v.* South Australian Land, &c. Co. 250
— *v.* Swire 22
— *v.* Watkins . . . 635, 720
Mellor's Policy Trusts, *In re* . . 1224
Mellors *v.* Shaw . 922, 923, 924, 926
Melville *v.* Hayden 1090
Membery *v.* G. W. Ry. 925
Mendelssohn *v.* Ratcliff . 184, 187, 951
Menetone *v.* Athawes . 876, 884, 885
— *v.* Gibbons 835
Mentz, Decker & Co. *v.* Maritime Ins. Co. 1170
Mercantile Bank of London *v.* Evans 225
Mercantile Bank of Sydney *v.* Taylor 1097
Mercantile Mar. Ins. Co. *v.* Tithering-ton . . . 58, 1153, 1154
Mercantile SS. Co. *v.* Tyser 1142, 1177
Mercer *v.* Cheese 154
— *v.* Irving 289
— *v.* Vans Colina 268
— *v.* Whall 939
Merchant Banking Co. *v.* Phœnix Steel Co. 610
Merchant Shipping Co. *v.* Armit-age 997, 1208
Merchants of the Staple *v.* Bank of England 858
Merchants' Trading Co. *v.* Banner 293
Meredith *v.* Footner 424
— *v.* Meigh . . 533, 536, 537
— *v.* Short 33
Meres *v.* Ansell 66
Meretony *v.* Dunlope 1154
Meriel *v.* Wymondsold 314
Merle *v.* Wells 1089
Merritt *v.* Boswell 205, 215
Merryweather *v.* Jones . . . 78, 120
PAGE
Merryweather *v.* Moore 930
Mersey Docks *v.* Gibbs 897
Mersey Docks Board *v.* Inland Rev. Com. 1344, 1348
Mersey Steel & Iron Co. *v.* Naylor . 173, 543, 603
Mesnard *v.* Aldridge 479
Mesnil (Baron de) *v.* Dakin . . 464
Messenger, *In re* 964
— *v.* Armstrong 720, 732, 734
Messent *v.* Reynolds 449
Mestayer *v.* Biggs 1344
Metcalf *v.* Bruin 359
Metcalfe *v.* Britannia Irn. Wks. Co. 997
— *v.* L. & B. Ry. . 913, 1042, 1055, 1069
— *v.* Richardson . . . 1273
— *v.* Rycroft 311
— *v.* Shaw . . . 425, 426
Metropolitan Bank *v.* Heiron. . 220
— — *v.* Pooley . 268
— Coun. Assur. Co. *v.* Brown . 701, 703, 755
— Electric Supply Co. *v.* Ginder . . 302
— Ry. *v.* Defries . . 684
— Ry. *v.* Jackson . . 1026
— Water Board *v.* Solo-mon . . 669, 712
Metzner *v.* Bolton 919
Meux *v.* Cobley 693
— *v.* G. E. Ry. . . . 308, 1018
— *v.* Jacobs 702
Mews *v.* Carr 42, 478
Meyer *v.* Decroix 1246
— *v.* Dresser . 63, 591, 982, 995
— *v.* Everth . . 552, 571, 572
— *v.* Haworth 432
— *v.* Ralli . . 1199, 1203
Meyerhoff *v.* Froehlich . . . 213
Michael *v.* Fripp 833
— *v.* Hart . 279, 628, 816, 952
— *v.* Tredwin . . . 1162
Michell, *Re* 244
Micklethwaite *v.* Merrill . . 826
Middlemore *v.* Goodale . . 228, 261
Middleton, *In re* 241
— *v.* Fowler . . 846, 1077
— *v.* Greenwood . . 294
Middlewood *v.* Blakes . . . 1119
Midgley *v.* Lovelace 237, 243, 317, 681
— *v.* Midgley . . . 258
— *v.* Wood 1321
Mid Kent Fruit Factory, *In re* . 275
Midland Banking Co. *v.* Chambers . 1104
— Counties District Bk. *v.* Attwood . . . 386
— G. W. Ry. *v.* Johnson . 134
— Ry. *v.* Bromley . . 1038
— Ry. *v.* Myers Rose & Co. 1060, 1061
Mighell *v.* Johore (Sultan) . . 439
Milbourn *v.* Ewart . . . 1323
Milburn *v.* Jamaica Fruit Co. 1009
Mildmay's (Sir Anthony) Case . 50
Mildred *v.* Maspons . . 962, 1107
Miles, *Ex parte* 615
— *v.* Cattle 1074

PAGE

Miles *v.* Furber . . . 790, 791, 793
— *v.* New Zealand Co. . . . 11
— *v.* Williams . . . 221, 264
Milford *v.* Hughes . . . 947
Milgate *v.* Kebble . . . 904
Millard *v.* Harvey . . . 418
Millen *v.* Brasch . . 1030, 1041
— *v.* Dent 1364
Miller *v.* Aris 355
— *v.* Borner & Co. . . 976, 978, 996
— *v.* Cook 413
— *v.* Dell . . . 207, 847
— *v.* Hamilton . . . 337
— *v.* Law Accident Ins. Soc. . 1178, 1180, 1181
— *v.* Race . . 157, 1241, 1308, 1309
— *v.* Sharp 23
— *v.* Thomson . . 1243, 1285
— *v.* Titherington . 1010, 1130
— *v.* Travers 47
— *v.* Woodfall . 1189, 1190
Millership *v.* Brookes . . . 21
Milles *v.* Fletcher 1194
Mills *v.* Alderbury Union . 456, 1087
— *v.* Blackall 13
— *v.* Borthwick . . . 208
— *v.* Dunham 96
— *v.* East London Union 151, 753
— *v.* Fowkes . . . 166, 215
— *v.* Goff 726
— *v.* Haywood 16
— *v.* Oddy 500
Millwall (The) 284
Millward *v.* Littlewood . 148, 1313
Milner *v.* Field . . . 878, 879
— *v.* Harewood (Lord) . . 405
— *v.* Milnes . . . 261, 263
Milnes *v.* Branch 240
— *v.* Duncan 460
— *v.* Gery . . . 298, 517
Milroy *v.* Lord 3
Milward *v.* Hibbert . 1010, 1129
— *v.* Ingram . . . 473
Mineral Water Bottle Trade Protection Society *v.* Booth . 96
Minett *v.* Anderson . 1154, 1155
Minneapolis (The) . . . 869
Minshull *v.* Oakes . . . 235, 236
Mirabita *v.* Imperial Ottoman Bank 589, 590
Mirams, *In re* 92
Misa *v.* Currie . . 1254, 1293
Missouri Steamship Co., *In re* . 59
Mitchel *v.* Reynolds . . . 98
Mitchell's Case 211
Mitchell *v.* Edie 1187
— *v.* Guildford Union . . 883
— *v.* King 169
— *v.* Newhall . . 643, 951
— *v.* Smith . . 1247, 1253
— *v.* Steward . . . 304
Mitcheson *v.* Nicol . . . 995
— *v.* Oliver . . 159, 342
Mitchinson *v.* Hewson . . . 263
Mitford *v.* Mitford . . . 272
Mixer, *Ex parte* 131
Mizen *v.* Pick . . . 431

PAGE

Moakes *v.* Nicholson . 583, 605, 612, 617
Mody *v.* Gregson . . 564, 569, 571
Moens *v.* Heyworth . . . 571
Moffatt *v.* Dickson . . . 878
— *v.* Edwards . . . 1246
— *v.* Farquhar . . . 643
— *v.* Laurie 875
— *v.* Parsons . . . 168
Moggridge *v.* Jones . . . 630
Mogul Steamship Co. *v.* McGregor, Gow & Co. 99
Moir *v.* Roy. Ex. Assur. Co. . . 1167
Molesworth *v.* Robbins . . . 965
Möller *v.* Young . . . 999, 1007
Mollet *v.* Wackerbath . . . 190
Molton *v.* Camroux . . . 436
Molyneux *v.* Hawtrey . . . 491
— *v.* Richard . . 295, 757
Mondel *v.* Steel . . . 630, 882
Money *v.* Jorden 1318
Moneypenny *v.* Bristowe . . 462
— *v.* Hartland . 889, 890
Monk, *In re* 253
— *v.* Arnold 679
— *v.* Cooper , . . . 674
Monopolies' Case . . . 102, 103
Montacute *v.* Maxwell . . . 1316
Montague *v.* Benedict . . . 426
— *v.* Flockton . . . 302
Montaignac *v.* Shitta . . . 329
Montefiore *v.* Guedalla . . . 226
— *v.* Lloyd . . . 1087
Montefiori *v.* Montefiori . . 1318
Montgomerie *v.* U. K. Mut. SS. Assoc. 1106
Montgomery *v.* Indemnity Mut. Mar. Ins. Co. . 1011, 1197, 1201
Monti *v.* Barnes . . . 695, 840
Montoya *v.* London Assur. Co. . 1177
Montreal Gas Co. *v.* Vasey . . 14
Moodie *v.* Bannister . . . 211
Moody *v.* Spencer 965
— and Yates' Cont., *In re* . 494
Moon *v.* Durden 107
Moor *v.* Hill 180
— *v.* Roberts 1083
Moore *v.* Bushell . . . 309, 356
— *v.* Campbell . . 171, 544
— *v.* Frowd 872
— *v.* Fulham Vestry . . 461
— *v.* Hart 1316
— *v.* Knight . . . 210, 851
— *v.* McGlynn . . . 417
— *v.* Marrable . . . 515
— *v.* Maxwell 957
— *v.* Moore 244
— *v.* Mourgue . . . 862
— *v.* Pyrke 460
— *v.* Ramsden . . . 95
— *v.* Smee 738
— *v.* Taylor . . 1151, 1152
— *v.* Williams . . . 7
— *v.* Wilson 1068
— *v.* Woolsey . . 1229, 1233
Moore, Nettlefold & Co. *v.* Singer Manuf. Co. 805
Moorhouse *v.* Colvin . . . 1316
— *v.* Lee 117

PAGE
Moorsom *v.* Page 978
Moran *v.* Jones 1012
— *v.* Pitt 594
Moran, Galloway & Co. *v.* Uzielli . 1108
Mordaunt Bros. *v.* British Oil and Cake Mills, Ltd. . . . 619
Mordy *v.* Jones 1207
Morel Bros. *v.* Westmorland (Earl) 425, 426
Morewood *v.* Pollok . . 991, 993
Morgan *v.* Bain 171, 172, 197, 543, 609
— *v.* Birnie 878
— *v.* Bissell 653
— *v.* Davies 724
— *v.* Griffith . . . 66
— *v.* Harrison . . 660, 733
— *v.* Jackson . . . 90
— *v.* Metropolitan Ry. . . 441
— *v.* Oswald 103
— *v.* Palmer 465
— *v.* Pike . . . 56, 313
— *v.* Ravey . . 445, 450, 766, 767, 769
— *v.* Rowlands . . . 217
— *v.* Russell . . . 279, 513
— *v.* Steble . . . 268, 894
— *v.* Thomas . . . 426
— *v.* Vale of Neath Ry. . 926, 927
Morier, *Ex parte* 856
Morison *v.* Thompson . . . 943
— *v.* Turnour . . . 40
Morley *v.* Attenborough . 560, 561
— *v.* Boothby . . . 19
— *v.* Carter 742
— *v.* Culverwell . . . 1251
— *v.* Frear 177
— *v.* Pincombe . . . 785
— *v.* Polhill 243
Morphett *v.* Jones . . . 23, 652
Morrell *v.* Cowan 1088
— *v.* Frith 213
Morris, *In re* 119
— *v.* Beal 679
— *v.* Chapman . . 76, 83
— *v.* Cleasby 948
— *v.* Dixon . . . 214, 1372
— *v.* Edgington . . 656, 666
— *v.* Hunt 873
— *v.* Lee 1285
— *v.* Levison . 601, 976, 978, 996
— *v.* M'Culloch . . . 86
— *v.* Morris 259
Morris's Estate, *In re* . . . 259
Morrison, *Ex parte* . . 177, 963
— *v.* Arbuthnot . . . 1317
— *v.* Chadwick . . 676, 687
— *v.* Parsons . . . 222
— *v.* Universal Mar. Ins. Co. . . 130, 1118, 1124
Morritt *v.* N. E. Ry. . . . 1052
Mors-le-Blanch *v.* Wilson . . 284
Morse *v.* Merest 517
— *v.* Slue 973
Morten *v.* Marshall . . 146, 1083
Mortgage Ins. Corp. *v.* Inland Rev. Com. . . . 1375, 1382
Mortimer *v.* Bell 476
— *v.* Capper 482
Mortimore *v.* Wright . 9, 10, 408, 413
Mortlock *v.* Buller . 22, 498, 516, 518
Morton *v.* Burn . . . 11, 12, 227
— *v.* Lamb . . . 598, 608
— *v.* Palmer 787
— *v.* Tibbett . . 532, 533, 535
— *v.* Withers 426
— *v.* Woods . 654, 754, 758, 773, 776
Mort's Dock and Engin. Co. *v.* Wadey 874
Moseley *v.* Hanford . . . 65
— *v.* Rendell . . . 257, 415
Mosely *v.* Virgin 295
Moser, *In re* 702
Moses *v.* Macferlan . . . 124
— *v.* Pratt 1158
Mosley *v.* Fosset 867
— *v.* Hide 139
— *v.* Kay . . . 251, 252
Moss, *Ex parte* 269
— *In re* . . . 965, 1100, 1104
— *v.* Byrom 1183
— *v.* Elphick 367
— *v.* Gallimore 756
— *v.* Hall 1093, 1267
— *v.* Smith 1191
— *v.* Sweet . . . 556, 580, 585
— *v.* Townsend . . . 772
Mosse *v.* Killick 94
Mostyn *v.* Mostyn 873
— *v.* West Mostyn Coal Co. . 135, 523
Motion *v.* Moojen 268
Motteux *v.* London Assur. Co. . 1138, 1140
Mouflet *v.* Cole 99
Moule *v.* Garrett 231
Moulis *v.* Owen . . . 59, 61, 108
Moult *v.* Halliday 919
Moulton *v.* Edmonds . . . 493
Mount *v.* Harrison . . . 1187
— *v.* Larkins 1172
Mountacue (Countess) *v.* Maxwell 34
Mountcashel (Earl) *v.* Barber . 396
Mountford *v.* Harper . . . 156
Mount Lyell Mining Co. *v.* Inland Rev. Com. 1347
Mountnoy *v.* Collier . . 739, 756
Mountstephen *v.* Brooke . . 214
— *v.* Lakeman . . 32
Mouse's Case 1010, 1066
Mousley *v.* Ludlam . . . 745
Mouys *v.* Leake 121
Mowatt *v.* Castle Steel and Iron Works . . . 20
— *v.* Lord Londesborough . 192
Mowbray, *Ex parte* . . . 1247
— *v.* Merryweather . . 281
Moxon *v.* Atkins 1138
Moyce *v.* Newington . . . 595
Mozley *v.* Tinkler . . . 14, 1083
Mucklow *v.* Mangles . . . 586
Muilman *v.* D'Eguino . . . 1278
Muir *v.* City of Glasgow Bank . 417
— *v.* Fleming 904
Mullens *v.* Miller 334
Muller *v.* Trafford 233
Mullett *v.* Huchison . . . 1371
— *v.* Mason . . . 278, 576

PAGE

Mullett *v.* Shedden . . .1181, 1188
Mulliner *v.* Florence 771
Mullings *v.* Trinder 515
Mumford *v.* Gething . . 46, 68, 100
— *v.* Walker 695
Muncey *v.* Dennis 747
Munday *v.* Asprey 38
Mundy *v.* Jolliffe . . . 23, 651
Municipal Investment Building Soc. *v.* Smith 759
Munn *v.* Godbold 1337
Munro *v.* Butt 880
Munroe (The) 1176
Munster *v.* S. E. Ry. . . .1037, 1044
Murphy *v.* Bell 1110
— *v.* Boese 41
— *v.* Caralli 922
— *v.* Coffin 1004
— *v.* Mid. G. W. (Ireland) Ry. 1068
— *v.* O'Shea 948
Murray *v.* Currie 916
— *v.* East Ind. Co. . 245, 1306
— *v.* Flavell 277
— *v.* Mann 954
— *v.* Reeves 84
— *v.* Scott 402
Muschamp *v.* Lanc. & Prest. Ry. . 1053
Musgrave and Hart's Case . . 645
Muspratt *v.* Gregory . 786, 790, 793
Mussen *v.* Price 624
Musurus Bey *v.* Gadban . 204, 439
Mutton *v.* Peat 166
Mutual Aid Society, *In re* . . 402
Mutual Loan Fund, &c. *v.* Sudlow 1082
Mutual Reserve Life Ins. Co. *v.* Foster 1227, 1231
Myers *v.* Edge 1087
— *v.* L. & S. W. Ry. . . 1021
— *v.* Sarl 69, 886
— *v.* Willis 342
Mynn *v.* Joliffe 159
Myrtle *v.* Beaver 354
Mytton *v.* Cock 863
— *v.* Midland Ry. . .1053, 1070

NADIN, *Ex parte* 735
Nalder and Collyer's Brew. Co. *v.* Harman 484
Nanney *v.* Martin 433
— *v.* Morgan 646
Napier *v.* Bruce 1087
Nargatt *v.* Nias 784
Nash *v.* Calthorpe 128
— *v.* De Freville 1283
— *v.* Gray 667
— *v.* Hodgson 215
— *v.* Inman 409, 410
— *v.* Lucas 782
— *v.* Nash 433
Natal Investment Co., *In re* . . 223
— Land, &c. Co. *v.* Pauline Colliery, &c. Syndicate . . 393
Nation *v.* Tozer 683
National Assur. & Invest. Assoc., *In re* 964
National Assur. Co. *v.* Best . . 1239

PAGE

National Bank *v.* Silke, 1246, 1289, 1291
— Coffee Palace Co., *In re* . 351, 968
— Mercantile Bank, *Ex parte* 27
— Motor Mail Coach Co., *In re* 380
— Provincial Bank *v.* Brackenbury 1080, 1091
— Provincial Bank *v.* Jackson 19
— Provincial Bank *v.* Marshall 98
— Provincial Bank & Marsh's Contract, *In re* 490
— Savings Bank Assoc., *In re* . . . 14, 15
— Savings Bank Assoc. *v.* Tranah 155
— Telephone Co. *v.* Inland Rev. Com. 1353
— Trustees Co. of Australasia *v.* Gen. Finance Co. 251
Navone *v.* Haddon 1200
Naylor *v.* Collinge . . . 700, 703
— *v.* Goodall 294
— *v.* Mangles 907
— *v.* Palmer 1184
— *v.* Taylor . . 1179, 1194
Neal *v.* Irving 328
Neale *v.* Gordon-Lennox . . . 343
— *v.* Mackenzie 294, 664, 750, 775
— *v.* Ratcliff . . . 54, 686
— *v.* Sheffield 176
Neap *v.* Abbot 516
Neate *v.* Harding 463
Neck, *Ex parte* 956
Needham *v.* Bremner 427
Needham's Case 1323
Needler *v.* Guest . . . 874, 876
Neill *v.* Ridley 995
— *v.* Whitworth 976
Neilsen *v.* Wait 1006
Neilson *v.* Delacour 1151
— *v.* Harford 71
— *v.* James 639
Nelson *v.* Baxter 850
— *v.* Couch 192
— *v.* Duncombe 436
— *v.* Serle 416
— (The) 836
Nelson & Co., *In re* 1236
Nelson & Sons *v.* Nelson Line (Liverpool) 1007
Nelson Line (Liverpool) *v.* Jas. Nelson & Sons . 974, 985, 1007
Nelthorpe *v.* Holgate . . 486, 498
Nepoter (The) 341
Nerot *v.* Wallace . . 83, 84, 147
Nesbitt *v.* Lushington . 1181, 1182
Nesham *v.* Selby 38
Neve *v.* Holland 218
Nevill, *In re* 949
— *v.* Snelling 412
Nevill's Case 1096
Neville, *Ex parte* 891
— *v.* Wilkinson 1318

PAGE
New *v.* Swain . . . 607, 608
Newall *v.* Tomlinson . . 355, 461
Newbould *v.* Smith . . . 213
New Bruns., &c. Co. *v.* Muggeridge . . . 297, 640, 650
Newby *v.* Painter 499
— *v.* Sharp 151
Newcastle Fire Ins. Co. *v.* Macmorran . . . 1214
— (Mayor) *v.* Att.-Gen. . 378
New City Constitutional Club, *In re* 792
Newcomb *v.* Harvey . . . 240
Newcombe *v.* De Roos . . . 18
Newell *v.* Radford . . 38, 40, 529
— *v.* Van Praagh . . . 186
Newen, *In re* 344
Newington *v.* Levy . . 177, 192
Newington Local Board *v.* Cottingham Local Board . . 151
Newington Local Board *v.* Eldridge 965
Newland *v.* Watkin . . . 95
New Land Development Assoc., *In re* 274
New London Credit Syndicate *v.* Neale 65
Newman, *In re* 290
— *v.* Anderton . . . 762
— *v.* Rodgers . . . 504
— *v.* Walters . . 3, 4, 870
Newman and Dale SS. Co. and Br. and So. Amer. SS. Co., *In re* . 990
Newmarch *v.* Clay . . . 164, 165
Newport (Mayor) *v.* Saunders . 682
Newsom *v.* Thornton . . . 608
Newsome *v.* Coles 368
— *v.* Graham . . . 462
Newson *v.* Smythies . . . 142, 145
Newton, *Ex parte* . . 1252, 1258
— *v.* Belcher . . . 393
— *v.* Blunt 320
— *v.* Chorlton . . . 1103
— *v.* Forster . . . 914
— *v.* Grand Junc. Ry. . . 280
— *v.* Liddiard . . . 74
— *v.* Marsden . . . 1310
— *v.* Scott . . . 197, 774
New Zealand Banking Corp., *In re*, Hickie & Co.'s Case . . 1300
New Zealand, &c. Land Co. *v.* Watson 356, 956
New Zealand Loan and Merc. Agency Co. *v.* Morrison . . 199
Nichol *v.* Godts . . . 563, 571
— *v.* Martyn 929
Nicholas *v.* Ridley . . 1079, 1103
Nicholl *v.* Chambers . . . 486
Nicholls *v.* Atherstone . . . 718
— *v.* Cross 1358
— *v.* Diamond . . . 1302
— *v.* Le Feuvre . . . 613
— *v.* Stretton . . 98, 121
— *v.* Wilson 953
Nichols, *Ex parte* . . . 224, 270
— *v.* Raynbred . . . 14
Nicholson *v.* Bower . . 529, 616
— *v.* Bradfield Union 139, 376, 564, 601
— *v.* Chapman . . 453, 871
PAGE
Nicholson *v.* Drury Buildings Co. . 431
— *v.* G. W. Ry. . . . 1064
— *v.* Harper 596
— *v.* Knapp 517
— *v.* Paget 1090
— *v.* Revill . . 175, 1097
— *v.* Ricketts . . . 137
— *v.* Williams . . . 1139
Nickalls *v.* Merry . . 343, 641, 951
Nickells *v.* Atherstone . . . 718
Nickels *v.* London & Prov. Mar. & Gen. Ins. Co. 1179
Nickoll and Knight *v.* Ashton & Co. 149, 540, 557
Nickson *v.* Brohan . . . 337
Nicloson *v.* Wordsworth . 493, 514
Nicol *v.* Hennessey . . . 454
— *v.* Nicol 1326
Nicoll *v.* Fenning 694
— *v.* Greaves . . . 919, 920
Nicolls *v.* Bastard . . . 911, 1068
Niell *v.* Morley 436
Nigel Gold Mining Co. *v.* Hoade . 103, 1179
Nind *v.* Nineteenth Century Building Soc. 714, 716
Nisbet *v.* Smith 1093
— and Potts' Contract, *In re* 489
Nitedals Taendstikfabrik *v.* Bruster 943
Nixon, *In re* 250
— *v.* Freeman . . . 782
Nobel's Explosives Co. *v.* Jenkins . 1182
— *v.* Rea . 1211
Noble *v.* Kennoway . . 1130, 1136
— *v.* Nat. Disc. Co. . . 181, 309
— *v.* Ward . . 67, 171, 544
Nockells *v.* Crosby . . . 466
Noke *v.* Awder 234
Noke's Case 238, 449
Nolte, *Ex parte* 1105
Norden *v.* Levit 257
— S.S. Co. *v.* Dempsey . . 1006
Nordenfelt *v.* Maxim Nordenfelt Co. 95, 96, 301
Nordenfelt's Case 95
Norfolk (Duke) *v.* Worthy . . 325
— Ry. *v.* M'Namara . . 192
Norman *v.* Binnington . . . 986
— *v.* Cole . . . 82, 123
— *v.* Kettlewell . . . 1147
— *v.* Phillips . . 533, 537
— *v.* Ricketts . . . 152
— *v.* Thompson . . . 186
Norris *v.* Aylett . . . 155, 184
— *v.* Irish Land Co. . 441, 443
— *v.* Staps 451
North, *In re* 58
— *v.* Percival . . 15, 497, 504
— *v.* Wakefield . . . 175
North American Land and Timber Co. *v.* Watkins . . 220, 947
North Atlantic S.S. Co. *v.* Burr . 1185, 1206
North Brit. Assur. Co. *v.* Lloyd . 1098
North British Ins. Co. *v.* Lond. Ins. Co. 1220
— — — *v.* Moffatt 1213
Northcote *v.* Doughty . . . 411

PAGE
Northcott *v.* Underhill . . . 56
North Eastern 100 A1 S.S. Ins. Co. 1107
North Eastern Ry. *v.* Hastings . 48
Northern *v.* Carnegie . . . 244
Northern Assam Tea Co., *In re* . 223
Northey *v.* Field 614
Northmoor S.S. Co. *v.* Harland & Woolf 993
North of England Banking Co., *In re* 315
North of England Oilcake Co. *v.* Archangel Ins. Co. . . . 1113, 1114, 1160
North & South Wales Bank *v.* Macbeth . . 1243, 1244, 1263, 1270, 1279
North Staffs. Coll. Owners Assoc. *v.* North Staffs. Ry. . 1059, 1061
North Sydney Invest. and Tram. Co. *v.* Higgins . . . 152
Northumberland Avenue Co., *In re* . . . 393
— (Duke) *v.* Errington . . . 320
Northumbria (The) . . . 987
North West Ry. *v.* Whinray . . 1084
North Western Rubber Co. and Hüttenbach & Co., *In re* . 194
Norton *v.* Cooper 891
— *v.* Dashwood . . . 696
— *v.* Davison 539
— *v.* Ellam 208
— *v.* Fazan 428
— *v.* Herron 347
— *v.* Seymour . . . 42, 1305
Norval *v.* Pascoe . . . 234, 235
Norway (The) 997
Norwich (Mayor) *v.* Norfolk Ry. . 387
Notara *v.* Henderson . . 983, 984
Nott *v.* Riccard 503
Nottebohn *v.* Richter . . . 973
Nottingham Brick and Tile Co. *v.* Butler 516
Nottingham Building Soc. *v.* Thurstan 404
Nottingham Hide, Skin & Fat Market Co. *v.* Bottrill . . 1090
Nottingham Tile Co. *v.* Butler . 229
Nouaille *v.* Flight 490
Nourse *v.* Liverpool Owners' Assoc. 869
Nouvion *v.* Freeman . . . 455
Nowlan *v.* Ablett 920
Nugent *v.* Smith . . 987, 1020, 1027
Nunn *v.* Fabian . . 23, 294. 480
— *v.* Tyson 422
— *v.* Wilsmore 1326
Nurse *v.* Craig 431
— *v.* Framton . . . 312, 315
— *v.* Wills 261
Nuttall *v.* Staunton . . . 779
Nye *v.* Moseley 76

OAKAPPLE *v.* Copous . . . 729
Oakden *v.* Pike . . 485, 492, 503
Oakeley *v.* Pasheller . . . 1082
Oakes *v.* Turquand . . 128, 380

PAGE
Oakley *v.* Monck 733
— *v.* Portsmouth Steam Packet Co. 1027, 1066
Oak Pits Co., *In re* . . . 792
Oastler *v.* Henderson . . 717, 763
Oates *v.* Hudson 464
Obbard *v.* Betham 630
O'Brian *v.* Ram 263
O'Brien *v.* Lewis 78
O'Callaghan *v.* Thomond (Marchioness) 221
Ocean (The) 437
— Wave (The) 991
Oceanic Steam Navigation Co. *v.* Sutherberry 414
Ockenden *v.* Henly . . . 509
Odell *v.* Cormack Bros. . . . 1306
Odwin *v.* Forbes 307
Oettinger *v.* Cohn 1374
Official Receiver, *Ex parte* . . 267, 273, 274
Offly *v.* Warde 312
Offord *v.* Davies . . 12, 1088, 1089
Ogden *v.* Benas 859
— *v.* Fossick 293
— *v.* Ogden 1322
— *v.* Peele 103
Ogdens, Ld. *v.* Nelson . 57, 448, 961
Ogg *v.* Shuter 590
Ogilvie *v.* Currie 127
— *v.* Foljambe . 39, 475, 489
Ogilvy *v.* West Austral. Mortgage Corporation 73
Oglander *v.* Baston . . . 432
Ogle *v.* Atkinson . . . 617, 910
— *v.* Vane (Lord) . 67, 544, 627
Oglesby *v.* Yglesias . . . 348
O'Hanlan *v.* G. W. Ry. . 627, 1072, 1075
Ohrloff *v.* Briscall . . . 985, 1045
Okell *v.* Charles 1261
— *v.* Smith 603
Old Battersea Building Soc. *v.* Inland Rev. Com. . . . 1346
Old *v.* Robson 97
Olde *v.* Olde 520
Oldershaw *v.* King . . . 1082
Oldham *v.* Langmead . . . 72
Olding *v.* Smith . . . 118, 379
Oliver *v.* Dovatt 471
— *v.* Fielden 974
— *v.* Hunting 37
— *v.* Nautilus Steam Shipping Co. 158
— *v.* Woodroffe . . . 405
Oliverson *v.* Brightman . . 1151, 1171
Olivier (The) 836
Olley *v.* Fisher . . . 135, 298
Ollivant *v.* Bailey 568
Ollive *v.* Booker . . . 975, 1166
O'Mealy *v.* Wilson . . . 437
Omoa and Cleland Coal and Iron Co. *v.* Huntley . . . 971
O'Neil *v.* Armstrong, Mitchell & Co. 885, 931
Ongley *v.* Chambers . . . 656
Onslow *v.* — 301, 707
— *v.* Corrie 231
— *v.* Inland Rev. Com. . 1327, 1355

PAGE
Oom *v.* Bruce 1160
Openheimer *v.* Levy . . . 437
Oppenheim *v.* Fry 1198
— *v.* Russell . . 618, 1057
— *v.* White Lion Hotel Co. . . 767, 768
Oppenheimer, *In re* . . . 170
— *v.* Attenborough . 823
— *v.* Boatman . . 170
— *v.* Frazer and Wyatt 822, 823
Opperman *v.* Smith . . . 795
Orchard *v.* Bush & Co. . . 768, 770
— *v.* Rackstraw . . . 904
Orchis (The) 457
Ord *v.* Noel 518
— *v.* Portal 1248
O'Reilly *v.* Gonne 1171
— *v.* Roy. Ex. Assur. Co. . 1171
— *v.* Thompson . . . 480
Orelia (The) 836
Orford *v.* Cole 1370
Organ *v.* Brodie 340
Oridge *v.* Sherborne 1246, 1272, 1285
Orienta (The) 966
Oriental Bank Corp., *In re* . . 385, 477, 931
— Financial Corp., *Ex parte* 192
— Financial Corp. *v.* Overend, Gurney & Co. . 1093, 1095
— Inland Steam Co., *In re* . 269
— Inland Steam Co. *v.* Briggs 293
— SS. Co. *v.* Tylor . 57, 995
Orme *v.* Broughton . . 245, 508
— *v.* Young 1094
Ormerod's Case 645
Ormes *v.* Beadel . . 131, 133, 879
Ormrod *v.* Huth . . 550, 571
O'Rorke *v.* Bolingbroke . . . 413
Orr *v.* Union Bank . . . 1259
Orrell *v.* Coppock . . . 30, 1081
Ortigosa *v.* Brown 841
Osborn's Case 45
Osborne *v.* Eales 287
— *v.* Harper . . . 318
— *v.* L. & N. W. Ry. . . 925
— *v.* Rogers 8
O'Sullivan *v.* Thomas . . 104, 107, 124, 467, 850
Oswald *v.* Berwick (Mayor) . . 1085
Oswell *v.* Vigne 1164
Ottaway *v.* Hamilton . . . 429
Otto Hermann (The) . . . 869
Ougier *v.* Jennings . . . 1131
Oulds *v.* Harrison . . . 1254, 1261
Outhwaite *v.* Luntley . . . 1294
Overend, Gurney & Co., *In re*, Grissell's Case . . . 198
Overend, Gurney & Co., *In re*, Musgrave and Hart's Case . 645
Overend, Gurney & Co., *In re*, Swan, *Ex parte* . . . 1261
Overend, Gurney & Co. *v.* Oriental Financial Corp . . . 1082, 1093, 1094
Overton *v.* Harvey . . . 192
PAGE
Overweg, *In re* 333
Owen *v.* Bowen . . . 181, 935
— *v.* Burnett 1040
— *v.* Cronk . . 310, 348, 355
— *v.* Gooch 350
— *v.* Homan . . 1097, 1099
— *v.* Leigh 801
— *v.* Routh . . . 628, 816
— *v.* Van Uster . 351, 389, 1302
Owens *v.* Denton 111
Owenson *v.* Morse 153
Oxendale *v.* Wetherell . 454, 601, 625
Oxford *v.* Prior 766
— *v.* Provand . . . 295
— (Mayor) *v.* Crow . . 376
Oxlade *v.* N. E. Ry. . 1021, 1022, 1024, 1061
Oxley *v.* Watts 799

PAGE *v.* Marsh 1082
Pacific (The) 834
Packer *v.* Gibbins. . . . 682
Padget *v.* Priest 255
Padstow Total Loss Assoc., *In re* . 1106
Page *v.* Adam 174
— *v.* Cowasjee . . . 542, 621
— *v.* Meek 153
— *v.* More 734
— *v.* Morgan 533
— *v.* Newman 281
Paget *v.* Foley 201
— *v.* Marshall . . . 134, 135
Paice *v.* Walker 347
Pain *v.* Coombs 294
Paine, *In re*, ... 85
— *v.* Hayne 686
— *v.* Hutchinson . . 641, 650
— *v.* Meller 482
— *v.* Strand Union . . . 377
Painter, *Ex parte* 1065
Palace Shipping Co. *v.* Caine . 937
Palethorpe *v.* Home Brewery, Ltd. 695
Palliser *v.* Gurney 419
Palmer *v.* Bate 91
— *v.* Blackburn . . . 1204
— *v.* Bramley . . . 777
— *v.* Day & Sons . . . 275
— *v.* Edwards . . . 232
— *v.* Grand Junc. Ry. . . 1067
— *v.* Hutchinson . . . 354
— *v.* Jarmain . . . 1308
— *v.* Johnson . . . 495, 496
— *v.* L. B. & S. C. Ry. . . 1060, 1064
— *v.* L. & S. W. Ry. . . 1065
— *v.* Mallet 101
— *v.* Marshall . . . 1138
— *v.* Naylor 1179
— *v.* Neave 1317
Palmerston (Lord) *v.* Turner . . 504
Palyart *v.* Leckie . . . 123, 467
Panama (The) 836
Panama and South Pac. Tel. Co. *v.* India Rubber Co. . . . 132
Pandorf *v.* Hamilton . . . 1174
Panmure, *Ex parte* . . . 968
Pannell *v.* City of London Brewery Co. 715

PAGE

Panther Lead Co., *In re* . . 717
Pape *v.* Westacott . . . 161, 776
Papillon *v.* Brunton . . . 731
Pappa *v.* Rose 899
Paquin, Ltd. *v.* Beauclerk . 419, 426
Paradine *v.* Jane . . 148, 675, 686
Parana (The) 1073
Pardington *v.* S. Wales Ry. . . 1046
Pardo *v.* Bingham 204
Pardoe, *In re* 206
Pare *v.* Clegg 401
Parfitt *v.* Jepson 476
Pargeter *v.* Harris . . 234, 654
Paris Skating Rink Co., *In re* . 439
— (The) 965
Parish *v.* Sleeman 667
Park *v.* Hammond . . . 949
Parke, *Ex parte* 781
Parker, *In re* 1103
— *v.* Bristol & Exeter Ry. . 463, 1061
— *v.* Brown 91
— *v.* Dubois 1372
— *v.* Flint . . . 764, 770
— *v.* Gordon . . . 1263
— *v.* G. W. Ry. . . 465, 1061, 1062
— *v.* Ibbetson . . 70, 931
— *v.* Jones . . . 720
— *v.* Lewis . . 1100, 1104
— *v.* Parker, Parker's Policies, *In re* . . . 419, 1224
— *v.* Patrick . . . 821, 906
— *v.* Potts 1163
— *v.* Rawlings . . . 55
— *v.* Smith 652
— *v.* S. E. Ry. . . . 866
— *v.* Staniland . . . 27
— *v.* Taswell . . 43, 294, 651
— *v.* Wallis 535
— *v.* Winlow 347
— *v.* Wise 1088
Parker's Policies, *In re* . . 419, 1224
Parkhurst *v.* Smith . . . 45
Parkin, *In re* 297
— *v.* Thorold . . 507, 543
— *v.* Tunno 1151
Parkinson *v.* G. W. Ry. . . 1064
Parmenter *v.* Webber . 651, 681, 773
Parmeter *v.* Cousins . 1138, 1139
Parmiter *v.* Parmiter . . 213, 1372
Parnell *v.* Tyler 476
Parnham *v.* Hurst 272
Parr *v.* Jewell 1261
— *v.* Winteringham . . . 850
Parrott *v.* Anderson . . 777, 797
— *v.* Eyre 397
— *v.* Palmer 707
— *v.* Sweetland . . . 525
Parr's Banking Co. *v.* Yates 165, 206, 1089, 1094
Parry *v.* Aberdein 1193
— *v.* Great Ship Co. . 139, 1107
— *v.* Nicholson . . . 1295
— *v.* Roberts 984
Parsons, *In re* . . . 262, 421
— *v.* Alexander . . . 108
— *v.* Birmingham Dairy Co. 111
— *v.* Gingell . . 790, 793

PAGE

Parsons *v.* New Zealand Shipping Co. 981
— *v.* Sexton . . 558, 877
— *v.* Thompson . . . 86
— *v.* Walter 31
Parteriche *v.* Powlet . . . 64
Partington *v.* Woodcock . 759, 760
Parton *v.* Crofts 532
Partridge *v.* Bank of England . 1289
— *v.* Strange . . . 525
Pasley *v.* Freeman . . . 560
Pasmore *v.* North 1248
Patching *v.* Dubbins . . . 303
Patent File Co., *In re* . . . 383
— Safety Gun Cotton Co. *v.* Wilson 858
Paterson *v.* Gandasequi . . 327
— *v.* Hardacre . . . 1257
— *v.* Harris . . 1174, 1176
— *v.* Long 491
— *v.* Wallace . . . 921
Patman *v.* Harland . . . 229
Patrick *v.* Eames 1142
— *v.* Milner 504
— *v.* Reynolds . . . 395
Patscheider *v.* G. W. Ry. . . 1053
Patten *v.* Wood 938
Pattinson *v.* Luckley . 190, 1297
Pattle *v.* Hornibrook . . 21, 71
Paul, *In re* 741
— *v.* Dod 624, 625
— *v.* Ins. Co. of N. Amer. . 1149
— *v.* Joel . . . 1273, 1275
— *v.* Nurse . . . 231, 669
Pauling *v.* L. & N. W. Ry. . . 376
Paull *v.* Simpson 255
Pavy's Patent Felted Co., *In re* . 961
Pawle's Case 129
Pawley *v.* Pawley 422
— *v.* Turnbull . . . 879
Pawson *v.* Ewer 1166
— *v.* Watson . . . 546
Payler *v.* Homersham . . . 176
Payne, *Ex parte* 273
— *v.* Banner 143
— *v.* Brecon (Corporation) 121, 374
— *v.* Cave . . . 17, 476
— *v.* Chapman . . . 464
— *v.* Hayne 752
— *v.* Jenkins 471
— Collier, *Ex parte* 963, 964, 965, 966
Paynter *v.* James 998
— *v.* Williams . . . 400
Peachey *v.* Rowland . . . 846
Peacock, *Ex parte* . . . 196
— *v.* Harris 472
— *v.* Pursell . . 153, 155
— *v.* Rhodes . . . 1256
Pearce *v.* Bastable . . . 275
— *v.* Brookes 77
— *v.* Foster 932
— *v.* Gardner 37
— *v.* Rogers 337
— *v.* Watts 46
Pearl *v.* Deacon 1103
Pearl Life Assur. Co. *v.* Greenhalgh . 1228
— *v.* Johnson . 1228

PAGE
Pearlmoor (The) . . . 984, 985
Pears *v.* Laing 219
Pearson, *Ex parte* . . . 385
— *v.* Cardon . . . 850
— *v.* Commercial Un. Assur. Co. . 1153, 1177, 1217
— *v.* Dawson . . 537, 612
— *v.* Dublin Corporation . 334, 882
— *v.* Henry 4
— *v.* Inland Rev. Com. . 1358
— *v.* Pearson . . . 101
— *v.* Scott . . 70, 160, 951
Pease *v.* Courtney 253
— *v.* Gloahec 619
— *v.* Mead 245
Peate *v.* Dicken . . . 114, 181
Peck *v.* Methold 143
Peckham *v.* Faria 31
Pedder *v.* Watt 152
Peek *v.* Larsen 972
— *v.* Matthews 306
— *v.* N. Staff. Ry. . 36, 902, 1022, 1034, 1035, 1044, 1045, 1046, 1047, 1048
Peel *v.* Thomas 390
Peel's Case 131, 380
Peer *v.* Humphrey . . . 906
Peers *v.* Lambert 497
— *v.* Sneyd 656
Peeters *v.* Opie 53
Pegler *v.* Monm. Ry. & Canal Co. 1020, 1059, 1061
— *v.* White 296
Peirce *v.* Corf . . . 42, 479
Peirse *v.* Bowles 168
Pell *v.* Shearman 281
Pellas *v.* Neptune Co. . . 222, 1114
Pellatt *v.* Boosey . . . 676, 713
Pellatt's Case 15
Pellecat *v.* Angell 112
Pelly *v.* Roy. Exch. Assur. Co. . 1130, 1137, 1149
Pelly and Jacob's Cont., *In re* . 484, 504
Pelton *v.* Harrison . . . 420
Pemberton *v.* Vaughan . . 99, 1370
Penfold *v.* Abbott . . . 449
Peninsular & Oriental Steam Nav. Co. *v.* Shand 60
Penkivil *v.* Connell . . . 1307
Pennell *v.* Woodburn . . . 632
Penney *v.* Porter 140
Penniall *v.* Harborne . . . 490
Penniford *v.* Hamilton . . . 1370
Pennington *v.* Crossley & Son . 152
Penny *v.* Brice 205
— *v.* Slade 470
Penrose *v.* Martyn . . . 385, 1307
Penson *v.* Lee 1158
Penton *v.* Barnett 715
— *v.* Robart 699
Pepper *v.* Burland 886
Peppin *v.* Cooper 1085
Perionowski *v.* Freeman . . 898
Perkins, *In re* . . . 176, 268
— *v.* Bell . . . 571, 606
— *v.* Ede 513
— *v.* Perkins . . . 716
Perls *v.* Saalfeld . . . 96, 121
Perring *v.* Hone . . . 189, 1337
Perrins *v.* Marine & Gen. Ins. Co. . 1226
Perry *v.* Attwood 152
— *v.* Barnett 639
— *v.* Bouchier 1331
— *v.* Nat. Prov. Bank of England 1093
Perth Electric Tramways, *In re* . 384
Peruvian Ry. Co. *v.* Thames & Mersey Mar. Ins. Co. . . 1306
Petch *v.* Tutin 27
Peter *v.* Compton 35
— *v.* Rich 1101
Peters *v.* Anderson . . 164, 165
— *v.* Fleming 409
— *v.* Opie 887
Peterson *v.* Ayre . . . 284, 626
Peto *v.* Blades 525
— *v.* Brighton, Uckfield & Tunbridge Wells Ry. . . 293
— *v.* Reynolds . . . 1243, 1285
Petre *v.* Duncombe . . . 1105
Petrel (The) 927, 991
Petrie *v.* Bury 316
Pett *v.* Smith 435
Pettit *v.* Mitchell 606
Pettit's Estate, *In re* . . . 275
Pettman *v.* Keble 967
Petty *v.* Anderson 424
— *v.* Cooke 1097
— *v.* Styward 260
Pewtriss *v.* Austen . . . 353
Peytoe's Case 185
Peyton *v.* Bladwell . . . 1317
Pfiel *v.* Vanbatenberg . . . 159
Pfleger *v.* Browne . . 151, 177, 187
Phantom (The) 869
Pharmaceutical Soc. *v.* Armson . 111
— *v.* Delve . 111
— *v.* Lond. & Prov. Supply Assoc. . . 111
Pharmaceutical Soc. *v.* Piper . 111
— *v.* White . 111
Phelps *v.* Comber 1300
— *v.* Hill 1169
— *v.* L. & N. W. Ry. . . 1037
— *v.* Lyle 359
— *v.* Protheroe . . . 322
Phenè *v.* Popplewell . . 717, 773
Phillimore *v.* Barry . 40, 42, 530
Phillipps *v.* Briard . . 69, 959
Phillips, *Ex parte* 105
— *v.* Barber . . . 1175, 1184
— *v.* Bateman . . . 12
— *v.* Berryman . . . 192
— *v.* Bistolli 534
— *v.* Bridge 737
— *v.* Broadley . . . 213
— *v.* Bucks (Duke) . . 516
— *v.* Clark . . . 986, 1045
— *v.* Clift 939
— *v.* Edwards . . 481, 1022
— *v.* Eyre 307
— *v.* Fielding . . . 510
— *v.* Foxall . 1086, 1092, 1099
— *v.* Gould 1273
— *v.* Headlam . . . 1164
— *v.* Homfray . 254, 332, 684

PAGE

Phillips *v.* Hull Alhambra Palace Co. . . . 195, 930
— *v.* Hunter. . . . 269
— *v.* Irving . 1131, 1141, 1172
— *v.* Jones . . . 917, 935
— *v.* L. & S. W. Ry. . . 1075
— *v.* Morrison 1339, 1345, 1368
— *v.* Nairne . . . 1176, 1191
— *v.* Phillips . . . 258
— *v.* Shervill . . 197, 774
— *v.* Silvester . . 482. 511
— *v.* Smith 692
— *v.* Warren . . . 158
Phillipson *v.* Hayter . . . 425
— *v.* Kerry . . . 135
Philliskirk *v.* Pluckwell . . 418
Philp & Co. *r.* Knoblauch . .. 16
Philpot *v.* Swan 1207
Philpott *v.* Adams 455
— *v.* Dobbinson . . . 781
— *v.* Jones . . 111, 165, 166
Philpotts *v.* Evans . . . 626
— *v.* Reed 199
Phipps *v.* Daubney . . . 953
— *v.* New Claridge's Hotel . 845
— *v.* Sculthorpe . . 655, 683
— *v.* Tanner . . . 48, 1246
Phipson *v.* Kneller . . . 1279
Phœnix Assur. Co. *v.* Spooner . 1213
— Bessemer Steel Co., *In re* . 609
Phosphate of Lime Co. *v.* Green . 331
— Sewage Co. *v.* Hartmont . . 133, 851
Phyn *v.* Royal Exchange . . 1183
Pianciani *v.* L. & S. W. Ry. . 1039, 1076
Pickard *v.* Banks 467
— *v.* Sears . . . 72, 592
Picker *v.* London & County Bank . 1289
Pickering's Claim 315
Pickering *v.* Barclay . . . 987
— *v.* Busk . . . 335, 338
— *v.* Dowson . . 526, 577
— *v.* Ilfracombe Ry. . . 225
Pickford *v.* Ewington . . . 222
— *v.* Grand Junction Ry. . 1021, 1062, 1076
Pickup *v.* Thames Ins. Co. . . 1165
Pidcock *v.* Bishop 1098
Piddington *v.* S. E. Ry. . . . 1062
Pierce *v.* Fothergill . . . 279
— *v.* Thornley 272
Pierpoint *v.* Gower . . . 1352
Piers *v.* Piers 1319, 1323
Pierson *v.* Hughes 79
— *v.* Knutsford Estates Co. . 963
— *v.* Scott 70
Piggott *v.* Middlesex County Council . 686, 715
— *v.* Rush 204
— *v.* Stratton 307
Pigot's Case 189
Pigot *v.* Cubley . . 826, 827, 903
Pigott *v.* Thompson . . . 322
Pike *v.* Eyre 661
— *v.* Fitzgibbon . . . 421
— *v.* Ongley 70
Pilbrow *v.* Pilbrow's Co. . . 50
Pilkington *v.* Green . . 11, 83
— *v.* Scott . . 9, 915, 916

PAGE

Pillar *v.* Llynvi Coal Co. . . . 119
Pilley *v.* Robinson 319
Pillot *v.* Wilkinson . . . 913
Pilmore *v.* Hood 574
Pilton, *Ex parte* 738
Pinaud *v.* Klockman . . . 1283
Pince *v.* Beattie . . . 78, 80
Pindar *v.* Ainsley 674
— *v.* Wadsworth . . . 705
Pinhorn *v.* Souster . . 663, 755
Pink *v.* Fleming . . . 1177, 1184
Pinnell's Case . . . 3, 12, 151
Pinner *v.* Arnold . . 29, 633, 1364
Pinto *v.* Santos . . . 325, 856
Piper *v.* Piper 428
Pipon *v.* Cope 1164
Pirie *v.* Steele 1210
Pistor *v.* Cater 688
Pitcairn *v.* Ogbourne . . . 1317
Pitcher *v.* Bailey 459
Pitman *v.* Universal Ins. Co. . 1195
— *v.* Woodbury . . 672, 688
Pitt *v.* Purssord 1101
— *v.* Shew 783
— *v.* Smith 125
— *v.* Yalden 892
Pittan *v.* Foster 218
Pitts *v.* Beckett 531
Planché *v.* Colburn . . 874, 914
— *v.* Fletcher . . . 1181
Plant *v.* Bourne 475
Plantamour *v.* Staples . . . 1151
Plaskett's Estate, *In re* . . 78
Platt *v.* Bromage 460
Playford *v.* U. K. Telegraph Co. . 308, 309
Pleasant *v.* Benson . . . 720
Plevins *v.* Downing . 67, 171, 544, 545
Plews *v.* Samuel 512
Plimley *v.* Westley . . . 1286
Plumbly, *In re* 951
Plumer *v.* Gregory 851
Plummer *v.* Whiteley . . . 681
— *v.* Wildman . . . 1011
— *v.* Woodburne . . 194
Plymouth (Countess) *v.* Throgmorton. 935
Pochin *v.* Pawley 350
Poingde-tre *v.* Roy. Exch. Corp. . 1206
Poirier *v.* Morris 1257
Polak *v.* Everett 1092
Pole *v.* Fitzgerald 1192
— *v.* Leask . . . 326, 327, 592
Polglass *v.* Oliver 168
Polhill *v.* Walter 328
Pollard *v.* Ogden 855
Pollen *v.* Brewer 736
Pollexfen *v.* Moore . . . 482
Pollitt, *In re* 894
— *v.* Forrest . . . 288, 775
Pollock *v.* Stables . . . 457, 951
— *v.* Stacy . . . 653, 682
Pomeranian (The) 1198
Pond *v.* Underwood . . . 164
Pontida (The) 836
Pontifex *v.* Farnham . . . 894
Pool's Case 55
Poole *v.* Adams . . . 482, 1213

PAGE

Poole *v.* Hill 504, 510
— *v.* Longueville . . . 775
— *v.* Middleton . . . 643
— *v.* Shergold 497
— *v.* Soady 431
— *v.* Warren 734
— (Mayor) *v.* Whitt . . 676, 758
Poole's Case 699
Pooley *v.* Budd 629
— *v.* Goodwin . . . 1338
— *v.* Harradine . . 1082, 1095
— Hall Co., *In re* . . . 381
Pope *v.* Duncannon (Lord) . . 517
— *v.* G. E. Ry. 519
— *v.* Roots 483
Poplett *v.* Stockdale . . . 77
Popple *v.* Sylvester 192
Popular Life Assur. Co., *In re* . 1236
Pordage *v.* Cole . . 55, 446, 448
Port Caledonia (The) . . . 871
Porter *v.* Cooper 470
— *v.* Drew 666
Porteus *v.* Watney 1003
Portland (Countess) *v.* Prodgers . 432
Portman *v.* Middleton . . . 282
— *v.* Mill 502
Portsea Isl. Building Soc. *v.* Barclay . . . 89
— Un. *v.* Whillier . . 1084
Postlethwaite *v.* Freeman . 140, 1005
Postmaster-General and Colgan's Court, *In re* 504
— *v.* Highland Ry. . . 1021
Pothonier *v.* Dawson . . 818, 826
Pott *v.* Clegg 202, 852
— *v.* Flather 626
Potter *v.* Brown 307
— *v.* Deboos 1312
— *v.* Duffield 37
— *v.* Faulkner . . 922, 927
— *v.* Inland Rev. Com. . . 1345
— *v.* Rayworth . . . 1278
— *v.* Saunders . . . 18
Potts *v.* Bell 103
— *v.* Plunkett 923
— *v.* Port Carlisle, &c. Ry. 923, 924
Poucher *v.* Norman . . . 868
Pougett *v.* Tomkyns . . . 1321
Poulteney *v.* Holmes . . . 22
Poulton *v.* Lattimore . . . 629
— *v.* L. & S. W. Ry. . . 1057
Pounder *v.* N. E. Ry. . . . 1026
Poussard *v.* Spiers & Pond 55, 147, 150
Pow *v.* Davis . . 284, 351, 352, 968
Powell *v.* Brodhurst 159, 163, 164, 188, 358
— *v.* Divett 190
— *v.* Duff 20
— *v.* Edmunds . . 65, 551
— *v.* Graham 417
— *v.* Gudgeon . . . 1177
— *v.* Horton 564
— *v.* Hyde 1179
— *v.* Jessop . . . 29, 637
— *v.* Jones 944
— *v.* Main Colliery Co. . . 929
— *v.* Marshall, Parkes & Co. . 435, 507

PAGE

Powell *v.* Powell 513
— *v.* Robins 247
— *v.* Smith . . 134, 298, 708
— *v.* Thomas 635
Power *v.* Barham 550
— *v.* Whitmore . . . 1011
Powers, *In re* 213
— *v.* Fowler 39
Powis *v.* Smith 317
Powles *v.* Innes . 1112, 1113, 1160
Pownal *v.* Ferrand . . . 459
Poynder *v.* Bluck 213
Poyser *v.* Beyfus 176
Praeger *v.* Brist. & Exeter Ry. . 1025
Pratt *v.* S. E. Ry. 866
— *v.* Thomas 1330
— *v.* Willey 160
Preece *v.* Corrie . . . 681, 773
Prehn *v.* Royal Bank of Liverpool . 1299
Preist *v.* Last 565, 566
Premier Indus Bk. *v.* Carlton Man. Co. . . 382
— *v.* Crabtree . 1307
Prescott *v.* Ingram . . . 655
Prested Miners Co. *v.* Gardner . 528
Preston *v.* Greenwood . . . 1135
— *v.* Luck 135
— *v.* Merceau . . . 65
— *v.* Tamplin . . . 341
Preston's Trustee *v.* Cooke . . 274
Prestwich *v.* Poley. . . 891, 893
Prestwick *v.* Marshall . . . 424
Price, *In re* 1324
— *v.* Al Ships Small Damage Ins. Assoc. . . . 1200
— *v.* Barker . . 175, 176, 1095, 1097
— *v.* Crouch 963
— *v.* Dyer 171, 300
— *v.* Easton 180, 308
— *v.* Green . . 99, 121, 289, 290
— *v.* Griffith 498
— *v.* Lea 538
— *v.* Ley 497
— *v.* Livingstone . . 994, 1139
— *v.* Maritime Ins. Co. . . 1142
— *v.* Moulton . . . 185, 192
— *v.* Neal 137, 467
— *v.* Nixon . . 50, 140, 624
— *v.* Penzance (Corporation) . 295
— *v.* Price . . 153, 154, 155, 186
— *v.* Salusbury 294
— *v.* Shute 1296
— *v.* Taylor . . 403, 1245, 1303
— *v.* Thomas 1330
— *v.* Union Lighterage Co. . 985, 1033
Prickett *v.* Badger . 874, 875, 934, 960, 961
Prideaux *v.* Bunnett . . . 567
— *v.* Criddle . . . 1290
— *v.* Lonsdale . . . 127
Priest *v.* Parrot 76
Priestley *v.* Fernie . . 327, 342, 973
— *v.* Fowler . . 921, 923
Prince *v.* Haworth 81
— *v.* Oriental Bank Corp. . 859
Prince of Wales Assur. Co., *In re* 391

PAGE

Prince of Wales Assur. Co. *v.* Harding . . 382, 383, 391, 1230
Pringle *v.* Hartley 1194
— *v.* Mollett 1006
Prior *v.* Hembrow . . . 261, 456
— *v.* Wilson 281
Prison Commissioners *v.* Middlesex 135
Pritchard *v.* Merch. Life Assur. Co. 1230
Proctor *v.* Sargent 99
Prodgers *v.* Langham . . . 488
Progress Assur. Co., *In re* . . 792
Prole *v.* Soady 300
— *v.* Wiggins 85
Propert *v.* Parker . . . 39, 57
Prosser *v.* Edmonds . . . 80
— *v.* Watts 493
Protector Loan Co. *v.* Grice . . 286
Proud *v.* Bates 667
Proudfoot *v* Hart 686
— *v.* Montefiore . 1121, 1122, 1124
Proudlove *v.* Twemlow . . . 804
Prouting *v.* Hammond . . . 470
Provender *v.* Wood . . . 308
Provincial Bill-posting Co. *v.* Low Moor Iron Co. . . . 783
Prudential Assur. Co. *v.* Inland Rev. Com. 1383
Prugnell *v.* Gosse 97
Pryce, *In re* 270
Pryce-Jones *v.* Williams . . 486
Public Works Commissioners *v.* Hills 288
Puckett's Contract, *In re* . . 495
Puget de Bras *v.* Forbes . . 1265
Pugh *v.* Arton . . . 702, 703
— *v.* Leeds (Duke) . 58, 657, 1229
— *v.* L. B. & S. C. Ry. . . 1237
— *v.* Stringfield . . . 316
Pulbrook *v.* Lawes . . . 23, 26
Pullen *v.* Palmer 780
Pulling *v.* G. E. Ry. . . . 245
Pullman *v.* Hill 941
Pulsford *v.* Richards . . . 125
Pultney *v.* Keymer . . . 962
Punnett, *Ex parte* . . 654, 655, 754
Purdew *v.* Jackson . . . 272
Purdon *v.* Purdon 470
Purves *v.* Landell 894
Purvis *v.* Rayer 490
Pusey *v.* Pusey . . . 300, 629
Pust *v.* Dowie . . 55, 145, 976
Pybus *v.* Gibb 1086
Pye *v.* British Automobile Comm. Syndicate 288
Pyke *v.* Williams 480
Pyle *v.* Partridge . . 1372, 1373
Pym *v.* Campbell 71
Pyman *v.* Dreyfus 1004
— *v.* Marten 1157

QUARREL *v.* Beckford . . . 817
Quebec Mar. Ins. Co. *v.* Com. Bank of Canada 1164
Queen (The) 992
Queensberry Indust. Soc. *v.* Pickles 402

PAGE

Queensbury (Duke) *v.* Cullen . 396
Queen's College (Provost, &c.) *v.* Hallett 691
Queensland Merc. and Agency Co., *In re* 227
Queensland National Bank *v.* P. & O. S.S. Co. . . 806, 974, 984
Quelin *v.* Moisson 307
Quick *v.* Ludburrow . . . 253
Quilter *v.* Mapleson . . . 714
Quincey *v.* Sharpe 212
Quincy, *Ex parte* 703
Quinion *v.* Horne 486

RAATZ, *Ex parte* . . . 153, 154
Raatz, *In re* 153, 154
Rabey *v.* Gilbert . . . 1278, 1280
Rackham *v.* Marriott . . . 212
Radburn *v.* Morris 176
Radcliff *v.* Hayes 635
Radford *v.* Smith 144
Radley *v.* L. & N. W. Ry. . . 1030
Rae *v.* Hackett 973
Raffety *v.* Schofield . . . 1214
Raffles *v.* Wichelhaus . . 47, 134
Raikes *v.* Todd 165
Railton *v.* Matthews . . 1091, 1098
— *v.* Wood . . . 774, 794
Rainbow *v.* Howkins . . 350, 633
— *v.* Juggins . . . 1103
Raine *v.* Bell 1140, 1152
Rainsford *v.* Jas. Keith and Blackman Co. . . 383, 648
— *v.* Fenwick . . . 409
Rainy *v.* Vernon 960
Raitt *v.* Mitchell . . . 905, 967
Raleigh *v.* Atkinson . . . 945
Ralli *v.* Dennistoun . . . 138
— *v.* Janson . . . 1200, 1208
Ralph *v.* Harvey 390
Ramage *v.* Womack . . . 749
Ramazotti *v.* Bowring . . 322, 592
Rambert *v.* Cohen 1337
Ramsbottom *v.* Davies . . . 1332
— *v.* Mortley . 1361, 1370
— *v.* Tunbridge . . 1370
Ramsden *v.* Dyson and Thornton 480, 635
Ramsgate Corporation *v.* Debling . 635
Ramsgate Vict. Hotel Co. *v.* Montefiore 17
Ramskill *v.* Edwards . . . 196
Ramstrom *v.* Bell 1135
Ramuz *v.* Crowe 1265
Rand *v.* Vaughan 795
Randal *v.* Cockran 1221
— *v.* Harvey 9
Randall *v.* Lynch 53
— *v.* Morgan 1316
— *v.* Newson . . 564, 566, 567
— *v.* Raper . . . 284, 632
— *v.* Rigby 240
Randegger *v.* Holmes . . . 81
Randell *v.* Trimen . . . 352, 969
Ranelagh (Lord) *v.* Melton . . 503
Ranken *v.* Alfaro 1300
Rankin *v.* Huskisson . . . 303
— *v.* Lay 294

PAGE
Rankin *v.* Potter 1187
Rann *v.* Hughes . . . 4, 9, 29
Rannie *v.* Irvine 98
Ransome *v.* East Co. Ry. . 1060, 1061, 1063, 1064
Ranson *v.* Platt 849
Raper *v.* Birkbeck . . . 189
Raphael *v.* Bank of England...157, 1256, 1309
— *v.* Pickford . . . 1051
— *v.* Thames Valley Ry. . 294
Rapid Road Transit Co., *In re* . 966
Rapp *v.* Latham 851
Rashdall *v.* Ford . . . 127, 351
Ratcliff *v.* Davies 910
Ratcliffe *v.* Barnard . . . 894
— *v.* Davies 825
— *v.* Shoolbred 1117
Rathbone Bros. *v.* McIver, Sons & Co. 974, 985, 989
Rattenberry, *In re* . . . 157
Ravee *v.* Farmer 194
Rawlings, *Ex parte* 224, 269, 635, 831
— *v.* Bell 967
— *v.* Morgan . . . 687, 752
Rawlins *v.* Briggs 679
— *v.* Burgis 482
— *v.* Wickham 125, 126, 546, 547
Rawlinson *v.* Clarke . . . 102
— *v.* Shaw . . . 258
Rawson *v.* Johnson . . 598, 608
— *v.* Walker 65
Rawstorne *v.* Gandell . . . 177
Ray *v.* Barker 585
— *v.* Grant 157
— *v.* Jones 178
Rayment or Raymond *v.* Minton . 147, 939
Raymond *v.* Fitch 243
Rayner *v.* Condor 290
— *v.* Fussey 1095
— *v.* Godmond . . . 1202
— *v.* Grote 346
— *v.* Preston 482
— *v.* Rederiaktiebolaget Condor 972
Read's Case 254
Read *v.* Anderson 104
— *v.* Brown 222
— *v.* Burley 790
— *v.* Dunsmore 932
— *v.* Fairbanks 586
— *v.* Hutchinson . . . 130
— *v.* Legard 436
— *v.* Price 219
Reade *v.* Meniaeff . . . 138
Reader *v.* Kingham . . . 30
Readhead *v.* Midland Ry. . 451, 566, 1015, 1017, 1020
Reardon *v.* Swaby . . . 1371
Reason *v.* Wirdnam . . . 874
Reay *v.* White . . . 88, 188
Reddaway *v.* Banham . . . 575
Reddich *v.* Indemnity Mut. Mar. Ins. Co. 1110
Redding *v.* Wilkes . . . 481
Rede *v.* Burley 786
Rederi Aktiebolaget Nordstjernan *v* Salvesen & Co. . . . 970
PAGE
Redgrave *v.* Hurd 126, 547
Redhead *v.* Cator 313
Redman *v.* Redman . . . 1318
— *v.* Wilson . . . 1175
Redmayne *v.* Forster . . . 841
Redmond *v.* Smith . 1160, 1163
Redpath *v.* Roberts 763
Reece *v.* Rigby 893
Reed *v.* Deere 1335
— *v.* Kilburn Co-operative Soc. 50, 140
— *v.* Moore 430
— *v.* R. Exch. Assur. Co. . . 1223
Reedie *v.* L. & N. W. Ry. . . 846
Rees *v.* Berrington . . . 1093
— *v.* Davies 739
— *v.* De Bernardy . . 81, 133
— *v.* Thomas 928
— *v.* Williams 895
Reese River Silver Min. Co. *v.* Smith 126, 129
Reeve *v.* Berridge 491
— *v.* Bird 719
— *v.* Davis 341
— *v.* Jennings 36
— *v.* Palmer . . . 207, 865
— *v.* Whitmore . . 794, 831
Reeves *v.* Butcher . . 205, 206
— *v.* Capper 909
— *v.* Hearne 206
— *v.* Watts 311
Refuge Ass. Co. *v.* Kettlewell 334, 1228
Reg. *v.* Birmingham . . . 1319
— *v.* Bowerman . . . 1261
— *v.* Brancaster Churchwardens 440
— *v.* Chadwick . . . 1320, 1323
— *v.* Charretie 91
— *v.* Chawton Inhabitants . 658
— *v.* Everdon 1330
— *v.* Frere 1065
— *v.* General Cemetery Co. 441, 841
— *v.* Humphery 55
— *v.* Hurstbourne Tarrant Churchwardens . 440, 441
— *v.* Kent Justices . . . 108
— *v.* Lee 699
— *v.* Lond. & Southampton Ry. 735
— *v.* Lord 406
— *v.* Millis 1320
— *v.* Norfolk Sewers Commissioners 440
— *v.* Poulter 735
— *v.* Rotherham Local Board . 397, 441
— *v.* Rymer 771
— *v.* Salisbury (Marquis) . . 634
— *v.* Silvester 114
— *v.* Smith 938
— *v.* Spurrell 721
— *v.* Stamford (Mayor) . . 376
— *v.* Stoke-on-Trent . . 69, 933
— *v.* Treasury (Lords) . 462, 897
— *v.* Victoria Park Co. . . 440
— *v.* Warwick (Mayor) . . 376
— *v.* Welch . . 9, 452, 915, 916
— *v.* Wood 372
— *v.* Wortley 1368
Regnart *v.* Porter 776
Reichel *v.* Oxford (Bishop) . . 94

	PAGE
Reid *v.* Allan	391
— *v.* Dreaper	347
— *v.* Explosives Co.	386, 930, 931
— *v.* Furnival	1252
— *v.* Macbeth	84, 586
— *v.* Parsons	710
— *v.* Reid	262, 421
v. Rigby	957, 1301
— *v.* Teakle	425
Reimer *v.* Ringrose	1198
Rein *v.* Lane	1360
Reis, *In re*	46
Reischer *v.* Borwick	1175
Reliance (The)	836
Renals *v.* Cowlishaw	229, 694
Rendall *v.* Andreæ	242, 247, 248
Reneaux *v.* Teakle	425
Reniger *v.* Fogossa	584
Rennie *v.* Clarke	50, 394
— *v.* Robinson	234. 683
— *v.* Wynn	393
Renpor (The)	869
Repetto *v.* Millar's Karri Jarrah Forests	971, 1008
Reuss *v.* Picksley	36
Reuter *v.* Elect. Tel. Co.	376
— *v.* Sala	542, 601, 625
Revell, *Ex parte*	435
Revelstoke (Lord) *v.* Inland Rev. Com.	1350
Rew *v.* Pettet	218
Rex *v.* Amersham	1359
— *v.* Atherton	920
— *v.* Aylesbury	1359
— *v.* Batheaston	918
— *v.* Bathurst	736
— *v.* Bigg	378
— *v.* Billinghurst	1321
— *v.* Birdbrooke	918, 920, 921
— *v.* Birmingham County Court Judge	514
— *v.* Bourton	1360
— *v.* Bradford	1359
— *v.* Brampton	932
— *v.* Burbach	937
— *v.* Burton-on Trent	1321
— *v.* Butterton	707
— *v.* Byker	920
— *v.* Carter	373
v. Cheshunt	653
— *v.* Christ's Parish, York	921
— *v.* Clare	920
v. Cleworth	114
— *v.* Costello	941
v. Cotton	774
v. Cox	113
— *v.* Dedham	920
— *v.* Dodd	369
— *v.* Dodderhill	920, 921
— *v.* Elstack	920
— *v.* Farleigh Wallop	920
— *v.* Gt. Bowden	921
— *v.* Gt. Yarmouth	920, 921
— *v.* Hales Owen	938
— *v.* Halesworth	1358
— *v.* Hampreston	921
— *v.* Hanbury	920
— *v.* Haughley	373
Rex *v.* Herron and Montgomery	1084, 1086
— *v.* Herstmonceaux	708
— *v.* Humphrey	908
— *v.* Islip	933
— *v.* Ivens	765
— *v.* Keynsham	1360
— *v.* Lambeth	921
— *v.* Lidney	920
— *v.* Londonthorpe	697
— *v.* Long Buckby	1338
— *v.* Longnor	99, 938
— *v.* Louth	1331, 1332
— *v.* Lynn	930
— *v.* Lyth	918
— *v.* Marsh	476
— *v.* Mead	113
— *v.* Merchant Taylors' Co.	441
— *v.* Mitcham	920
— *v.* Nether Knutsford	937
— *v.* Newton Toney	920
— *v.* New Windsor	920
— *v.* Northwingfield	122
— *v.* Northwold	920
— *v.* Odiham	920
— *v.* Otley	697
— *v.* Pendleton	917
— *v.* Polesworth	933
— *v.* Porter	75, 123
— *v.* Pucklechurch	918, 920
— *v.* Ridgwell	21, 1345, 1368
— *v.* Rolvenden	921
— *v.* St. Andrew, Pershore	921
— *v.* St. Dunstan, Kent	699
— *v.* St. Kath. Dock Co.	440
— *v.* St. Matthew's, Ipswich	921
— *v.* St. Petrox	1359
— *v.* Sandhurst	920
— *v.* Sankey	965
— *v.* Scammonden	72
— *v.* Seaton	918
— *v.* Shinfield	937
— *v.* Skeffington	1358
— *v.* Sow	917
— *v.* Stokesley	917
— *v.* Sudbrooke	933
v. Topping	712
— *v.* Warminster	920
— *v.* Weeks	1331
— *v.* Welford	932
— *v.* Weyhill	917, 921
— *v.* Whitnash	114
— *v.* Wilkinson	864
— *v.* Wilson	736
— *v.* Wishford	937
v. Worfield	919
— *v.* Wroxton	1321
— *v.* Younger	113
Reynell *v.* Lewis	395
— *v.* Sprye	80
Reyner *v.* Pearson	1182
Reynolds *v.* Ashby & Son	697, 702, 783, 840
— *v.* Bridge	289, 290
— *v.* Doyle	208, 459
— *v.* Jex	340, 1000
— *v.* Nelson	141, 503
— *v.* Waring	480
— *v.* Wheeler	456, 1101

PAGE
Reynolds *v.* Wright . . . 244
Rhadamanthe (The) . . . 838
Rhind *v.* Wilkinson . . . 1112
Rhodes, *In re* 437
— *v.* Forwood . . . 57
— *v.* Moules 851
— *v.* Smethurst . . . 205
Rhymney Ry. *v.* Brecon, &c. Ry. . 142, 173, 603
— *v.* Rhymney Iron Co. . 280, 1063
Rialto (The) 871
Rice *v.* Baxendale 1072
— *v.* Chute 354
— *v.* Reed 175, 1308
— *v.* Shepherd 430
Rich *v.* Aldred 911
— *v.* Coe 341
— *v.* Jackson 65
— *v.* Pierpoint 897
— *v.* Woolley 799
Richards, *In re* 1252
— *v.* Browne . . . 252
— *v.* Frankum . . . 1247
— *v.* Heather . . . 260
— *v.* L. B. & S. C. Ry. . 1038, 1053, 1077
— *v.* May 886
— *v.* Porter 531
— *v.* Revitt . . 303, 304, 305, 306
— *v.* Richards . . . 433
— *v.* Starck . . . 105
— *v.* Symons . . . 830
Richardson, *Ex parte* . . 842, 843
— *v.* Barnes . . . 138
— *v.* Barry . . . 213
— *v.* Brown . . . 553
— *v.* Cartwright . . 338
— *v.* Chasen . . . 507
— *v.* Du Bois . . . 437
— *v.* Dunn . . 284, 352
— *v.* Gifford . . 43, 672, 688
— *v.* Goss . . 618, 908
— *v.* G. E. Ry. . . 1015
— *v.* Hall . . . 683
— *v.* Jackson . . . 170
— *v.* Langridge . . 661
— *v.* Lond. Assur. Co. . 1152
— *v.* Mellish . . . 87
— *v.* Metropolitan Ry. . 1026
— *v.* N. E. Ry. 1028, 1043
— *v.* Smith . . 298, 517
— *v.* Williamson . 351, 352
— *v.* Willis . . . 455
— Spence & Co. *v.* Rowntree . . 866, 1036
Richardsons and Samuel & Co., *In re* 979
Richdale, *Ex parte* . . 435, 1257
Riches, *In re* 362
Richmond *v.* Coles . . . 115
— *v.* Smith . . . 767
Rickett *v.* Green . . . 43, 737
Ricketts *v.* Bennett . . . 389
— *v.* Weaver . . . 242
Rickford *v.* Ridge . . . 1290
Rickman *v.* Carstairs . . 1146
Ridd *v.* Thorne 964
PAGE
Ridgway *v.* Hungerford Market Co. . . 918, 935
— *v.* Stafford (Lord) . 803
— *v.* Wharton . . 36, 298, 328, 529
Ridley *v.* Plymouth Baking Co. . 383
— *v.* Ridley . . . 35, 294
— *v.* Taylor 363
Ridout *v.* Bristow . . . 74, 416
Ridsdale *v.* Newnham . . . 1167
— *v.* Shedden . . . 1135
Riga (The) 341
Rigby *v.* Connol 97
Rigge *v.* Burbidge . . . 630, 882
Riggs, *In re* 268, 670
Right *v.* Beard . . . 662, 720
— *v.* Cuthell . . . 719, 722
— *v.* Darby 720
— *v.* Proctor 652
Rigley *v.* Daykin 453
Rikard Nordraak (S.S.) . . 973
Riley, *In re* 504
— *v.* Baxendale . . 921, 923
— *v.* Pakington . . . 394
— *v.* Warden 117
Rimell *v.* Sampayo . . . 338
Rimmer *v.* Webster . . . 638
Ringland *v.* Lowndes . . . 441
Ripley *v.* Lordan 878
— *v.* M'Clure . . 56, 146, 172
— *v.* Scaife 997
— *v.* Waterworth . . . 244
Ripon City (The) 966
Risbourg *v.* Bruckner . . 322, 967
Risney *v.* Selby 547
Ritchie *v.* Atkinson . . . 997
— *v.* Smith . . 85, 113, 749
Rivaz *v.* Gerussi 1117
Rivers *v.* Griffiths . . . 168
Robarts *v.* Robarts . . . 213
— *v.* Tucker . . 852, 855, 858
Robb *v.* Green . . 452, 917, 930
Robbins *v.* Alexander . . 250, 252
— *v.* Fennell . . 462, 469
— *v.* Heath 469
— *v.* Whyte 759
Roberts, *In re* . . 247, 251, 271, 274, 344
— *v.* Barker 69
— *v.* Berry 503
— *v.* Brett . 54, 56, 141, 884
— *v.* Bury Commissioners . 147, 887
— *v.* Hardy 437
— *v.* Havelock . . . 876
— *v.* Holland . . 239, 317
— *v.* Massey 508
— *v.* Roberts . 247, 251, 344
— *v.* Rose 635
— *v.* Security Co. . 1219, 1240
— *v.* Smith . . 453, 873, 926
— *v.* Tucker 34
— *v.* Walker 259
— *v.* Watkins . . . 878
— *v.* Wyatt . . . 174, 486
Robertshaw *v.* Bray . . . 520
Robertson *v.* Ewer . . . 1127
— *v.* Fauntleroy . . 309
— *v.* French . 45, 1127, 1136

PAGE

Robertson *v.* Jackson . . . 1006
— *v.* Lockie . . . 174
— *v.* Wait . . . 277
Robey *v.* Ollier . . . 1300
— *v.* Snaefell Mining Co. . 144
Robins *v.* Bridge 351
— *v.* Evans 500
— *v.* Goddard 878
— *v.* Goldingham . . . 963
— *v.* Gray 771
— *v.* May 1285
Robinson *v.* Anderton . . 462, 561
— *v.* Bland . . 59, 61
— *v.* Cook 168
— *v.* Cox 76
— *v.* Davison . . 150, 195
— *v.* Dunmore . . . 1021
— *v.* Ferreday . . . 169
— *v.* G. W. Ry. . 1024, 1045, 1048, 1050
— *v.* Harman . . 277, 750
— *v.* Hawksford . . . 1290
— *v.* Heuer . . 100, 303
— *v.* Hindman . . . 932
— *v.* Hoffman . . . 780
— *v.* Kelvert . . . 665
— *v.* Knights . . . 997
— *v.* Learoyd . . . 733
— *v.* Lyall 339
— *v.* Lynes 267
— *v.* Macdonnell . . 1353
— *v.* Mearns . . . 467
— *v.* Mollett . . 70, 951
— *v.* Musgrove . . . 500
— *v.* Nahon . . . 434
— *v.* Ommaney . . 196, 1310
— *v.* Page 171
— *v.* Price 1012
— *v.* Read 161
— *v.* Rutter . . . 345
— *v.* S. W. Ry. . 1031, 1039
— *v.* Tobin 1134
— *v.* Touray . 1133, 1134, 1336
— *v.* Turpin . . . 993
— *v.* Waddington . . 803
— *v.* Wall 477
— *v.* Ward . . . 857, 900
— Gold Mining Co. *v.* Alliance Mar. Assur. Co. 1107, 1178, 1179, 1180
Robison *v.* Gosnold . . . 428
Robson, *Ex parte* . 1085, 1096, 1104
— *v.* Biggar 803
— *v.* Drummond . . 358, 888
— *v.* Eaton 464
— *v.* Godfrey . . . 886
— *v.* N. E. Ry. . . . 1026
— *v.* Oliver 1270
Rochefoucauld *v.* Boustead . . 60
Rochester (Bishop of) *v.* Le Fanu . 170, 681
— (Dean) *v.* Pierce . . 375
Rock *v.* Leighton 251
— Port Land Co. *v.* Wilson . 657
Rocke *v.* Hart 857
Roddam *v.* Morley . . . 219
Roddick *v.* Indemnity Mut. Mar. Ins. Co. . . . 1127, 1130

PAGE

Rodger *v.* Comptoir d'Escompte de Paris . . . 223, 616, 620
Rodgers *v.* Maw 457
— *v.* Parker 804
Rodney (The) 989
Rodocanachi *v.* Elliott . 1180, 1181
— *v.* Milburn . . 591, 995, 1073
Rodwell *v.* Phillips . . . 27
Roe *v.* Fairbanks 719
— *v.* Galliers 712
— *v.* Harrison . . 668, 669
— *v.* Hayley . . . 230, 235
— *v.* Lees 659
— *v.* Paine 711
— *v.* Pierce 722
— *v.* Sales 668
— *v.* Street . . . 719, 730
— *v.* Wiggs 732
Roelandts *v.* Harrison . . . 994
Roffey *v.* Greenwell . . . 279
— *v.* Henderson . . 701, 703
Roger's Case 17
Rogers, *In re* 274
Rogers *v.* Boehm 942
— *v.* Hadley . . . 68, 71
— *v.* Head . . . 982, 1019
— *v.* Hosegood . 235, 484, 694
— *v.* Humphreys . . . 758
— *v.* Ingham 460
— *v.* Kingston . . . 84
— *v.* Kingston-upon-Hull Dock Co. . . . 724
— *v.* Lambert . 821, 847, 849, 912, 954
— *v.* Langford . . . 136
— *v.* Macarthey . . . 1107
— *v.* Maddocks . . 99, 121
— *v.* Price 451
— *v.* Rice 715
— *v.* Spence 271
Rogers, Eungblut & Co. *v.* Martin 787
Rohde *v.* Thwaites . . 538, 588
Rohl *v.* Parr . . . 1028, 1201
Rolfe *v.* Abbott 408
— *v.* Peterson . . . 288, 706
Rolin *v.* Steward . . 450, 854, 860
Rollason, *In re* 828
— *v.* Leon 651
Rolls *v.* Miller 695
— *v.* Yate 260
Rolph *v.* Crouch 284
Romer & Haslam, *In re* . . 153
Romford Canal Co., *In re* . 221, 815
Rondeau *v.* Wyatt 481
Ronneberg *v.* Falkland Islands Co. 284
Roose, *In re* 27
Rooth *v.* N. E. Ry. . . . 1046
— *v.* Wilson . . . 828, 863
Roots *v.* Dormer (Lord) . 478, 538
— *v.* Williamson . . . 646
Roper *v.* Bumford 153
— *v.* Coombes 507
— *v.* Holland 472
— *v.* Johnson . . 603, 626, 627
— *v.* Lendon . . . 81, 1218
— *v.* Williams . . . 304, 306
Rosario (The) 871
Roscorla *v.* Thomas . . . 545

PAGE
Roscow *v.* Corson 1183
Rose *v.* Bank of Australasia . 984, 1011
— *v.* Buckett 271
— *v.* Hart 907
— *v.* Main 84
— *v.* N. E. Ry. 1026
— *v.* Poulton . . . 260, 313
— *v.* Savory 473
— *v.* Sims 1257
— *v.* Watson . . . 509, 512
Rosenbaum *v.* Belson . . . 329
Rosenberg *v.* Cook 483
Rosetti *v.* Gurney . . . 1193, 1198
Rosevear Clay Co., *Ex parte* . . 589, 605, 613
Ross *v.* Bradshaw 1228
— *v.* Buxton 963
— *v.* Hill 1019, 1020
— *v.* Hunter 1183
— *v.* Moses . . . 640, 820
Rosse *v.* Bramsteed . . . 772
Rosseter *v.* Cahlmann . . 63, 109
Rossiter *v.* Miller . . . 15, 475
Roswell *v.* Vaughan . 521, 523, 560
Rosyer *v.* Langdale . . . 9
Rotch *v.* Edie 1181
Rotherham Alum and Chemical Co., *In re* 380
Rothery *v.* Munnings . . . 213
Rothschild *v.* Inland Rev. Com. . 1379
Rothwell *v.* Humphreys . . 814
Round *v.* Bell 201
Rourke *v.* Short 105
— *v.* White Moss Colliery Co. 916
Rouse *v.* Bradford Banking Co. . 1082, 1093, 1094
Rousillon *v.* Rousillon . 96, 122, 455
Routh *v.* Macmillan . . 336, 975
Routledge *v.* Burrell . . . 1166
— *v.* Grant . . 14, 16
— *v.* Ramsay . . . 213
— & Sons, *In re* . . . 384
Roux *v.* Salvador . . . 1187, 1201
Row *v.* Dawson . . . 221, 225
Rowcroft *v.* Lomas . . . 212
Rowe, *In re* 157
— *v.* London School Board . 514
— *v.* Tipper 1274
— *v.* Young 1264
Rowell *v.* Inland Rev. Com. . . 1347
— *v.* Rowell . . . 1325, 1326
Rowlands *v.* Springett . . . 1275
Rowley *v.* Adams 249
Rowson *v.* Atlantic Transport Co. . 989
Roxburghe *v.* Robertson . . 69
Royal Arch (The) 835
Royal Bank of Scotland *v.* Commercial Bank of Scotland . 1300
Royal Bank of Scotland *v.* Cuthbert 199
— — *v.* Tottenham . . 1245, 1257, 1377
Royal Bristol Building Society *v.* Bomash 482, 514
Royal Brit. Bank *v.* Turquand 382, 815
Royal Ex. Assur. Co. *v.* McSwiney . 1146
Royal Ex. Assur. Co. *v.* Sjoforsakrings, &c. Vega . . 59, 1125, 1131, 1134, 1381
Royal Ex. Ship Co. *v.* Dixon . 1010
Royal Mail Co. *v.* English Bank of Rio 1012
Royal Mail Co. and Riv. Plate S.S. Co., *In re* 1007
Royle *v.* Busby 953
Ruabon S.S. Co. *v.* London Assurance 1192
Rubery *v.* Stevens 248
Rucker *v.* London Assur. Co. . . 1149
Ruckmaboye *v.* Mottichund . . 219
Rudd *v.* Lascelles . . . 498, 514
Ruddock *v.* Lowe . . . 898, 899
Ruffey *v.* Henderson . . . 634
Ruffles *v.* Alston 1326
Rugg *v.* Minett . . . 587, 588
— *v.* Weir 140, 624
Ruggles *v.* Gen. Interest Ins. Co. . 1121
Rumball *v.* Ball . . . 144, 1265
— *v.* Metropolitan Bank . 1289
Rummens *v.* Robins . . . 515
Rumsey *v.* George 261
— *v.* N. E. Ry. . 446, 453, 868, 1037
Runger *v.* G. W. Ry. . . . 880
Runquist *v.* Ditchell . . 338, 343
Ruppell *v.* Roberts . . . 324
Rusby *v.* Scarlett 337
Rusden *v.* Pope . . . 833, 834
Rush *v.* Lucas . . . 706, 743
Rushbrook *v.* Hood . . . 1331
Rushforth *v.* Hadfield . . 907, 1057
Russell *v.* Austin Fryers . . 223
— *v.* Bangley . . . 160
— *v.* Bell 268
— *v.* Harford 635
— *v.* Inland Rev. Com. . . 1354
— *v.* Langstaffe . . . 1249
— *v.* Sa da Bandiera . 884, 886
— *v.* Thornton . . . 1119
— Son & Scott, *In re* . . 895
Russian Petroleum Co., *In re* . 384
Russo-Chinese Bank *v.* Li Yau Sam 328, 332, 341
Rust *v.* Nottidge 916
Rutherford, *In re* . . . 208, 217
Rutter, *In re* 1322
Ruttinger *v.* Temple . . 9, 413
Ruys *v.* Roy. Exch. Assur. . . 1194
Ryal *v.* Rich 734
Ryall *v.* Rowles . . . 559, 818
Ryan *v.* Sams 434
— *v.* Shilcock 782
Ryder *v.* Townsend (Lord C.) . 167
— *v.* Wombwell . . . 410
Rylands *v.* Kreitman . . . 601

SADLER, *In re* . . . 821, 954
— *v.* Belcher . . . 853
— *v.* Dixon 1164
— *v.* Evans 354
— *v.* Henlock . . . 916
— *v.* Johnson . . . 1365
— *v.* Leigh 323
— *v.* Robins 455
— *v.* Whiteman . . 89, 809
Safety Explosives Ltd., *In re* . 964
Saffery, *Ex parte* 84

PAGE

Saffery *v.* Mayer 104
Sailing Ship Garston Co. *v.* Hickie, Borman & Co. . 987, 994, 1138, 1139, 1149, 1154, 1175
St. Albans (Duke) *v.* Ellis . . 51
— *v.* Shore . . 502
St. Aubyn *v.* Smart . . . 851
St. Cloud (The) 341
St. James' Club, *In re* . . . 396
St. John (Ld.) *v.* St. John (Lady) 1324. 1326
St. John's College *v.* Murcott . 791
St. Paul Fire & Mar. Ins. Co. *v.* Morice . . 1177, 1178, 1180
St. Saviour's (Wardens of) *v.* Bostock 1085
St. Thomas' Hospital (Governors) *v.* Richardson 270
Sainter *v.* Ferguson . . 98, 290
Salaman *v.* Holford . . . 678
— *v.* Sec. of State for India 354
Sale *v.* Lambert 37
Salford (Mayor) *v.* Ackers . . 878
— *v.* Lever . . 957
Salisbury *v.* Hatcher . . . 507
Salmon *v.* Ward 547
— *v.* Watson . . . 471, 633
Salomons *v.* Pender . . 132, 943
Salop (Countess) *v.* Crompton . 690
Salouci *v.* Johnson . . . 1168
Salt, *In re* 247
Salte *v.* Field 618
Salter *v.* Kidgley 315
— *v.* Woollams . . 597, 600
Saltmarshe *v.* Hewett . . . 95
Salton *v.* New Beeston Cycle Co. . 328, 333
Saltoun *v.* Houston . . . 47
Salts *v.* Battersby 681
Salvador (The) 148
Salvador *v.* Hopkins . . . 1131
Salvesen *v.* Rederi Aktiebolaget Nordstjernan . . . 969
Salvin *v.* James 1219
Sampson *v.* Easterby . 47, 50, 236
Samson, *In re* . . . 250, 252
— *v.* Rhodes . . . 485
Samuel *v.* Green 327
— *v.* Newbold . . 413, 810
— *v.* Roy. Exch. Assur. Co. . 1148, 1153, 1155
— *v.* Whetherly . . . 321
Sandars *v.* Spencer . . . 767
Sandbach and Edmundson, *In re* . 484
Sandbach's Contract, *In re* . . 495
Sandeman *v.* Scurr . . . 341
Sanders *v.* Coward . . . 205
— *v.* Davis 840
— *v.* Jenkins . . . 1004
— *v.* Maclean . . . 590
— *v.* Rodway . . 297, 1324
— *v.* St. Neots Guard. . . 376
v. Sanders . . . 201
— *v.* Venzeller . . . 1000
Sanders' Case 1236
Sanderson *v.* Aston . . . 1092
— *v.* Bell 888
— *v.* Berwick-upon-Tweed Corporation . 232, 665

PAGE

Sanderson *v.* Collins . . 847, 864
— *v.* Graves . 67, 171, 469
— *v.* Symonds . . . 190
Sandford *v.* Clarke . . 726, 763
Sandilands *v.* Marsh . . . 1105
Sandill *v.* Franklin . . . 728
Sandiman *v.* Breach . . . 114
Sands *v.* Clarke 1270
Saner *v.* Bilton . . . 685, 690
Sanger *v.* Sanger 264
Sanguinetti *v.* Pacific St. Nav. Co. 1007
Sankey Brook Coal Co., *In re* . 380
Sansom *v.* Sansom 93
Santa Fé Land Co. *v.* Forestal Land, etc. Co. . . . 15
Santiago (The) 870
Santley *v.* Wilde 817
Sappho (The) 871
Sapsford *v.* Fletcher . . . 457
Sapwell *v.* Bass 283
Saqui *v.* Stearns 1240
Sara (The) 835
Sard *v.* Rhodes 153
Sargent, *Ex parte* . . . 841
— *v.* Morris . . . 345, 1068
— *v.* Wedlake 177
Sarl *v.* Bourdillon . . 37, 40, 530
Sarquy *v.* Hobson 1177
Sarson *v.* Roberts 761
Saunders *v.* Drew 995
— *v.* Milsome . . . 192
— *v.* Musgrave . . . 660
— *v.* Topp 533
— *v.* Wakefield . . . 475
Saunderson *v.* Collins . . . 901
— *v.* Jackson . . 41, 529
— *v.* M'Callum . . 1135
— *v.* Piper . 47, 48, 1246
— *v.* Symonds . . 1135
Savage *v.* Aldren 205
— *v.* Foster 493
Savill *v.* Barchard . . . 907
— Bros., Ltd. *v.* Bethell . . 46
Saville *v.* Campion . . 971, 998
— *v.* Robertson . . . 361
Savona (The) . . 977, 980, 983
Sawtell *v.* Loudon . 1119, 1135, 1336
Sawyer *v.* Mawgridge . . . 53
— *v.* Mercer 251
Saxby *v.* Fulton . . . 59, 61
Saxon *v.* Blake 347
Saxon S.S. Co. *v.* Union S.S. Co. . 1004
Saxty *v.* Wilkin 183
Say *v.* Barwick 516
Say and Seal's Case (Lord) . . 48
Sayer *v.* Chaytor 320
— *v.* Wagstaff 153
Sayers *v.* Collyer 304
— *v.* London and Birmingham Flint Glass Co. . . 571
Sayles *v.* Blane 645
Scadding *v.* Eyles . . . 471
Scaife *v.* Farrant . . 1020, 1033
Scaltock *v.* Harston . . . 689
Scammell *v.* Wilkinson . . . 255
Scaramanga *v.* Stamp . . . 1170
Scarborough (Mayor) *v.* Butler . 377
— *v.* Cosgrove 761, 762, 846

PAGE
Scarf *v.* Jardine . . . 130, 366
Scarfe *v.* Morgan . 114, 888, 903, 905
Scarpellini *v.* Atcheson . . . 433
Scarr *v.* General Accident Assur. Corp. . . 1236, 1237, 1238
Scarsdale (The) 937
Schack *v.* Anthony . . . 192
Schibsby *v.* Westenholz . . 455
Schilizzi *v.* Derry 979
Schloss *v.* Heriot . . 985, 1011, 1013
— *v.* Stevens . 1107, 1135, 1184
Schmaling *v.* Thomlinson . 221, 959
Schmaltz *v.* Avery . . . 322, 346
Schneider *v.* Heath . 333, 546, 577
— *v.* Norris . . . 41
Scholefield *v.* Robb . . . 549
Scholey *v.* Ramsbottom . . 857
— *v.* Walton 218
Scholfield *v.* Londesborough (Earl) 857, 858, 1295
Schoolbred *v.* Nutt . . . 1116
Schotsmans *v.* Lanc. & York. Ry. . 617
Schreiber *v.* Creed . . . 306
Schroder *v.* Thompson . . . 1180
Schroeder *v.* Central Bank of London 224
Schultz *v.* Astley 1248
Schulze *v.* G. E. Ry. . 1073, 1075
Schumann, *Ex parte* . . . 930
Schwan (The) 988
Scio (The) 834
Scobie *v.* Collins . . . 662, 754
Scorell *v.* Boxall 27
Scot *v.* Scot 737
Scothorn *v.* South Staff. Ry. . . 1054
Scotson *v.* Pegg 4
Scott *v.* Alvarez 490
— *v.* Avery 82
— *v.* Bourdillon . . . 45
— *v.* Brown 83
— *v.* Clifton School Bd. . 375, 376
— *v.* Coulson . . . 135, 1233
— *v.* Eastern Counties Ry. . 538
— *v.* Ebury (Lord) . . 381, 394
— *v.* England 582
— *v.* Gillmore . . . 110, 122
— *v.* Godfrey 952
— *v.* Hanson 501
— *v.* Irving . . . 71, 1131
— *v.* Littledale 133
— *v.* Liverpool Corporation . 82, 878, 879
— *v.* London Dock Co. . . 1018
— *v.* Miller 81
— *v.* Morley 420
— *v.* Nixon 488
— *v.* Parker 827
— *v.* Pettit . . . 613, 615
— *v.* Pilkington . 60, 194, 455
— *v.* Rayment 295
— *v.* Scott 1317
— *v.* Thompson . . . 1169
— *v.* Tyler 414
— *v.* Uxbridge & Rickmansworth Ry. . . . 170
— and Alvarez's Contract, *In re* 495
— and Horton *v.* Godfrey . 642
Scottish Mar. Ins. Co. *v.* Turner . 1190
— N. E. Ry. *v.* Stewart 294, 377
PAGE
Scottish Petroleum Co., *In re* . 128
Scout (The) 871
Scrimshire *v.* Alderton . . . 323
Scrivener *v.* Pask 877
Scurfield *v.* Gowland . . . 465
Sea Ins. Co. *v.* Blogg . . . 1167
— *v.* Gavin . . . 1173
— *v.* Hadden . . . 1189
Seaborne *v.* Maddy . . . 9
Seago *v.* Deane . . . 25, 471
Seagram *v.* Knight . . . 205, 220
Seagrave *v.* Seagrave . . 297, 1326
— *v.* Union Mar. Assur. Co. 1109
Seaman *v.* Fonereau . . 1117, 1118
— *v.* Price . . . 6, 26, 32
Sear *v.* House Property Society . 669
Seare *v.* Prentice . . . 889, 898
Searle *v.* Laverick . . . 864
— *v.* Lindsay 922
Seath *v.* Moore . . . 84, 586
Seaton *v.* Benedict . . . 426
— *v.* Burnand . . . 1098
— *v.* Heath 1216
Seaward *v.* Drew 722
Second East Dulwich Soc., *In re* . 251
Secretary of State for War *v.* Wynne 783
Seddon *v.* N. E. Salt Co. . 126, 129
— *v.* Senate 449
— *v.* Tutop 193
Seeger *v.* Duthie 54
Seeling *v.* Crawley . . . 1326
Seignior and Wolmer's Case . . 321
Selby *v.* Greaves . . . 764, 772
Seligman *v.* Price 815
Sellar *v.* M'Vicar . . . 1143, 1148
Sellen *v.* Norman . . . 935, 936
Seller *v.* Jones 1088
Sellers *v.* Bickford . . . 174
Sellick *v.* Trevor 487
Sellin *v.* Price 20
Selway *v.* Fogg . . 125, 130, 453
— *v.* Holloway . . . 1976
Semenza *v.* Brinsley . . 160, 322
Semple *v.* Steinau 1370
Senior *v.* Ward . 922, 923, 924, 926
Sentance *v.* Hawley . . . 459
— *v.* Poole 435
Sergeson *v.* Sealey . . . 436
Serjeant *v.* Nash, Field & Co. . 713
Serle, *In re* 715
Serraino *v.* Campbell . . . 1008
Serrel *v.* Derbyshire Ry. Co. . . 1260
Servante *v.* James 316
Seton *v.* Lafone 73
— *v.* Slade . . . 37, 481
Severn *v.* Clerk 522
— & Clerk's Case . . . 51
Sevin *v.* Deslandes . . . 303
Sewell *v.* Burdick . . 590, 591, 1014
Seymour *v.* Bridge . . 639, 946
— *v.* Gartside . . . 1311
— *v.* Maddox . . 922, 925
— *v.* Pickett . . 165, 166
Seyton, *In re* 1224
Shackell *v.* Charlton . . . 792
— *v.* Rosier 75
Shackleford's Case . . . 17
Shackleton *v.* Sutcliffe . . . 497

PAGE

Shadforth *v.* Cory 1007
— *v.* Higgin 974
Shakespear, *In re* 419
Shallcross *v.* Finden 247
Shand *v.* Grant . 355, 463, 470,, 473
— *v.* Sanderson . . . 1000
Shardlow *v.* Cotterell . 37, 38, 475
Sharington *v.* Strotton . . . 19
Sharman *v.* Brandt . . . 42
— *v.* Sanders . . . 117
Sharp *v.* Bailey 1279
— *v.* Fowle 800
— *v.* Grey . . . 1015, 1016
— *v.* Johnson & Co. . . . 928
— *v.* Key 676
— *v.* Milligan 361
Sharpe *v.* Foy 493
— *v.* Gibbs 192
Sharples *v.* Rickard . . 1334, 1376
Shaw *v.* Barber 663
— *v.* Chairitie 932
— *v.* Crompton 200
— *v.* Dartnall 462
— *v.* Fisher 650
— *v.* Foster . . . 512, 520
— *v.* G. W. Ry. . . . 1044
— *v.* Holland 628
— *v.* Kay 687
— *v.* Picton . . 165, 462, 473
— *v.* Port Phillip Gold Mining Co. 649
— *v.* Pritchard . . . 95
— *v.* Robberds 1215
— *v.* Sherwood . . . 312, 317
— *v.* Stenton 666
— *v.* Thackray 435
— *v.* Woodcock . . 462, 463
— *v.* Worcester (Marquis) . 286
Shawe *v.* Felton 1154
Shears *v.* Goddard . . . 435
— *v.* Jacobs 383
Shee *v.* Clarkson 950
Sheffield & Manch. Ry. *v.* Woodcock 315
— Build. Soc. *v.* Harrison 783, 840
— Corporation *v.* Barclay . 649
— (Earl) *v.* Lon. & Joint Stock Bk. . . . 1289
— Nickel Co. *v.* Unwin . 131, 579
Shelbury *v.* Scotsford . . 849, 911
Sheldon *v.* Brett 94
Shelton *v.* Braithwaite . . . 1273
— *v.* James 1378
— *v.* Livius 64
— *v.* Springett . . 9, 414
Shenston *v.* Hilton . . . 825
Shenstone *v.* Freeman . . . 788
Shepard *v.* De Bernales . . 999, 1000
Shephard, *In re* 1319
Shepheard *v.* Bray 128
Shepherd *v.* Berger . 713, 737, 774
— *v.* Bristol & Exeter Ry. . 1052
— *v.* Chewter . . . 1206
— *v.* Harrison . . . 590
— *v.* Hills 203
— *v.* Johnson . . . 815
— *v.* Kain . . . 563, 577
— *v.* Keatley . . . 490
— *v.* Kottgen . . . 1011

PAGE

Shepherd *v.* Mackoul . . . 429
— *v.* Pybus 567
Shepley *v.* Davis . . . 583, 609
Sheppard *v.* Duke 200
— *v.* Shoolbred . . . 594
Sheridan *v.* New Quay Co. . 912, 1076, 1078
Sherrard *v.* Gascoigne . . . 90
Sherrington *v.* Yates . 261, 272, 433
Sherry, *In re* 167
Sherwood *v.* Robins . . . 499
Shiells *v.* Blackburne . . 862, 863
Shilcock *v.* Passman . . . 894
Shillibeer *v.* Glyn . . . 854, 860
Shilling *v.* Accidental Death Ins. Co. 1223
Shillito *v.* Biggart 833
Shine, *In re* 274
Shipley *v.* Marshall . . . 271
Shippey *v.* Derrison . . . 475
Shipton *v.* Casson 187
— *v.* Thornton . . 983, 1151
Shipway *v.* Broadwood . . . 133
Shirley *v.* Stratton . . . 525
— *v.* Wilkinson . . . 1117
Shirreff *v.* Hastings . . . 250
— *v.* Wilks 363
Shoolbred *v.* Roberts . . 124, 467
Shore *v.* Wilson . . . 46, 47
Short *v.* McCarthy . . . 206, 209
— *v.* Simpson 1014
— *v.* Spackman . . . 346
— *v.* Stone . . . 141, 1313
Shove *v.* Webb 465
Shrewsbury (Countess) *v.* Crompton 704
— (Earl) *v.* Gould . . 52
— *v.* N. Staff. Ry. . 381, 387
— & Birm. Ry. *v.* L. & N. W. Ry. . . 98, 387
— *v.* Blount . . . 553
Shrewsbury's (Lady) Case . . 690
Shrivell *v.* Payne 1378
Shroder *v.* Ward 807
Shropshire Union Ry. *v.* Reg. . 638
Shubrick *v.* Salmond . . . 19
Shubrook, *Ex parte* . . . 962
Shutford *v.* Borough . . . 205
Shuttleworth, *Ex parte* . . 1281
— *v.* Hernaman . . 820
— *v.* Stephens . . 1243
Sibbald *v.* Hill 1124
Sibley *v.* Fisher 1297
Siboni *v.* Kirkman . . . 246
Sibree *v.* Tripp . . . 153, 186
Sibthorp *v.* Brunel . . . 55
Sichel *v.* Lambert 1319
Sickens *v.* Irving 980
Sicklemore *v.* Thistleton . . 143
Sidaway *v.* Hay 199
Sidaways *v.* Todd 1221
Siddall *v.* Rawcliffe . . . 192
Sidebotham *v.* Holland . . 726, 728
Sidnam *v.* Worthington . . 8
Sidney Sussex College *v.* Davenport 373
Sidwell *v.* Mason 213
Sievers *v.* Boswell 465
Sievewright *v.* Archibald . . 531
Siffkin *v.* Ray 608
Siggers *v.* Evans 187

PAGE

Sigourney *v.* Lloyd . . . 1252
Sill *v.* Worswick 269
Sillem *v.* Thornton . . . 1215
Silvester, *In re* 1100
Simeon *v.* Bazett 1182
Simm *v.* Anglo-Amer. Tel. Co. . 649
Simmonds *v.* G. E. Ry. . . . 965
Simmons *v.* Gutteridge . . . 258
— *v.* Rose 891
— *v.* Simmons . . . 25
— *v.* S. E. Ry. . . . 1075
— *v.* Swift . . . 584, 587, 622
— *v.* Wilmott . . . 400
— *v.* Woodward . . . 818
Simms *v.* Marryatt . . . 559
Simon *v.* Lloyd 154
— *v.* Sedgwick . . . 1128
Simond *v.* Braddon . . . 564
Simonds *v.* Hodgson . 1144, 1145
— *v.* White 1211
Simonin *v.* Mallac 1322
Simons *v.* G. W. Ry. . 129, 1046, 1047, 1078
— *v.* Patchett . . 351, 968
Simonson, *In re* 272
Simpson *v.* Accid. Death Ins. Co. 1219, 1230
— *v.* Att.-Gen. . . . 102
— *v.* Clayton . . 228, 238
— *v.* Crippin . 173, 543, 603
— *v.* Eggington . . . 157
— *v.* Fogo 455
— *v.* Gutteridge . . . 254
— *v.* Hartopp . 784, 785, 790
— *v.* Henning . . . 198
— *v.* Lamb . 132, 875, 952, 960, 961
— *v.* L. & N. W. Ry. . . 1073
— *v.* Margitson . . . 57
— *v.* Nicholls . . . 114
— *v.* Penton . . . 1079
— *v.* Routh 143
— *v.* Sadd 491
— *v.* Scottish Union Ins. Co. 1222
— *v.* Thomson . . . 1221
— *v.* Titterell . . . 52
Sims *v.* Bond . . . 325, 358, 852
— *v.* Brittain . 325, 855, 856, 955
— *v.* Brutton 209
— *v.* Juffs 801
— *v.* Landray 42
Simson *v.* Cooke 1087
— *v.* Ingham . . . 164, 167
Sinclair *v.* Bowles 876
— *v.* Maritime Pass. Assur. Co. 1236, 1237
Siner *v.* G. W. Ry. . . . 1026
Singer Manufac. Co. *v.* Clark . 829
— *v.* L. & S. W. Ry. . 866, 1060
Siordet *v.* Hall 987
Sivewright *v.* Allen . . 148, 936
Six Carpenters' Case . . . 799
Sjoerds *v.* Luscombe . . . 979
Skaife *v.* Jackson . . . 74, 158
Skeet *v.* Lindsay 212
Skillett *v.* Fletcher . . . 1086
Skinner *v.* Hunt 680
— *v.* Lambert . . . 389
— *v.* L. B. & S. C. Ry. . . 1017

PAGE

Skinner *v.* Stocks 357
Skinners' Co. *v.* Knight . . . 716
Skipp *v.* East Counties Ry. . . 923
Skipper *v.* Holloway . . . 222
Skipworth *v.* Green . . . 656
Skrine *v.* Elmore 1364
Skyring *v.* Greenwood . . 462, 473
Slade's Case 192, 259
Slater *v.* Baker . . . 889, 898
Slater's Trusts, *In re* . . . 413
Sleap *v.* Newman 248
Sleat *v.* Fagg 1074
Sleddon *v.* Cruikshank . . . 697
Sleeman *v.* Barrett . . . 117
Sleigh *v.* Tyser 1162
Slim *v.* G. N. Ry. . . 1050, 1077
Slingsby's Case 316
Slipper *v.* Tottenham Junc. Ry. . 151
Sloman *v.* Bank of England . . 648
— *v.* Cox 1297
Slubey *v.* Heyward . . 614, 619
Small *v.* Currie 1100
— *v.* Marwood 313
Smallcombe's Case. . . . 382
Smart *v.* Harding 25
— *v.* Jones . . 22, 634, 635
— *v.* Nokes 1337
— *v.* Sandars 945
— *v.* West Ham Union . 377, 398
Smeed *v.* Foord 281
Smelting Co. of Australia *v.* Inland Rev. Com. 1361
Smethurst *v.* Mitchell . . . 327
— *v.* Taylor 338
Smith, *In re* 162
— *v.* Accident Insur. Co. . 1238
— *v.* Algar 11
— *v.* Arnold 236
— *v.* Ashforth . . . 799
— *v.* Aykwell 1311
— *v.* Bailey 915
— *v.* Baker 925
— *v.* Bank of Scotland 1091, 1099
— *v.* Battams 183
— *v.* Bedouin St. Nav. Co. . 981
— *v.* Bellamy 1243
— *v.* Bond 286
— *v.* Boutcher . . . 959
— *v.* Braine 1257
— *v.* Bromley . . . 465, 468
— *v.* Buchanan . . . 199
— *v.* Butler . . . 173, 509
— *v.* Carter 690
— *v.* Cator 1365
— *v.* Chadwick . . 126, 550
— *v.* Chance . . . 597, 623
— *v.* Chorley District Council 439
— *v.* Clark 730
— *v.* Cologan 950
— *v.* Compton . . . 524
— *v.* Cook 867
— *v.* Craven . . . 361, 814
— *v.* Cuff . . 458, 465, 468
— *v.* Dart & Son . . . 975
— *v.* Dean 1375
— *v.* Dearlove . . 765, 770
— *v.* E. I. Co. . . . 174
— *v.* Eldridge . . 682, 684
— *v.* Ferrand . . . 153, 161

PAGE
Smith *v.* Forty 216
— *v.* Gold Coast and Ashanti Explorers . . . 35
— *v.* Goldsworthy . . . 389
— *v.* Goodwin . . . 797
— *v.* Green . . . 278, 283
— *v.* Gronow 712
— *v.* Hancock. . . . 101
— *v.* Hankey 252
— *v.* Howell . . 278, 753, 1105
— *v.* Hudson . . 533, 534, 537
— *v.* Hughes . . . 126, 576
— *v.* Hull Glass Co. . . 383
— *v.* Humble 678
— *v.* Hunt 318
— *v.* Jackson . . . 510, 520
— *v.* Jameson 852
— *v.* Jamesons . . . 164
— *v.* Jarves 1304
— *v.* Jeffryes 64
— *v.* Kay . . . 125, 573
— *v.* Kendall 1272
— *v.* King 411
— *v.* Lanc. & Yorks. Ry. . 928
— *v.* Land Corp. . . . 547
— *v.* Lascelles . . 949, 1112
— *v.* Lindo 457
— *v.* Low . . . 408, 412
— *v.* M'Guire . . . 338, 1014
— *v.* Mapleback . . . 773
— *v.* Marrable . . 673, 761
— *v.* Mawhood . . . 112
— *v.* Mercer . . 137, 154, 467
— *v.* Moore 6
— *v.* Mullett 1274
— *v.* Mundy . . . 467, 850
— *v.* Myers 556
— *v.* Neale . . . 35, 36
— *v.* Nicolls 194
— *v.* Normanton Colliery Co. 928
— *v.* Peat . . . 751, 753
— *v.* Peters 517
— *v.* Plummer . . . 999
— *v.* Pocklington . . . 238
— *v.* Pococke . . 210, 862, 958
— *v.* Prosser 1250
— *v.* Pyman 995
— *v.* Render 697
— *v.* Reynolds . . . 1109
— *v.* Robinson . . 490, 679
— *v.* Rosario Nitrate Co. . 1180
— *v.* Russell 791
— *v.* Scott 1175
— *v.* Sieveking . 1007, 1008
— *v.* Simonds 243
— *v.* Sleap . . . 325, 464
— *v.* Smith . . . 5, 12, 428
— *v.* Sparrow 113
— *v.* Surman . . 27, 36, 530, 535
— *v.* Surridge 1140
— *v.* Thorne 212
— *v.* Twoart 682
— *v.* Union Bank of London . 1259, 1291
— *v.* Vertue 1270
— *v.* Walton . . . 118, 728
— *v.* Webster 22
— *v.* Weguelin . . . 60
— *v.* Westall 35

PAGE
Smith *v.* Wheatcroft . . . 134
— *v.* White 77
— *v.* Widlake 660
— *v.* Wilson . . 70, 156, 998
— *v.* Wright 799
— (W. H.) & Son *v.* Clinton . 1080
Smout *v.* Ilbery . 328, 333, 353, 432
Smurthwaite *v.* Wilkins . . 1014
Snaddon *v.* London, Edin. & Glasgow Assur. Co. . . . 1087
Snaith *v.* Mingay . . . 63, 1248
Snell, *In re* 965
— *v.* Finch . . . 757, 780
Snelling *v.* Huntingfield (Lord) . 35
Sneyd, *In re* 192
Snook *v.* Davidson . . . 963
Snow *v.* Leatham . . . 1309
— *v.* Peacock . . . 1309
Snowdon, *Ex parte* . . 208, 1102
— *v.* Davis 464
Soady *v.* Turnbull . . . 256
Soames *v.* Edge 296
— *v.* Nicholson . . 708, 725
— *v.* Spencer 331
Soares *v.* Glyn . . . 1244, 1251
Soblomsten (The) . . . 838, 983, 994, 997
Société Générale *v.* Met. Bank . 1294
Société Générale de Paris *v.* Tramways Union Co. . . . 842
Société Générale de Paris *v.* Walker 226, 638, 646
Softlaw *v.* Welch 420
Solarte *v.* Palmer . . . 1275
Solicitors Act, 1870, *In re* . . 81
Solly *v.* Forbes . . . 45, 175
Solomons *v.* Bank of England . 1259
— *v.* Dawes . . 910, 912
Soltykoff, *In re* 405
Solvency Mutual Guarantee Co. *v.* Freeman 1099
Solway Prince (The) . . . 872
Somerset (Duke) *v.* Cookson . 300, 629
— *v.* Fogwell . . 634
Somerset's (Earl) Case . . . 259
Somes *v.* Brit. Emp. Shipping Co. . 887
Sondes (Lord) *v.* Fletcher . . 278
Soothill Upper Urban Council *v.* Wakefield Rural Council . 399
Soper *v.* Arnold 509
Soprani *v.* Skurro 671
Sorsbie *v.* Park 316
Sotilichos *v.* Kemp . . . 71
Sottomayer *v.* De Barros . . 1322
Souch *v.* Strawbridge . . . 38
Soulsby *v.* Neving 733
Souter *v.* Drake . . . 450, 490
South, *Ex parte* 182
— *v.* Finch 1365
South African Breweries *v.* King . 59
— Territories *v.* Wallington . 295, 809
South Australian Ins. Co. *v.* Randall 813, 847
South British Fire & Mar. Ins. Co. of N. Z. *v.* Da Costa . . 1110
South Carolina Bank *v.* Case . 1305
South Hetton Coal Co. *v.* Haswell, &c. Coal and Coke Co. . . 15

PAGE
South Kensington Co-operative Stores, *In re* 170
South of England Dairies *v.* Baker 230, 678
South of Ireland Colliery *v.* Waddle 378
South Sea Co. *v.* Duncomb . . 827
South Staffs. Tram Co. *v.* Sickness and Accident Assur. Assoc. . 58, 1238
Southall *v.* Rigg 1258
Southampton Bridge Co. *v.* Southampton Local Board . . 442
Southampton (Lord) *v.* Brown . 311
Southby *v.* Wiseman . . . 337
Southcomb *v.* Exeter (Bishop) 486, 515
Southcote's Case . . 451, 826, 845
Southern *v.* How 575
Southerne *v.* Howe . . . 576
Southgate *v.* Bohn 1365
Southport and West Lancashire Banking Co. *v.* Thompson . 839
Southwell *v.* Bowditch . . . 349
South York Ry. *v.* G. N. Ry. . 377
Soward *v.* Palmer 186
Spackman's Case 382
Spaeth *v.* Hare 144
Spaight *v.* Cowne 1098
— *v.* Farnworth . . . 997
Spain *v.* Arnott . . . 932, 935
Spalding *v.* Crocker . . 1134, 1151
— *v.* Ruding . . . 620
Spanish Telegraph Co. *v.* Shepherd 678
Sparenburgh *v.* Bannatyne . . 438
Spargo's Case 152
Spark *v.* Heslop 1079
Sparke's Lease, *In re* . . . 669
Sparkes *v.* Marshall . . 588, 1111, 1112, 1114
Spark's Trusts, *In re* . . . 1326
Sparling *v.* Brereton . . . 116
Sparrow *v.* Carruthers . . . 993
— *v.* Paris 289
— *v.* Sowgate . . . 1099
Spartali *v.* Benecke . . 599, 644
Spears *v.* Hartley . . 203, 902, 907
Spedding *v.* Nevell . 750, 968, 969
Spence *v.* Chodwick . . . 983
— *v.* Healey 174
Spencer *v.* Clarke 225
— *v.* Demett 197
— *v.* Parry 458
Spencer's Case . 227, 230, 234, 236, 238, 247, 655
Speyer *v.* Inland Rev. Com. . . 1352
Spice *v.* Bacon . . . 767, 769
— *v.* Webb 796
Spicer *v.* Burgess 1336
— *v.* Cooper 71
— *v.* Martin . . 229, 307, 694
Spiers *v.* Hunt . . 78, 148, 1313
Spiller *v.* Paris Skating Rink Co. . 332
— *v.* Westlake 55
Spillers and Bakers, Ld. *v.* G. W. Ry. 1059
Spindler's Contract, *In re* . . 506
Spittle *v.* Lavender . . . 347
Splidt *v.* Bowles 227
Spong *v.* Wright 213
Spooner *v.* Browning . . . 343

PAGE
Spotswood *v.* Barrow . . . 933
Spragg *v.* Hammond . . . 677
Spratt *v.* Hobhouse . . . 462
— *v.* Jeffery 490
Spreadbury *v.* Chapman . . 425
Spry *v.* Emperor 464
— *v.* Pigott 464
Sprye *v.* Porter 80
Spurr *v.* Cass 324
Spurraway *v.* Rogers . . . 473
Spurrier *v.* La Cloche . . 59, 82
Squire *v.* Bayer 120
— *v.* Midland Lace Co. . . 120
Stacey *v.* Hill . . . 684, 1096
Stackemann *v.* Paton . . . 6
Stackpole *v.* Earle 91
— *v.* Simon . . . 1226
Stadhard *v.* Lee . . . 878, 881
Stafford (Earl) *v.* Buckley . 221
Stafford *v.* Clark 193
— *v.* Gardner . . . 746
— (Mayor) *v.* Till . . 375, 683
Staffordshire Financial Co. *v.* Valentine 809
Stagg *v.* Elliott . . . 392, 1302
Stahlschmidt *v.* Lett . . . 258
Stainbank *v.* Fenning . . 835, 1144
— *v.* Shepard . 339, 837, 1144
Staines *v.* Morris 249
— *v.* Wainwright . . . 84
Stainton *v.* Carron Co. . . . 946
Staley *v.* Barrett 200
Stamers *v.* Preston . . . 43
Stamford Banking Co. *v.* Smith . 215, 219
Stamford Banking Co. and Knight's Contract, *In re* . . 485, 496
Stamma *v.* Brown 1183
Standen *v.* Chrismas . . 232, 684
Standing *v.* Bowring . . 187, 313
Stanhope's Case 382
Stanley *v.* Agnew 762
— *v.* Dowdeswell . . . 17
— *v.* English Fibres Industries 226
— *v.* Hayes . . . 664, 666
— *v.* Jones 80
— *v.* Western Ins. Co. . . 1217
Stannard *v.* Ullithorne . . . 892
Stansfeld *v.* Portsmouth (Mayor) . 702, 703
Stanton *v.* Brown 90
— *v.* Chamberlain . . . 21
— *v.* Collier 268
— *v.* Richardson . . 806, 974
Stapleton, *Ex parte* . . . 609
Starkey *v.* Bank of England . 351, 352
— *v.* Barton 295
Starr-Bowkett Build. Soc., *In re* . 506
Startup *v.* Cortazzi . . . 626
— *v.* Macdonald . 140, 142, 146, 544
State Fire Ins. Co., *In re* 49, 391, 1306, 1307
State of Wyoming Syndicate, *In re* 387
Staunton *v.* Wood . 56, 141, 544, 599
Staveley *v.* Allcock . . . 780
Stavers *v.* Curling . 53, 143, 881, 976
Stead *v.* Dawber . . 64, 67, 171, 544

PAGE

Stead *v.* Liddard . . . 36, 1332
Stead's Estates, *In re* . . . 201
Steadman *v.* Hockley . . . 965
Steamship Balmoral *v.* Marten . 1132
— Carisbrook Co. *v.* Lond. & Prov. Mar. Ins. Co. . . . 1009
— City of Lincoln *v.* Smith . 983, 984, 989
— County of Lancaster *v.* Sharp . . . 1008
— Isis Co. *v.* Bahr . . 978
— Waikato (Cargo Owners of) *v.* New Zealand Shipping Co. . . 985
Steam Stoker Co., *In re* . . 169
Stears *v.* South Essex Gas Co. . 185
Stedman *v.* Hart 437
Steeds *v.* Steeds . . 164, 174, 175, 184, 188
Steel *v.* Dixon 1102
— *v.* State Line Steamship Co. . 806
— *v.* Young 886
Steele *v.* Harmer 1306
— *v.* Hoe 1082
— *v.* M'Kinlay 1301
— *v.* Mart 658
— *v.* S. Wales Miners' Fedn. . 97
— *v.* Williams 464
Steeven's Hospital *v.* Dyas . . 375
Steigenberger *v.* Carr . . . 390
Steiglitz *v.* Egginton . 43, 334, 370
Stein *v.* Pope 749
Steinman *v.* Angier Line . . 986
— *v.* Magnus . . 177, 186
Stella (The) . 990, 1044, 1049, 1055
Stephen Wright (The) . . . 936
Stephens *v.* Badcock . . 355, 956
— *v.* De Medina . . . 641
— *v.* L. & S. W. Ry. . . 1042
— *v.* Lowe 1337
— *v.* Olive 1326
— *v.* Reynolds . . . 1305
Stephenson *v.* Hart . 1051, 1068
Sterne *v.* Beck 286
Sterry *v.* Clifton 91
Stevens, *In re* 272
— *v.* Adamson . . . 525
— *v.* Benning . . . 223
— *v.* Biller 962
— *v.* Copp 235
Stevenson *v.* Blakelock . . . 963
— *v.* Lambard . . . 235
— *v.* McLean . . . 16
— *v.* Mortimer . . . 325
— *v.* Newnham . 130, 796, 797
— *v.* Snow . . 466, 1231
— *v.* Watson . . . 899
— *v.* Wilson . . 640, 643
Stevinson's Case 51
Steward *v.* Greaves . . . 388
Stewart, *Ex parte* 842
— *v.* Aberdein . . 161, 950
— *v.* Alliston . . . 499
— *v.* Bell . . 1149, 1150
— *v.* Cauty . . . 626, 644
— *v.* Kennett . . . 1273
— *v.* L. & N. W. Ry. 1029, 1037
— *v.* M'Kean . . . 1086

PAGE

Stewart *v.* Merchants' Mar. Ins. Co. . . . 1200
— *v.* Steele . . . 1195
— *v.* Todd . . . 192
Stikeman *v.* Dawson . . . 405
Stile's Case 21
Stiles, *In goods of* . . . 256
Stilk *v.* Myrick 4
Stindt *v.* Roberts . . . 1007
Stirling *v.* Maitland . . 57, 141
— *v.* Silburn . . . 809
Stock, *In re* 206
— *v.* Inglis . . . 1128
— *v.* Meakin . . . 680
Stockdale *v.* Ascherberg . . 679
Stocker *v.* Wedderburn . . 293, 298
Stockley *v.* Parsons . . . 262
Stockton Iron Co., *In re* . . 754
— Ry. Co. *v.* Barrett . . 1138
Stoddart *v.* Sagar . . . 107
Stoessigger *v.* S. E. Ry. . . 1030
Stogdon *v.* Lee . . . 419
Stokell *v.* Heywood . . 1238
Stokes *v.* Cox . . . 1216
— *v.* Lewis . . . 452, 457
— *v.* Moore . . . 39
— *v.* Trumper . . . 892
— *v.* Twitchen . . . 123
Stone *v.* City Bank . . . 128
— *v.* Compton . . . 1098
— *v.* Mar. Ins. Co. 1148, 1153, 1155
— *v.* Marsh . . 163, 851
— *v.* Midland Ry. 1021, 1034, 1059
— *v.* Stone . . . 220
Stoneham *v.* Ocean Ins. Co. . 1226, 1229
Stonehouse *v.* Gent . . . 339
Stones *v.* Dowler . . . 66, 67
Stonor's Trusts, *In re* . . . 262
Storer *v.* Gordon . . . 976
— *v.* G. W. Ry. . . . 295
— *v.* Hunter . . . 702, 703
Storey *v.* Waddle . . . 135
Storr *v.* Crowley . . . 1051
Story *v.* Perry . . . 408
— *v.* Richardson . . 318, 889
Stoughton *v.* Day . . . 1084
Stoveld *v.* Hughes . . . 612
Stowell *v.* Robinson . 64, 171, 505
Stracey *v.* Bank of England . 11, 179
— *v.* Deey . . . 357
Strachen *v.* Thomas . . . 201
Straffon, *Ex parte* . . 73, 315, 640
Strafford's (Lord) Contract, *In re* . 504
Straker *v.* Kidd . . . 1003
Strang Steel & Co. *v.* Scott 1009, 1011, 1013, 1211
Strange *v.* Fookes . . . 1103
— *v.* Lee . . . 1087
Stranks *v.* St. John . . 652, 666
Stratford *v.* Bosworth . . 515
Strathmore *v.* Vane . . 248
Strauss *v.* County Hotel Co. 766, 771
— *v.* Francis . . . 344
Stray *v.* Russell . . . 642, 643
Street *v.* Blay . . 466, 558, 606
Streeter *v.* Horlock . . 888
Strelley *v.* Pearson . . 57
Stribblehill *v.* Brett . . 1311
Stribley *v.* Imp. Mar. Ins. Co. . 1122

PAGE
Strick *v.* Swansea Canal Co. . . 1064
— *v.* Swansea Tinplate Co. . 97
Strickland *v.* Maxwell . . . 744
— *v.* Williams . . . 285
Stringer *v.* English Ins. Co. 1180, 1187, 1188
Stroms Bruks Aktie Bolag *v.* J. & P. Hutchison . . 1071, 1072
Strong *v.* Foster . . 1093, 1094
— *v.* Hart . . . 161, 999
— *v.* Harvey 169
— *v.* Natally . . . 993, 1149
Stroughill *v.* Buck 72
Strutt *v.* Farlar 914
— *v.* Smith 624
Stuart, *In re* 895
— *v.* Crawley . . 1028, 1043
— *v.* Freeman . . . 1230
— *v.* Joy . . . 232, 689
— *v.* Smith 26
Stuart and Olivant's Contract, *In re* 494
Stubbing *v.* Heintz . . . 338
Stubbs *v.* Holywell Ry. . . 195, 246
Stuckey *v.* Hooke 679
Stuckley, *In re* 512
— *v.* Kekewich . . . 512
Stucley *v.* Baily 552
Studds *v.* Watson 37
Studdy *v.* Beesty 1278
— *v.* Sanders 588
Stumore, Weston & Co. *v.* Breen . 981
Sturdy *v.* Henderson . . . 1288
Sturgeon *v.* Wingfield . . 234, 654
Sturlyn *v.* Albany 6
Sturtevant *v.* Ford . 1261, 1288
Styles *v.* Wardle 657
Suevic (The) 869
Suffell *v.* Bank of England . . 167, 189, 190
Suffield (Baron) *v.* Inland Rev. Com. 1349
Sugars *v.* Brinkworth . . 11, 83
Sugden *v.* Alsbury . . . 170
Sullivan, *In re* 963
— *v.* Bishop . . . 734
— *v.* Jones 682
— *v.* Pearson . . . 963
— *v.* Sullivan . . . 1321
Sully *v.* Duranty 281
Summers *v.* Ball 1325
— *v.* Griffiths . . . 131
— *v.* Solomon . . . 338
Summerson, *In re* 714
Sumner *v.* Bromilow . . . 696, 700, 702, 703
Sumpter *v.* Hedges . . . 877, 880
Sunbolf *v.* Alford 771
Sund. Marine Ins. Co. *v.* Kearney . 50, 312
Surcome *v.* Pinniger . . 23, 296
Surman *v.* Fitzgerald . . . 59
— *v.* Wharton . . 266, 420, 433
Surplice *v.* Farnsworth . . . 674
Surtees *v.* Woodhouse . . . 680
Sutcliffe *v.* G. W. Ry. . . . 1047
Sutherland *v.* Briggs . . . 480
— *v.* Pratt . . 1111, 1137
Sutton *v.* Buck 870

PAGE
Sutton *v.* Ciceri 985, 1034
— *v.* Grey 30, 948
— *v.* Hawkins . . . 169
— *v.* S. E. Ry. . . . 465
— *v.* Sutton 200
— *v.* Tatham 951
— *v.* Temple . . 673, 760, 806
— *v.* Toomer . . 852, 1294, 1297
Suwerkrop *v.* Day 257
Svendsen *v.* Wallace . 1008, 1011
Swain *v.* Ayres 775
— *v.* Shepherd . . 556, 604
Swaine *v.* Wilson . . . 97, 98
Swaisland *v.* Dearsley . . 135, 516
Swale *v.* Ipswich Tannery . . 932
Swallow *v.* Emberson . . . 254
Swan, *Ex parte* . . 646, 649, 1288
— *v.* North B. Austr. Land Co. 20, 441, 646, 649, 897
— *v.* Sowell 212
— *v.* Steele 1304
— & Co. *v.* Maritime Ins. Co. . 1112, 1114
Swanley Coal Co. *v.* Denton . 818, 820
Swann *v.* Falmouth (Earl) . . 796, 798, 800
Swannell *v.* Ellis 893
Swansea Bank *v.* Thomas . . 170
— (Mayor) *v.* Thomas . 233, 235
Swanwick *v.* Sothern . . 584, 611
Swatman *v.* Ambler . . 672, 678
Swayne *v.* Inland Rev. Com. . . 1342
Sweeny *v.* Promoter Life Assur. Co. 1226
Sweet *v.* Lee 34
— *v.* Meredith 93
— *v.* Pym . . . 607, 908
— *v.* Seager 667
— *v.* Sweet 1324
Sweeting *v.* Asplin . . . 32
— *v.* Pearce . 70, 71, 159,
— *v.* Turner . . . 588
Sweetmeat Automatic Delivery Co. *v.* Inland Rev. Com. 1346, 1358
Sweney *v.* Smith 170
Swift *v.* Swift . . . 78, 1325
Swinbanks, *Ex parte* . . . 159
Swinfen *v.* Bacon . . 709, 733, 734
— *v.* Chelmsford (Lord) . 895
Swinyard *v.* Bowes . . 154, 156
Swire, *In re* 22
— *v.* Leach 790
Syeds *v.* Hay 1052
Syers *v.* Jonas . . . 69, 572
Sykes *v.* Beadon . . 107, 467, 468
— *v.* Dixon 9, 38
Syms *v.* Chaplin 1077
Synge *v.* Synge 3
Syred *v.* Carruthers . . . 827

TAAFE *v.* Taafe 252
Tabbs *v.* Bendelack . . . 1168
Tabor *v.* Godfrey 748
Tabram *v.* Freeman . . . 84
Taddy & Co. *v.* Sterious & Co. . 310, 523

PAGE

Tadman *v.* Henman . . 740, 773
Taff, *In re* 423
Taff Vale Ry. *v.* Amalgamated Ry. Servants' Soc. . 96, 404
— *v.* Giles . 1050, 1070
Tagart Beaton & Co. *v.* Jas. Fisher & Sons 998
Tahiti Cotton Co., *In re* . . 841
Tailby *v.* Official Receiver . . 224
Tailors of Lichfield's Case . . 95
Tait *v.* Levi 1163
Talbot *v.* Godbolt 356
Talley *v.* G. W. Ry. . . . 1038
Tallis *r.* Tallis 99
Talver *v.* West 538
Tamplin *v.* James . . . 135, 516
Tamvaco *r.* Lucas 601
— *v.* Simpson . . . 998
Tancred *v.* Christy . . . 732
— *v.* Delagoa Bay Ry. . . 224
— *r.* Leyland . . 796, 802
Tanham *r.* Nicholson . . . 730
Tanner, *Ex parte* 395
— *v.* Bennett . . . 1191
— *r.* Christian . . 347, 655
— *v.* European Bank . . 850
— *v.* Scovell 621
— *r.* Smart 212
— *r.* Smith 486
Tanqueray-Willaume and Landau, *In re* 486
Tansley *r.* Turner . . 584, 597, 611
Tapley *v.* Martens . 153, 161, 186, 999
Tappenden *r.* Randall . . . 467
Tapscott *r.* Balfour . 1004, 1005
Tarbuck *r.* Bispham . . . 471
Tarleton *r.* Allhusen . . . 154
— *r.* Shingler . . . 1296
— *r.* Staniforth . 1219, 1230
Tarling *r.* Baxter 583
Tarrabochia *r.* Hickie . . . 978
Tarrant *r.* Webb 926
Tasker *r.* Cunninghame . . 1169
— *r.* Scott 1213
— *r.* Shepherd . . . 195, 930, 946
— & Sons, *In re* . . . 384
Tassell *r.* Cooper 855
— *r.* Lewis 1272
Tatam *r.* Reeve . . . 104, 107
Tate *r.* Meek 994, 998
— *r.* Williamson . . 131, 133
Tatem *r.* Chaplin . . . 230, 235
Tatham *r.* Haslar 1257
Tatlock *r.* Harris 179
— *r.* Smith . . . 179, 187
Tattersall *v.* National Steamship Co. 806
Taunton *r.* Pepler 19
Tayler *v.* Great Indian Penins. Ry. 646
Taylerson *r.* Peters 779
Tayleur *r.* Wildin 732
Taylor, *Ex parte* 167
— *In re* . 963, 964, 965, 966
— *v.* Bank of N. S. W. . . 1103
— *v.* Blacklow . . . 892

PAGE

Taylor *v.* Bowers 467
— *r.* Brewer . . . 453, 873
— *r.* Briggs . . 71, 153, 186
— *v.* Brittan 426
— *v.* Brown 503
— *r.* Bullen 577
— *r.* Caldwell 149, 195, 522, 557, 583, 653, 762, 807, 845
— *r.* Chapman . . . 719
— *v.* Chester . . 123, 137, 902
— *v.* Chichester & Midhurst Ry. 387
— *r.* Clay 1006
— *r.* Curtis 1012
— *v.* Dewar 1176
— *r.* Dobbins . . . 39
— *v.* Dunbar . 1177, 1184
— *r.* G. E. Ry. . . 529, 535
— *r.* G. Ind. Peninsular Ry. 897
— *r.* G. N. Ry. . . 140, 1022, 1025, 1070
— *r.* Green . . . 333, 547
— *r.* Higgins . . . 460
— *r.* Hilary . . . 33, 179
— *r.* Hollard . . 194, 212, 215
— *r.* Holt 281
— *r.* Horde 57
— *r.* Humphreys . . . 765
— *r.* Jones 7
— *r.* Laird 876
— *r.* Lendey 310
— *r.* Liv. & G. W. Steam Co. 986
— *r.* Manners . . . 175
— *r.* Merchants' Fire Ins. Co. 18
— *r.* Metropolitan Ry. . . 355
— *r.* Midland Ry. . . . 648
— *r.* Plumer 956
— *r.* Portington . . 46, 298
— *r.* Robinson . . . 962
— *r.* Shum 231
— *r.* Smetten . . . 107
— *r.* Smith . . 530, 533, 535
— *r.* Steele 1370
— *r.* Stray . . 642, 951, 967
— *r.* Taylor 251
— *r.* Wakefield . . . 535
— *r.* Wilson . . 1143, 1170
— *r.* Zamira 677
Tebb *r.* Cave 665
— *r.* Hodge 702
Tees Bottle Co., *In re* . . . 841
Tempest *r.* Fitzgerald . . . 535
— *r.* Kilner . . 29, 628, 643
Templeman *r.* Trafford . . . 111
Tenant *r.* Eliot 467
Tendring *r.* Loudon . . . 516
Tennant *r.* Bell 544
— *r.* Field 798
Tennent *r.* City of Glasgow Bank 131, 579
Tennyson, *Ex parte* . . . 1233
Terry *r.* Duntze 55
— *r.* Parker 1271
— *r.* Sweeting 254
— and White's Contract, *In re* 495, 502
Tetley *r.* Wanless 177
Teutonia (The) 1169
Tew *v.* Jones 684

PAGE
Texas Land Co. *v.* Inland Rev. Com. 1327
Thacker *v.* Hardy . . . 105, 106
— *v.* Moates 339
Thackeray *v.* Wood . . . 521, 522
Thackray *v.* Blackett . . . 1280
Thame *v.* Boast 152
Thames & Mersey Mar. Ins. Co. *v.* Hamilton, Fraser & Co. 1184
— *v.* Pitts 1201
— Conservators *v.* Inland Rev. Com. . . . 1208
— Iron Works Co. *v.* Patent Derrick Co. . . 830, 887
— Iron Works Co. *v.* Roy. Mail S. P. Co. . 145, 174
Tharsis Sulphur Co. *v.* Loftus . 899
— *v.* Morel Bros. 1005
Thatcher *v.* England . . 6, 310
Thellusson *v.* Fergusson. . . 1166
— *v.* Valentia (Viscount). 396
Theobald *v.* Rail. Pass. Assur. Co.. 1239
Thetford (Mayor) *v.* Tyler . . 683, 733, 750
Thetford's (Mayor) Case . . 377
Thicknesse *v.* Bromilow . . 1304
Thiis *v.* Byers 1003
Thimbleby *v.* Barron . . 177, 178
Thimblethorp *v.* Hardesty . . 316
Thin *v.* Richards 1163
Thisdon *v.* Tindall. . . . 340
Thistlewood *v.* Cracroft . . . 123
Thol *v.* Henderson. . . 282, 627
Thom *v.* Bigland . . . 353, 947
Thomas *v.* —— 316
— *v.* Bishop 349
— *v.* Blackman . . . 475
— *v.* Brown 37
— *v.* Cadwallader . . . 54
— *v.* Clarke 996
— *v.* Cook . 30, 719, 1080, 1101
— *v.* Courtnay . . . 88
— *v.* Dering . . . 498, 518
— *v.* Edwards . . . 327
— *v.* Evans 167
— *v.* Fenton . . 1279, 1378
— *v.* Fredericks . . . 634
— *v.* Harries. . . 796, 798
— *v.* Hawkes . . . 473
— *v.* Hayward . . . 235
— *v.* Jenkins. . . . 703
— *v.* Jennings . . 701, 840
— *v.* Jones 707
— *v.* Kelly. 818
— *v.* Lewis 343
— *v.* Lulham . . 737, 774
— *v.* Packer 732
— *v.* Quartermaine . . 925
— *v.* Rhymney Ry. 1054, 1070
— *v.* Shillibeer . . . 180
— *v.* Sorrell 634
— *v.* Thomas. . . 12, 729
— *v.* Whip 465
— *v.* Williams . . 122, 931
Thomas Fielden (The) . . . 869
Thomlinson *v.* Brown . . . 691
Thompson, *In re* 895
— *v.* Adams . 1125, 1213
— *v.* Ashington . . 928
PAGE
Thompson *v.* Bell 852
— *v.* Blackstone . . 518
— *v.* Cohen . . . 197
— *v.* Equity Fire Assur. Co. . . 1214, 1215
— *v.* Farden . . . 222
— *v.* Farrer . . . 937
— *v.* Gardiner . 42, 531, 532
— *v.* Giles . . . 853
— *v.* Gillespy . . . 994
— *v.* Hakewell . . 239, 317
— *v.* Harris . . . 241
— *v.* Harrison . . . 1317
— *v.* Harvey . . . 95
— *v.* Havelock . . . 942
— *v.* Hopper . 1162, 1165
— *v.* Hudson 151, 165, 286, 290
— *v.* Lack. . . . 1097
— *v.* Lacy . . 764, 771
— *v.* Lapworth . . . 679
— *v.* Leach . . . 716
— *v.* Maberly . . . 658
— *v.* Maceroni . . . 597
— *v.* Mashiter . . . 790
— *v.* Miles . . . 487
— *v.* Percival . . 179, 186
— *v.* Pettitt . . . 839
— *v.* Small . . . 982
— *v.* Taylor . 1142, 1148
— *v.* Tomkins . . . 1233
— *v.* Wesleyan Newspaper Assoc. . . . 1307
— *v.* Whitmore. 1174, 1175
Thomson *v.* Brown . . . 174
— *v.* Butler. . . . 144
— *v.* Clydesdale Bank . 1241
— *v.* Davenport . . 327, 347
— *v.* Leech . . . 436
— *v.* Roy. Exch. Assur. Soc. 835
— *v.* Weems . 1214, 1227
Thorley *v.* Orchis S.S. Co. . 986, 992
Thorman *v.* Dowgate S.S. Co. . 979
Thorn *v.* City Rice Mills . . 144
— *v.* London (Mayor) . . 882
Thornborow *v.* Whitacre . 148, 285
Thorne *v.* Kerr 202
— *v.* Tilbury . . . 911, 912
Thornely *v.* Hebson . . . 1193
Thornett *v.* Haines . . 476, 477
Thornewell *v.* Johnson . . . 229
Thornton *v.* Adams . . . 795
— *v.* Charles . . . 531
— *v.* Kempster . . . 531
— *v.* M'Kewan . . . 1104
— *v.* Maynard . . . 1256
— *v.* Meux 531
— *v.* Place . . . 881, 886
— *v.* Sherratt . . . 103
Thoroughgood's Case . . 20, 129
Thorp *v.* Dakin 177
— *v.* Thorp 55
Thorpe *v.* Booth . . . 144, 208
— *v.* Priestnall . . . 113
— *v.* Thorpe . . . 53, 599
Threfall *v.* Borwick . . . 771
Threlfall, *In re* 754
Thresher *v.* East London Waterworks 700, 703
Thrumscoe (The) . . 986, 1174, 1176

PAGE
Thrussell *v.* Handyside . . . 925
Thunder *v.* Belcher . . . 758
Thurnell *v.* Balbirnie . . . 623
Thursby *v.* Eccles 24
— *v.* Plant 232
Thwaites *v.* Wilding . . . 788
Tibbits *v.* George . . . 224, 269
Tichener, *In re* 226
Tidd, *In re* 848, 863
— *v.* Overell 863
Tidey *v.* Mollett 43, 143, 449, 651, 664
Tidmarsh *v.* Grover . 1295, 1336
Tidswell *v.* Ankerstein . 1223, 1224
— *v.* Whitworth . . . 679
Tiedemann, *In re* 332
Tiernay *v.* Etherington . . 1130
Tigress (The) 607
Tillett *v.* Charing Cross Bridge Co. 298
Tilley *v.* Bowman . . 124, 275, 435
— *v.* Thomas . . . 503, 875
Tim *v.* Reid 1215
Timbler *v.* Abrahams . . . 294
Timmins *v.* Gibbins . . . 853
— *v.* Rowlinson . . 721, 735
Timmis *v.* Platt 245
Tinckler *v.* Prentice . . . 737
Tingrey *v.* Brown 257
Tipper *v.* Bicknell 13
Tippets *v.* Heane 215
Tirrell *v.* Bennett 255
Toal *v.* N. B. Ry. . . . 1026
Tobacco Pipe, &c. Co. *v.* Loder 14, 203
Tobin *v.* Crawford . . . 1001
— *v.* Harford . . 1129, 1132
Tod *v.* Stokes 431
Todd *v.* Emly 396
— *v.* Kerrich . . . 918, 919
— *v.* Reid 161
— *v.* Ritchie 1183
— *v.* Robinson 328
Tod Heatly *v.* Benham . . . 695
Tole *v.* Chalmers 1146
Tolhurst *v.* Assoc. Portland Cement Manufacturers . 223, 224, 889
Toll *v.* Lee 390
Tollit *v.* Sherstone . . . 291
Tolputt *v.* Wells 252
Tomkins *v.* Ashby 1387
— *v.* Lawrance . . . 660
— *v.* Saffery 951
Tomkinson *v.* Balkis Consolidated Co. 647
— *v.* Staight . . . 538
Tomlinson *v.* Bentall . . . 400
— *v.* Consolidated Credit Corporation . . 795
— *v.* Day 750
Toms *v.* Wilson . . . 141, 144
Tomson *v.* Judge 132
— *v.* Noel 143
Tonge *v.* Watts 1143
Tooke *v.* Meering 1364
Tooker *v.* Smith 43
Tooley *v.* Windham . . . 11
Toovey *v.* Milne 271
Topham *v.* Braddick . 143, 208, 947
— *v.* Morecraft . . . 472
— *v.* Portland (Duke) . . 79
Toplis *v.* Grane . . . 454, 967
PAGE
Topping, *Ex parte* . . 212, 215
Torbryan (The) 988
Torkington *v.* Magee . . . 222
Torrance *v.* Bolton . . . 134
Torrens *v.* Walker 685
Torriano *v.* Young . . 689, 732
Touche *v.* Met. Ry. Warehousing Co. 313, 332
Toulmin *v.* Hedley 558, 598, 605, 606
Touteng *v.* Hubbard . . . 1181
Toutill *v.* Douglas 402
Toward, *In re* 269
Towers *v.* Barrett 467
Towerson *v.* Jackson . . 759, 760
Towle *v.* National Guardian Assur. Soc. 1227
Towne *v.* Campbell . . . 661
— *v.* D'Heinrich . . . 682
Townend *v.* Toker . . . 12
Townley *v.* Crump . . . 612
— *v.* Jones 894
Townsend *v.* Crowdy . . . 462
Townson *v.* Tickell . . . 313
— *v.* Wilson 355
Towry Law *v.* Burne . . . 224
Towse *v.* Henderson . . . 996
Tozeland *v.* West Ham Guardians 927
Traae and Lennard, *In re* . . 973
Tracy *v.* Veal 325
Traherne *v.* Gardner . . . 464
Traill *v.* Baring 126
Treacher *v.* Hinton . . . 1270
Treadwin *v.* G. E. Ry. . 1030, 1041
Tredwen *v.* Bourne . . . 390
— *v.* Holman 82
Tregelles *v.* Sewell . . . 590
Trego *v.* Hunt . . . 101, 102
Treloar *v.* Bigge . . . 669, 670
Tremeere *v.* Morison . . . 248
Trenchard *v.* Hoskins . . . 45
Trent and Humber Ship-building Co., *In re* 282
Trent Navigation Proprs. *v.* Wood 1020, 1028
Trent *v.* Hunt . . 757, 780, 801, 802
Tress *v.* Savage . . . 43, 720
Treswaller *v.* Keyne . . . 174
Trevelyan *v.* Charter . . . 948
Trevivan *v.* Lawrence . . . 654
Trevor *v.* Hutchins . . . 258
— *v.* Whitworth . . . 382
Trew *v.* Railw. Pass. Assur. Co. . 1237
Tribe *v.* Taylor 960
Trickey *v.* Larne 630
Trimbey *v.* Vignier . . . 61
Trimble *v.* Goldberg . . . 358
— *v.* Hill . . . 105, 124
Trinder, Anderson & Co. *v.* Thames & Mersey Mar. Ins. Co. . . 1174, 1183, 1187
Trinidad Asphalt Co. *v.* Coryat . 72
Trinity House *v.* Clark . . . 971
Tripp *v.* Armitage . . . 269, 884
Triston *v.* Barrington . . . 152
Tritton *v.* Ocean Steamship Co. . 1012
Trotter *v.* Maclean . . . 209
Troubadour (The) 342
Troup's Case 815
Trower *v.* Newcombe . . . 501

PAGE
Trueman's Estate, *In re* . . 386
Trueman *v.* Loder . . . 71, 362
Truscott *v.* Christie . 1142, 1147
Trustee, *Ex parte* . . . 106, 435
Tucker, *In re* . . . 218, 262
— *v.* Bennett . . . 135
— *v.* Humphrey . . . 617
— *v.* Laing 1094
Tuckey *v.* Hawkins . . . 205
Tuff *v.* Warman 989
Tugwell *v.* Heyman . . . 451
Tulk *v.* Moxhay . . . 229, 303
Tullis *v.* Jackson 82
Tully *v.* Howling 974
Tunney *v.* Midland Ry. . . 922, 926
Tunno *v.* Edwards 1210
Tupper *v.* Foulkes . . . 19, 20
Turley *v.* Bates . . 584, 588, 622
Turnbull *v.* Duval 133
— *v.* Garden . . . 943
— *v.* Robertson . . . 162
Turner, *In re* 251
— *v.* Barnes 778
— *v.* Browne 466
— *v.* Cameron . . 696, 784
— *v.* Cameron's Steam Coal Co. . 681, 684, 758, 760
— *v.* Davies 1101
— *v.* Deane 965
— *v.* Diaper 629
— *v.* Doe . . . 662, 663
— *v.* Evans 100
— *v.* Ford 814
— *v.* Goldsmith . . 57, 149
— *v.* Goulden 899
— *v.* Haji Goolam Mahomed Azam . . . 830, 972
— *v.* Hardey 417
— *v.* Harvey 526
— *v.* Jones 162
— *v.* Lamb 751
— *v.* Liverpool Docks Trustees 589, 617
— *v.* Mason 932
— *v.* Moon 524
— *v.* Robinson . 918, 919, 935
— *v.* Rookes 429
— *v.* Samson 1280
— *v.* Sawdon 916
— *v.* Stones 1270
— *v.* Vaughan 76
— *v.* Walker 6
— *v.* Walsh . . . 231, 756
— & Son *v.* Willis . . 471, 895
— and Skelton, *In re* . . 495
Turney *v.* Dodwell . . . 216
Turpin *v.* Bilton 949
— *v.* Chambers . . 174, 506
Turton *v.* Benson 1317
Tutton *v.* Darke 782
Tweddle *v.* Atkinson . . 5, 308
Tweedy *v.* Escalera Co. . . . 144
Twigg *v.* Fifield 483
Twining *v.* Morrice . . . 478, 516
Two Ellens (The) . . . 834, 887
Twopenny *v.* Young . . 192, 1094
Twycross *v.* Dreyfus . . 354, 439
Twynam *v.* Pickard . . . 233
— *v.* Porter 964

PAGE
Tye *v.* Fynmore . . . 563, 605
— *v.* Gwynne . . . 630, 882
Tyers *v.* Rosedale Iron Co. . 544, 603, 627
Tyler *v.* Yates 413
Tynan *v.* Bridges 176
Tyne and Blyth Shipping Co. *v.* Leech, Harrison & Forward . 1004
Tyrie *v.* Fletcher 1231
Tyrrel *v.* Bank of London . . 78
Tyser *v.* Shipowners' Syndicate . 1126, 1156
Tyson *v.* Jackson 80
— *v.* Thomas 110

Udell *v.* Atherton 131, 333, 334, 579
Uhde *v.* Walters 70
Undaunted (The) 869
Underground Electric Rys. Co. *v.* Inland Rev. Com. . . . 1342
Underhay *v.* Read 758
Underwood *v.* Barker . . . 95
— *v.* Burrows . . 450, 761
— *v.* Lewis . . 891, 953
— *v.* Nicholls . . . 160
— *v.* Underwood 11, 151, 175
Ungley *v.* Ungley 24
Union Bank *v.* Munster . . 477
— of London *v.* Lenanton 831
— of Manchester *v.* Beech . 176, 1093, 1096
Union Corporation, Ltd. *v.* Charrington and Brodrick . 643
— Marine Ins. Co. *v.* Borwick 1176
— Steamship Co. *v.* Claridge . 927
United Club Co., *In re* . . . 170
— Kingdom Life Assur. Co., *In re* 850
U. K. Mutual S.S. Assur. *v.* Nevill 1106
United Realization Co. *v.* Inland Rev. Com. . . . 1353
— Service Co., *In re* . 896, 897
— Shoe Manuf. Co. *v.* Brunet 95, 121, 130
— States Shipping Co. *v.* Empress Assur. Corp. . 1115
Unity Banking Assoc., *Ex parte* . 404, 406
Universal Non-Tariff Fire Insur-Co., *In re*, Forbes' Claim . 1215
Universal Stock Exchange *v.* Strachan . . . 103, 106
Universo Ins. Co. *v.* Marine Ins. Co. 950, 1156
Unwin *v.* Leaper 464
— *v.* Wolseley . . . 315, 356
Upfill *v.* Wright 77
Upperton *v.* Nicholson . . . 503
Upton *v.* Townend. . . . 675
Urmston *v.* Newcomen . . . 9
Urquhart *v.* Barnard . . . 1172
— *v.* Macpherson . 131, 579
Usher *v.* Noble 1209
Uspariche *v.* Noble . . 103, 1179
Uthwatt *v.* Elkins 400
Uzielli *v.* Boston Marine Ins. Co. . 1187
— *v.* Commercial Union Ins. Co. 1216

PAGE

VADALA *v.* Lawes . . . 455
Vagliano *v.* Bank of England . 73, 137, 857, 897, 1243, 1244, 1263, 1270, 1279
Valentine *v.* Penny . . . 635
Valentini *v.* Canali . . . 404
Valieri *v.* Boyland 982
Vallance, *In re* 76
— *v.* Dewar . 1131, 1141
Vallejo *v.* Wheeler . . . 1183
Valliant *v.* Dodemede . . . 231
Valpy *v.* Gibson . . 529, 585, 615
— *v.* Manley 465
— *v.* Oakeley . . . 607, 621
— *v.* Sanders 273
Van *v.* Corpe 57
Van Casteel *v.* Booker . . 589, 617
Vance *v.* Lowther 1295
Vandenbergh *v.* Spooner . . 37
Van Diemen's Land Co. *v.* Table Bay Marine Board . . . 48
Vane (Earl) *v.* Rigden . . 252, 414
Van Grutten *v.* Trevenen . . 730
Vanlohe, *In re* 273
Van Praagh *v.* Everidge . 17, 42, 134, 297, 516
Vanquelin *v.* Bouard . 194, 415, 455
Van Sandau *v.* Browne . . . 891
Vansittart *v.* Vansittart . 77, 297
Van Toll *v.* S. E. Ry. . . 866, 902, 1032, 1049, 1051
Van Wart *v.* Woolley . . . 277
Varley *v.* Coppard 668
— *v.* Whipp 564
Varney *v.* Hickman . 107, 123, 467
Vaughan *v.* Hancock . . . 25
Vaughton *v.* Brine . . . 1373
— *v.* L & N. W. Ry. . . 1042
Vavasseur *v.* Krupp . . . 439
Veitch *v.* Russell 873
Velasquez (The) 992
Velox (The) 871
Venables *v.* Baring . . . 1289
Venezuela Co. *v.* Kisch . 126, 127, 128
Venning *v.* Leckie 1364
Vere *v.* Ashby 1303
Vernon *v.* Smith . . . 235, 1218
Vertue *v.* East Anglian Ry. . . 222
— *v.* Jewell 608
Vesey *v.* Mantell 316
Vezey *v.* Rashleigh . 67, 171, 300
Vezian *v.* Grant 1167
Vibart *v.* Coles 252
Vice *v.* Anson (Lady) . . 365, 390
Vickers *v.* Vickers 517
Victorian Daylesford Syndicate *v.* Dott 89, 810
Victors *v.* Davies 8
Vigers *v.* Sanderson . . 533, 563
Vince, *In re* 46
Vincent *v.* Godson 250
— *v.* Horlock . . . 1251
Vinden *v.* Hughes . 1243, 1263, 1270, 1279
Vine, *Ex parte*, ... 271
— *v.* Mitchell 87
Viney *v.* Bignold 82
Violett *v.* Allnutt 1147
— *v.* Sympson . . . 206

PAGE

Virany *v.* Warne 873
Virtue *v.* Bird 1074
Visger *v.* Prescott 1179
Vivian *v.* Champion . . 237, 754
— *v.* Moat 709
Vlierboom *v.* Chapman . . 994, 997
Vogemann *v.* Zanzibar S.S. Co. . 995
Voisey, *Ex parte* 754
Von Freeden *v.* Hull . . . 343
Vonhollen *v.* Knowles . . . 505
Vooght *v.* Winch 192
Vorley *v.* Barrett 1096
Vortigern (The) . . 975, 988, 989
Vose *v.* Lanc. & York. Ry. . 923, 924
Voss, *In re* 262
Vrede (The) 870
Vyvyan *v.* Arthur 236

WADDELL *v.* Blockey . . . 627
— *v.* Harshaw . . . 206
— *v.* Wolfe 490
Waddilove *v.* Barnett . . . 759
Waddington *v.* Bristow . . 27, 1368
Wade *v.* Simeon 11
Wade's Case 168
Wadling *v.* Oliphant . . . 273
Wadsworth *v.* Guy . . . 246
— *v.* Marshall . . . 891
Waikato (Cargo owners of S.S.) *v.* New Zealand Shipping Co. . 985
Wainman *v.* Kynman . . 215, 217
Wainwright *v.* Bland . . . 1227
— *v.* Ramsden . . 676
Wait *v.* Baker 589
Waite *v.* Jennings 670
Waithman *v.* Wakefield . 425, 427
Wake *v.* Hall 700
— *v.* Harrop . . 324, 347, 349, 353, 356
Wakefield *v.* Brown . . . 316
— *v.* Newbon . . . 464
Wakeman *v.* Lindsey . . . 802
— *v.* Rutland (Duchess) . 521
Walbank *v.* Quarterman . . 953
Walburn *v.* Ingilby . . . 369
Walcot *v.* Goulding . . . 286
Waldo *v.* Martin 86
Waldock *v.* Winfield . . . 916
Wale *v.* Inland Rev. Com. . . 1348
Walker, *In re* . . . 436, 1102
— *v.* Barker 161
— *v.* Bartlett . 637, 645, 647, 1366
— *v.* Birch 907
— *v.* Bradford Old Bank 224, 225
— *v.* Brit. Guar. Assoc. . . 900
— *v.* Butler 215
— *v.* Chapman . . . 123
— *v.* Constable . . . 508
— *v.* Gode 727
— *v.* G. W. Ry. . . . 378
— *v.* Harris 55
— *v.* Hatton 753
— *v.* Hill 33
— *v.* Hobbs 674
— *v.* Hull 246
— *v.* Jackson 1074
— *v.* Jeffreys 504

PAGE
Walker *v.* Mottram . . . 101
— *v.* Nevill 178
— *v.* Nussey 539
— *v.* Perkins 76
— *v.* Roberts 1378
— *v.* Rostron 309
— *v.* Taylor 33
— *v.* York & N. Midland Ry. . . 1032, 1033
Walkers *v.* Shaw, Son & Co. . . . 572
Wall *v.* Cockerell 161
Wallace, *Ex parte* and *In re* . . 329
— *v.* Breeds 610
— *v.* Fieldin 836
— *v.* Hardacre . . . 270
— *v.* Jarman 574
— *v.* Kelsall . 74, 163, 164, 188
— *v.* Tellfair 861
— *v.* Woodgate . . 908, 1058
Waller, *Ex parte* 435
— *v.* Holmes 965
— *v.* S. E. Ry. . . 922, 926
Wallis *v.* Hands 719
— *v.* Harrison 635
— *v.* Littell 71
— *v.* L. & S. W. Ry. . . 1058
— *v.* Scott 144
— *v.* Smith . . . 288, 290
— and Grout's Cont., *In re* . 489
— Son, & Wells *v.* Pratt . . 555
Walls *v.* Atcheson 719
Walmesley *v.* Cooper . . . 178
Walmsley *v.* Milne . 695, 696, 840
Walsh *v.* Fussell 86
— *v.* Lonsdale . 660, 672, 775
Walsham *v.* Stainton . . . 957
Walshe *v.* Provan . . 324, 325, 848, 913, 955
Walter *v.* Cubley 1336
— *v.* Everard . . 405, 409, 410, 938
— *v.* Haynes . . . 1276
— *v.* James 157
— *v.* Norwich (Dean) . . 56
— *v.* Smith 829
Walters *v.* Morgan . . . 526
— *v.* Smith 176
Walthew *v.* Mavrojani . . . 1012
Walton, *Ex parte* 774
— *v.* Hastings . . . 1336
— *v.* Mascall . . . 144
— *v.* Waterhouse . . . 234
Walwyn *v.* St. Quintin . . . 1267
Wandsworth Union *v.* Worthington 202
Wankford *v.* Wankford . 256, 258, 1323
Wansbrough *v.* Maton . . . 697
Want *v.* Blunt 1230
— *v.* Stallibrass . . 484, 486
Waples *v.* Eames . . . 1154, 1155
Warburton *v.* G. W. Ry. . 922, 927
— *v.* Heyworth . . 936
Ward, *Ex parte* . . 124, 130, 435
— *v.* Beck 832
— *v.* Benett 252
— *v.* Byrne 95
— *v.* Day . . 130, 140, 713
— *v.* Duncombe . . . 226
PAGE
Ward *v.* Evans 160
— *v.* Eyre 280
— *v.* Haddrill 964
— *v.* Hobbs . . . 278, 577
— *v.* Lowndes . . . 397, 441, 443, 444
— *v.* Lumley . . . 191, 749
— *v.* National Bank of New Zealand . . 175, 1097
— *v.* Shew 780
— *v.* S. E. Ry. . . . 441
— *v.* Trathen 492
— *v.* Wallis 461
Ward, Lock & Co. *v.* Long . . 224
Wardell *v.* Mourillyan . . . 1052
— *v.* Usher 745
Wardens of St. Saviour's *v.* Bostock 1085
Ware, *In re* 676
Warin *v.* Scott 438
Waring, *Ex parte* 1299
— *v.* Cox 620
— *v.* Favenck . . . 162
— *v.* Hoggart . . . 499
— *v.* King 682
Warlow *v.* Harrison 17, 476, 477, 478
Warner *v.* Willington . . . 36
Warre *v.* Miller . . 1138, 1151
Warren, *Ex parte* . . . 435
— *v.* Richardson . . . 492
Warriner, *In re* 679
Warrington *v.* Early . 1294, 1295
— *v.* Furbor . . . 1365
Warrior (The) 937
Warter *v.* Warter . . . 1320
Warwick *v.* Bruce . . 27, 407
— *v.* Nairn . . . 630
— *v.* Scott 1130
Warwicke *v.* Noakes . . . 152
Wasdale, *In re* 226
Washbourn *v.* Burrows . 27, 1368
Watbroke *v.* Griffith . . . 770
Watchorn *v.* Langford . . . 1214
Waterfall *v.* Penistone . . . 783
Waterford, Limerick & Western Ry. *v.* Postmaster-General . 1021
Waterhouse *v.* Keen . . . 465
Waters, *Ex parte* 196
— *v.* Mansell . . . 466
— *v.* Monarch Life Assur. Co. . . 1213, 1220
— *v.* Ogden 253
— *v.* Thanet (Earl) 207, 208, 213
— *v.* Tomkins . . . 217
— *v.* Towers 627
Watherell *v.* Howells . . . 745
Watkins *v.* Maule . . . 245, 270
— *v.* Nash 21
— *v.* Perkins . . . 32
— *v.* Rymill . . . 866
— *v.* Vince . . . 328, 330
Watling *v.* Horwood . . . 1332
— *v.* Oastler . . . 925
Watson, *Ex parte* . . . 615, 616
— *v.* Alcock 1091
— *v.* Ambergate Ry. . 1053, 1074
— *v.* Charlesworth . . 504
— *v.* Clark 1163
— *v.* Denton 549

PAGE

Watson *v.* Evans . . 848, 1244, 1285
— *v.* Hetherington . . 168
— *v.* Home 678
— *v.* Lane 754
— *v.* McAllum . . . 475
— *v.* McLean . . . 226
— *v.* Mainwaring . . 1226
— *v.* Moore 463
— *v.* Murrell . . . 314
— *v.* Pears 58
— *v.* Reid 503
— *v.* Russell . 462, 1256, 1258, 1293
— *v.* Snead 53
— *v.* Spratley . . 29, 637
— *v.* Swann 332
— *v.* Threlkeld . . . 434
— *v.* Waud 775
Watt *v.* Assets Co. . . . 199
— *v.* Evans 480
Watteau *v.* Fenwick . . . 338
Watters *v.* Smith . . . 11, 151
Watts *v.* Christie 854
— *v.* Driscoll 367
— *v.* Friend 27
— *v.* Porter 225
— *v.* Shuttleworth . . 1090, 1091
Waud, *Ex parte* 106
Waugh, *In re* 435
— *v.* Bussell 189
— *v.* Cope 215
— *v.* Morris 89
Wauton *v.* Coppard . . . 695
Wave (The) 837
Waverley (The) 871
— Typewriter, *In re* . . 384
Wavertree Sailing Ship Co. *v.* Love . . . 1013, 1156
Way *v.* Hearn 68
— *v.* Modigliani . . . 1170
Wayde *v.* Carr (Lady) . . . 1016
Waymell *v.* Reed 112
Wayne *v.* Hanham . . 826, 840
Weaver *v.* Floyd . . . 117
Webb, *In re* . . 226, 1052, 1233
— *v.* Austin 234
— *v.* Bishop 123
— *v.* Derbyshire . . . 853
— *v.* England 295
— *v.* Fagotti Bros. . . . 484
— *v.* Fairmaner . . . 58
— *v.* Fox 274, 907
— *v.* Herne Bay Commissioners . . 221, 440
— *v.* Hewitt . . 174, 175, 1096
— *v.* Hughes 506
— *v.* Jiggs 240
— *v.* Martin . . . 143, 208
— *v.* Page 1017
— *v.* Plummer 52
— *v.* Russell . . . 227, 233
— *v.* Salmon 178
— *v.* Smith . . . 225, 345
— *v.* Spicer . . . 177, 315
Webb Hale & Co. *v.* Alexandria Water Co. 637
Webber *v.* Farmer 1317
— *v.* G. W. Ry. . . . 1053
— *v.* Lee 22

PAGE

Webber *v.* Maddocks . . . 1336
Webster *v.* British Empire Assur. Co. 281
— *v.* Dillon 302
— *v.* Du Tastet . . . 1111
— *v.* Rickards . . . 262
— *v.* Seekamp . . . 339
— *v.* Webster . . . 1326
Weddall *v.* Capes 717
Weddell *v.* Lynam . . . 466
Wedderburn *v.* Bell . . 1162, 1216
Wedlake *v.* Hurley . . . 309
Weekes *v.* Maillard . . . 191
Weeks *v.* Goode . . . 902, 905
— *v.* Maillardet . . . 20
— *v.* Propert 351
Weems *v.* Matthieson . . 922, 923, 925
Wegener *v.* Smith . . 1007, 1008
Wegg-Prosser *v.* Evans . . 192, 193
Weguelin *v.* Cellier . . 607, 999
Wehner *v.* Dene S.S. Co. . 998, 1001
Weidner *v.* Hoggett . . . 347
Weiner *v.* Gill . . . 580, 585
— *v.* Harris . . . 585, 823
Weir *v.* Aberdeen . 1116, 1164, 1169
— *v.* Girvin 995
— *v.* Union S.S. Co. . 971, 978, 996
Welch *v.* Anderson . . . 281
Welchman *v.* Sturgis . . . 415
Weldon *v.* De Bathe . . . 422
— *v.* Gould 906
Welford *v.* Beezely . . . 40
Weller *v.* L. B. & S. C. Ry. . . 1026
Wellesley *v.* Wellesley . . 294, 296
Wells *v.* Foster 92
— *v.* Girling 87
— *v.* Hopwood . . . 1201
— *v.* Horton 35
— *v.* Kingston-on-Hull (Mayor) 23, 375
— *v.* Masterman . . . 1304
— *v.* Maxwell 503
— *v.* Williams 438
Wells and Croft, *In re* . . . 267
Welsh *v.* Rose 776
Wenham *v.* Fowle 87
Wennall *v.* Adney . . . 10, 922
Wentworth *v.* Cock . . . 253
— *v.* Outhwaite . 618, 620, 621
Werner *v.* Humphreys . . . 246
Werra (The) 869
West *v.* Blakeway . 146, 174, 700, 703
— *v.* Dobb 710
— *v.* Fritche . . . 754, 758
— *v.* L. & N. W. Ry. . . . 1060
— *v.* Nibbs 804
West Coast Gold Fields, *In re* . 198
West Ham Central Charity Board *v.* East London Waterworks Co. 690, 706
West Ham Corporation *v.* G. E. Ry. 1060
West India Telegraph Co. *v.* Home Ins. Co. 1184
West London Commercial Bank *v.* Kitson 127
— Syndicate *v.* Inland Rev. Com. . . . 1361

PAGE

West Mid. Water Co. *v.* Suwerkropp 1364
West of England Bank, *In re* . 1105
— Fire Ins. Co. *v.* Isaacs . . 1220
West's Contract, *In re* 423
Westaway *v.* Frost 891
Western *v.* MacDermott . 229, 306
— Assur. Co. of Toronto *v.* Poole . 1186, 1187, 1203
— Wagon Co. *v.* West . . 224
Westhead *v.* Sproson . . . 1082
Westlake, *In re* 967
— *v.* Adams . . . 5, 12
Westmeath *v.* Salisbury . . 1324
— *v.* Westmeath . . 1325
Westminster Fire Office *v.* Glasgow Provident Soc. . . . 1220
Weston *v.* Barton 1087
— *v.* Collins 293
— *v.* Emes 1123
— *v.* Met. Asyl. District . 695
— *v.* Savage . . . 496, 508
— *v.* Wright 339
— and Thomas' Cont., *In re* . 506
Westport Coal Co. *v.* McPhail 971, 1183
Westropp *v.* Solomon 136, 561, 951, 967
Westrup *v.* Gt. Yarmouth Co. 835, 887
Westwick *v.* Theodor . . . 939
Westwood *v.* Bell 963
— *v.* Secretary for India . 884
Westzinthus, *In re* . . 619, 620
Wetherell *v.* Jones . . . 112
— *v.* Julius . . . 268
— *v.* Langston . . . 316
Wetton *v.* Hodd 1269
Whaite *v.* L. & Y. Ry. . . . 1030
Whaley, *In re* 695
— *v.* Roehrich . . . 695
Wharton *v.* Lewis 1315
— *v.* Mackenzie . . . 410
— *v.* Naylor . . . 791
— *v.* Walker . . . 181
— *v.* Walton 1330, 1332, 1365
Whatman *v.* Gibson . . . 305
Wheatley *v.* Low 854
— *v.* Smithers . . . 363
— *v.* Williams . . . 1378
Wheeler, *In re* . . . 252, 419
— *v.* Branscombe . 757, 760
— *v.* Collier 416
— *v.* Stevenson . . . 675, 676
— *v.* Young 1290
Wheelton *v.* Hardisty . 333, 1226, 1228
Whincup *v.* Hughes . 137, 195, 940
Whippy *v.* Hilary 213
Whistler *v.* Forster . 1254, 1255, 1259, 1293, 1378
Whitaker, *In re* . . . 421, 1252, 1253
— *v.* Bank of England . 854
Whitbread *v.* Jordan . . . 493
— *v.* Watt . . . 509
Whitcher *v.* Hall . . . 1084, 1092
Whitchurch *v.* Bevis . . . 481
White, *Ex parte* 949
— *v.* Bailey . . 653, 721, 930
— *v.* Bartlett 355
— *v.* Beeton 145
— *v.* Bluett 12

PAGE

White *v.* British Empire Mut. Life Assur. Co. . . 1229, 1233
— *v.* Corbett 205
— *v.* Cuddon 501
— *v.* Cuyler . 192, 334, 357, 423
— *v.* Gainer 905
— *v.* Garden . 124, 130, 594, 821, 906
— *v.* G. W. Ry. . . 1048, 1076
— *v.* Humphery . . 865, 1051
— *v.* Morris 819
— *v.* North 1370
— *v.* Nutts 482
— *v.* Parkin 71
— *v.* Proctor 42
— *v.* Roy. Exch. Assur. Co. . 964
— *v.* Southend Hotel Co. . 234, 235
— *v.* Spettigue . . 847, 903
— *v.* Tindall 317
— *v.* Tyndall 261
— *v.* Wilks 585
— & Co. *v.* Furness, Withy & Co. 992
White's Case 767
— Contract, *In re* . . 491
Whiteacre *v.* Symonds . . . 732
Whitechurch *v.* Cavanagh 73, 340, 638
Whitecross Wire Co. *v.* Savill . 1012
Whitehead, *Ex parte* . . . 435
— *v.* Anderson . 614, 618
— *v.* Barron . . . 366
— *v.* Bennett . . . 700
— *v.* Greetham . 862, 894
— *v.* Howard . . . 209
— *v.* Lord . . . 205
— *v.* Palmer . . . 248
— *v.* Price . . . 1216
— *v.* Reader . . . 928
— *v.* Taylor . . . 781
— *v.* Tuckett . . . 328
Whitehorne Bros. *v.* Davison . 594
Whitehouse *v.* Frost . . . 611
— *v.* Hugh . . . 484
— *v.* Pickett . . . 769
Whiteley *v.* Edwards . . . 422
Whitfield *v.* Brand . . . 958
Whitham, *In goods of* . . . 256
— *v.* Kershaw . . . 706
Whiting *v.* Burke . . . 1101
Whitley *v.* Roberts . . . 781
Whitman *v.* Townroe . . . 417
Whitmore *v.* Gilmour . . 269, 273
— *v.* Humphries . . 748
Whittaker *v.* Howe . . . 301
— *v.* Kershaw . . . 419
Whittall & Co. *v.* Rahtken's Shipping Co. 1007
Whittemore *v.* Whittemore . . 495
Whitting, *In re* . . 224, 225, 309
Whittingham *v.* Hill . . . 406
Whittle *v.* Frankland . 9, 449, 915
Whitton *v.* Peacock . . 227, 234
Whitwell *v.* Harrison . . 1139, 1153
Whitwood Chemical Co. *v.* Hardman 302
Whitworth *v.* Crockett . . . 1364
Whorewood *v.* Whorewood . . 1326
Whywall *v.* Champion . . . 406
Wick *v.* Hodgson 1368

PAGE

Wickens *v.* Evans 102
Wickham *v.* Hawker . . . 636
— *v.* Wickham . . . 948
Wiedemann *v.* Walpole . . . 1313
Wieler *v.* Schilizzi 564
Wiffen *v.* Roberts 1260
Wigan *v.* English and Scottish Law Life Assoc. . . . 7, 1229
Wigg *v.* Shuttleworth . . . 121
Wiggett *v.* Fox 927
Wigglesworth *v.* Dallison 69, 743, 745
Wightman *v.* Townroe . . . 364
Wigmore *v.* Jay 922
Wigsell *v.* School for Indigent Blind . . 277, 281, 283, 750
Wilby *v.* Elgee . . . 11, 213
— *v.* West Cornwall Ry. . . 1053
Wild *v.* Harris . . 141, 148, 1313
Wilde *v.* Clarkson 287
— *v.* Radford 860
— *v.* Waters 692
Wilder *v.* Speer 798
Wildes *v.* Dudlow 30
Wilding *v.* Sanderson . . . 134
Wiles *v.* Woodward . . . 72
Wiley *v.* Crawford 839
Wilhelm Tell (The) . . . 871
Wilkie *v.* Geddes 1163
Wilkins *v.* Bromhead . . . 587
— *v.* Wood 745
Wilkinson, *In re* 141
— *v.* Byers . . . 11
— *v.* Calvert . . . 725
— *v.* Candlish . . . 159
— *v.* Clements . . . 294
— *v.* Colley . . . 734
— *v.* Collyer . . . 679
— *v.* Coverdale . . . 861
— *v.* Evans . . . 38
— *v.* Gerard Frères . . 818
— *v.* Grant . . . 458
— *v.* Hall . . . 317, 661
— *v.* Hyde . . 1128, 1200
— *v.* Johnson . 136, 466, 1251, 1297
— *v.* King . . . 593
— *v.* Lanc. & Yorks. Ry. . 1022, 1034, 1049
— *v.* Lloyd . 466, 561, 643
— *v.* Oliveira . . . 5
— *v.* Peel . . . 779
— *v.* Rogers . . . 694
— *v.* Unwin . . . 1250
— *v.* Verity . 205, 207, 847
Wilks *v.* Atkinson . . . 598, 608
— *v.* Back . . . 325
— *v.* Davis . . . 517
Willand *v.* Fenn 254
Willatts *v.* Kennedy . . . 11
Willcock *v.* Terrell . . 92, 93
Willes *v.* Glover . . 1118, 1119
Willet *v.* Chambers . . . 851
Williams, *Ex parte* . . . 84
— *In re* . . . 251, 252
— *v.* Afric. St. Ship Co. . 990
— *v.* Allsup . . . 887
— *v.* Bayley . 82, 83, 133
— *v.* Birmingham Battery Co. . . . 925

PAGE

Williams *v.* Bosanquet . . . 230
— *v.* Burgess . . 539, 556
— *v.* Burrell . 50, 230, 449, 665, 750
— *v.* Byrne . 918, 919, 931
— *v.* Carwardine . . 310
— *v.* Chester & Holyhead Ry. 378
— *v.* Colonial Bank . 642, 1289
— *v.* Clough . . 923, 924
— *v.* Cranston . . 1043, 1069
— *v.* Davies . . 855
— *v.* Deacon . . . 161
— *v.* Earle . . 235, 236, 751
— *v.* East Ind. Co. . . 902
— *v.* Evans . . 160, 480, 652
— *v.* Everett . . 181, 309
— *v.* Fitzmaurice . . 877
— *v.* Gabriel . . 232, 665
— *v.* Gerry . . . 1337
— *v.* Gibbs . . . 893
— *v.* Glenton . . . 504
— *v.* G. W. Ry. . . 1037
— *v.* Griffith . . 166, 213
— *v.* Griffiths . . 211
— *v.* Harrison . . 405
— *v.* Hathaway . . 49, 356
— *v.* Hayward . . 240
— *v.* Heales . . 255
— *v.* Hedley . . 468
— *v.* Holmes . . 790
— *v.* Jarrett . . 1378
— *v.* Jones . . 65, 455, 812
— *v.* Jordain . . 37
— *v.* Lake . . 37, 39, 1081
— *v.* Lloyd . . 807, 989
— *v.* Lond. Assur. Co. . 1009
— *v.* Mercier . . 264
— *v.* Midland Ry. . 1047
— *v.* Millington . . 345
— *v.* Mostyn . . 188
— *v.* North China Ins. . 1122, 1132, 1142
— *v.* North's Navigation Collieries . . 119
— *v.* O'Keefe . . 4
— *v.* Paul . . . 114
— *v.* Pigott . . . 395
— *v.* Protheroe . . 80
— *v.* Rawlinson . . 167
— *v.* Reynolds . . 282, 627
— *v.* Roberts . . 795
— *v.* St. George's Harbour Co. . . . 387
— *v.* Sawyer . . 1358
— *v.* Shee . . . 1173
— *v.* Smith . . . 1274
— *v.* Stern . . . 73
— *v.* Stiven . . . 778
— *v.* Thorp . . 1233
— *v.* Walker . . 423
— *v.* Wentworth . . 437
— *v.* Wheeler . . 59
— *v.* Williams . . 34, 1316
— Deacon & Co. *v.* Shadbolt 1252
— & Thomas and Lancashire, &c. Insur. Co. . 1238
Williamson *v.* Allison . . . 574
— *v.* Barton . . 347
— *v.* Clements . . 2, 6

PAGE

Williamson *v.* Hine . . . 343
— *v.* Innes . 1143, 1148
— *v.* Johnson . . . 1305
— *v.* Taylor . . . 915
— *v.* Watt . . . 405
Willins *v.* Smith 211
Willis *v.* Barrett . . 1244, 1266
— *v.* Black 296
— *v.* Cooke 1143
— *v.* De Castro . . 175, 176
— *v.* Dyson 362
— *v.* Freeman 270
— *v.* Palmer 834
— *v.* Peckham 4
— *v.* Poole 1226
— *v.* Young 107
Willison *v.* Patteson . . . 438
Willoughby, *Ex parte* . . . 967
— *v.* Horridge . . 1066
— *v.* Swinton . . 286
Wills *v.* Murray 249
— *v.* Sutherland . . . 388
Willson *v.* Love 288
Willyams *v.* Bullmore . . 75, 122
Wilmot *v.* Alton 270
— *v.* Gardiner . . . 279
— *v.* Rose 746
— *v.* Smith . . . 159, 168
— *v.* Wilkinson . . . 1345
Wilmott *v.* London Road Car Co. . 668
Wilmshurst *v.* Bowker . . 605, 621
Wilsford *v.* Wood 180
Wilson, *In re* . 170, 271, 746, 774
— *v.* Abbott 763
— *v.* Anderton . . . 849
— *v.* Bailey 366
— *v.* Bank of Victoria . . 1012
— *v.* Brett . . . 813, 863
— *v.* Carnley . . 78, 148, 1313
— *v.* Church 439
— *v.* Coupland . . . 179
— *v.* Craven 388
— *v.* Dickson 991
— *v.* Ducket 785
— *v.* Finch Hatton . . 761
— *v.* Ford 430
— *v.* Forster 1193
— *v.* Furness Ry. . . . 295
— *v.* Glossop 428
— *v.* Harper 195
— *v.* Hart . 229, 236, 324, 326
— *v.* Hartlepool Harbour Ry....293
— *v.* Hicks 1014
— *v.* Hodson 255
— *v.* Jones 1110
— *v.* Kearse 407
— *v.* Keating 19
— *v.* Kymer 999
— *v.* Lanc. & York. Ry....1073, 1075
— *v.* Lewis 366
— *v.* Lond., Italian & Adriatic Steam Nav. Co. . . 992
— *v.* Martin 1142
— *v.* Merry . . . 926, 927
— *v.* Milner 456
— *v.* Mushett 1326
— *v.* Nelson 1132
— *v.* Nightingale . . . 802
— *v.* Powis 913

PAGE

Wilson *v.* Queen's Club . . . 759
— *v.* Rankin . . 1129, 1164
— *v.* Ray . . . 123, 461
— *v.* Redhead . . . 670
— *v.* Salamandra Ins. Co. . 1165
— *v.* Smith . . 1198, 1331
— *v.* Strugnell . . . 123
— *v.* Tooker . . . 827, 839
— *v.* Tucker 894
— *v.* Tumman . . 157, 331
— *v.* Twamley . . . 695
— *v.* Vysar 156
— *v.* West Hartlepool Ry. . 381, 388, 480, 481
— *v.* Whitehead . . . 360
— *v.* Wilson . 252, 297, 471, 833
— *v.* Zantho (The) . . 1174
— *v.* Zulueta . . . 348, 1363
Wilson's Contract, *In re* . . 504
Wilston *v.* Pilkney . . . 240
Wilton *v.* Dunn . . 757, 758, 759
— *v.* Osborne 413
— *v.* Royal Atlantic Mail Steam Packet Co. . 1022, 1034
Wiltshear *v.* Cottrell . . . 697
Wiltshire Iron Co., *In re* . 385, 604
— *v.* G. W. Ry. . 385
Wimbledon Olympia, *In re* . . 128
Winch *v.* Winchester . . . 502
Windham's Case 316
Windhill L. B. *v.* Vint . . 82, 83
Windsor (Dean) 235
Wing *v.* Harvey . . . 146, 1232
— *v.* London Gen. Omnibus Co. 1015
Wingate *v.* Foster 1217
Wingfield, *Ex parte* . . . 585
— *v.* Erskine . . . 251
— & Blew, *In re* . . 431
Winkfield *v.* Packington . . 1059
— (The) 864
Winn *v.* Bull 14, 475
Winspear *v.* Acc. Insur. Co. . . 1237
Winstone *v.* Lynn 939
Winstone's Case 1236
Winter *v.* Anson (Lord) . . 525
— *v.* Foweracres . . . 309
— *v.* Haldimand . 1141, 1142
— *v.* Trimmer 287
Winterbottom *v.* Ingham . . 684
— *v.* Wright... 277, 291, 923
Winterbourne *v.* Morgan . . 798
Winterstoke, &c. 318
Wintle *v.* Crowther . . . 1303
Wise *v.* Charlton 1283
— *v.* Metcalfe 690
— *v.* Perpetual Trustee Co. . 396
— *v.* Wilson . . . 932, 939
Wiseman *v.* Easton . . 362, 363
Withers *v.* Bircham . . . 317
— *v.* North Kent Ry. . . 1066
— *v.* Reynolds...172, 543, 598, 603, 608, 622
Withy *v.* Cottle 650
Witt, *In re* 962
Wix *v.* Rutson 679
Wolf *v.* Archangel, &c., Ins. Co. . 1165
— *v.* Summers 1058
Wolfe *v.* Matthews . . . 97

	PAGE
Wolff *v.* Koppel	32
Wollaston *v.* Hakewill	248
— *v.* Stafford	797
Wolmershausen *v.* Gullick	1101
Wolseley *v.* Cox	1331
Wolverhampton Corp. *v.* Emmons	295
Wolverhampton, &c., Ry. *v.* L. & N. W. Ry.	302
Wolveridge *v.* Steward	52, 53
Womersley *v.* Dally	317
— *v.* Merrit	379
Wood *v.* Abrey	12
— *v.* Barker	88
— *v.* Beard	659
— *v.* Bell	587, 885
— *v.* Benson	314
— *v.* Chivers	737
— *v.* Clarke	784, 790
— *v.* Cooper	695
— *v.* Copper Miners' Co.	50
— *v.* Downes	80
— *v.* Dunn	163
— *v.* Dwarris	1228
— *v.* Fenwick	405
— *v.* Griffith	498
— *v.* Hewett	696, 697
— *v.* Leadbitter	634
— *v.* Mytton	1286
— *v.* Nunn	796
— *v.* Priestner	1090
— *v.* Roberts	13
— *v.* Scarth	297
— *v.* Slack	191
— *v.* Smith	575
— *v.* Tassell	597, 600
— *v.* Tate	375
— *v.* Wood	960, 1324
Woodall *v.* Clifton	233
Woodcock *v.* Houldsworth	1276
— *v.* Nuth	719
Woodger *v.* G. W. Ry.	283, 1075
Woodhead *v.* Ambler	252
Woodhouse *v.* Shepley	1312
Woodland *v.* Fear	859
Woodley *v.* Coventry	612, 913
Woodman *v.* Chapman	263, 267
Woodroffe *v.* Farnham	939
Woods *v.* Dean	1280
— *v.* Durrant	798
— *v.* Russell	586
— *v.* Thiedemann	857
— & Lewis' Cont., *In re*	504
Woodside *v.* Globe Mar. Ins. Co.	1195, 1211
Woodward *v.* D'Arcy (Lord)	259
— *v.* Gyles	706
— *v.* L. & N. W. Ry.	1030
— *v.* Woodward	422
Wookey *v.* Pole	1248
Woolcott *v.* Peggie	506
Woolfe *v.* Horne	143, 345, 350, 479, 542
Woollam *v.* Hearn	64, 69
Woolley *v.* Watling	682
Woolston *v.* Ross	780
Worc. Co. Bank *v.* Dorch. & Milt. Bank	1309
Worley *v.* Harrison	1246
Worms *v.* Storey	988
Wormwell *v.* Hailstone	389, 397
Worsley, *In re*	272, 420
— *v.* Wood	1166, 1218
Worthing Corp. *v.* Heather	306
Worthington *v.* Curtis	1225
— *v.* Grimsditch	219
— *v.* Hulton	441
— *v.* Warrington	524, 1330, 1332
Wotton *v.* Cook	242
Wragge's Case	226
Wray *v.* Wray	312
Wren *v.* Bradley	1325
— *v.* Eastern Counties Ry.	1048
— *v.* Holt	565, 568
— *v.* Kirton	857
Wride *v.* Dyer	726
Wright, *Ex parte*	371, 436
— *v.* Anderton	766
— *v.* Burroughes	233
— *v.* Carter	132, 952
— *v.* Colls	466
— *v.* Crookes	333, 552
— *v.* Dannah	42
— *v.* Davies	94
— *v.* Elwood	1320
— *v.* Fairfield	268
— *v.* Gihon	938
— *v.* Glyn	337
— *v.* Howard	497
— *v.* Inland Rev. Com.	1334
— *v.* Inshaw	1296, 1336
— *v.* Laing	166
— *v.* L. & N. W. Ry.	927
— *v.* Marwood	1010, 1129
— *v.* Midland Ry.	1016, 1071
— *v.* Newton	466
— *v.* Pole	1214
— *v.* Proud	132
— *v.* Reed	167
— *v.* Russel	1087
— *v.* Sandars	1097
— *v.* Shiffner	1166
— *v.* Simpson	1094
— *v.* Smith	733
— *v.* Snell	1057
— *v.* Stavert	24
— *v.* Verney (Lord)	83
Wright's Trusts, *In re*	963
Wrightup *v.* Chamberlain	632
Wrigley *v.* Sykes	250
Wulff *v.* Jay	1103
Wyatt *v.* Hertford (Marquis)	158, 162
Wyburd *v.* Stanton	87
— *v.* Tuck	687
Wyer *v.* Dorchester Bank	1309
Wyke *v.* Rogers	1096
Wyld *v.* Pickford	1035, 1040, 1041
Wylson *v.* Dunn	293
Wynch *v.* Grant	252
Wyndham *v.* Way	745
Wynn *v.* Shropshire Union Rys. & Can. Co.	151
Wynne *v.* Price	640, 645
Wynne's Case	17
Wythes *v.* Labouchere	1099
Wyvill *v.* Exeter (Bishop)	483

PAGE

Xantho (The) 1175
Xenos *v.* Fox 1203
— *v.* Wickham . . 20, 950

Yalden, *Ex parte* . . . 964
Yan Yean (The) 869
Yangtaze Insce. Assoc. *v.* Indemnity Mut. Mar. Assoc. . . 1168
Yard *v.* Ellard 255
Yarmouth *v.* France . . . 925
Yates *v.* Aston 185
— *v.* Boen 436
— *v.* Dalton 1303
— *v.* Dunster . . . 706, 752
— *v.* Evans . . . 1284, 1337
— *v.* Frickleton . . . 159
— *v.* Gardiner 55
— *v.* Hoppe 945
— *v.* Nash 1244
— *v.* Whyte . . . 1217, 1221
Yeates *v.* Groves 225
Yeatman, *Ex parte* . . . 80
Yelland, *Ex parte* 934
Yellowly *v.* Gower . . 233, 689
Yeoman *v.* Ellison . . . 776
— *v.* The King . . . 1002
Yeomans *v.* Williams . . . 175
Yollop, *Ex parte* 1224
Yonge *v.* Toynbee . . . 351, 353
York Buildings Co. *v.* Mackenzie . 131
— *v.* Grindstone . . . 770
Yorke *v.* Grenaugh . . . 904
Yorks. Banking Co. *v.* Beatson . 1304
— Miners' Assoc. *v.* Howden . 97

PAGE

Young, *Ex parte* 1104
— *v.* Ashley Gardens Properties . . . 669
— *v.* Austen 65
— *v.* Cole 136
— *v.* English 165
— *v.* Glover . 1247, 1248, 1261
— *v.* Grote 858
— *v.* Higgon 58
— *v.* Hoffman Manuf. Co. . 927
— *v.* Lambert . . . 909
— *v.* Leamington (Corp.) . 375
— *v.* Matthews . . . 584
— *v.* Moeller . . . 999, 1007
— *v.* Murphy . . . 1315
— *v.* Schuler 1081
— *v.* Smith 51
— *v.* Spencer . . . 691
— *v.* Timmings . . . 9
— *v.* Turing 1191
— *v.* Waller 934
— & Harston's Cont., *In re* . 504
Ysabel, La 836
Yuill *v.* Scott Robson . . . 1180

Zagury *v.* Furnell . . . 584
Zanzibar (The) 991
Zeta (The) 1176
Zimbler *v.* Abrahams . . . 660
Zouch *v.* Parsons 407
— *v.* Willingale . 731, 773, 779
Zuilchenbart *v.* Alexander . . 948
Zunz *v.* S. E. Ry. . 1046, 1049, 1053
Zwilchenbart *v.* Henderson . . 999

TABLE OF STATUTES.

	PAGE
51 Hen. 3, stat. 4	784
52 Hen. 3, c. 4	798
15	782
23	704
3 Edw. 1, c. 16	798
5 Rich. 2, stat. 2, c. 8	736
32 Hen. 8, c. 9	79
ss. 2, 4	525
c. 34	232, 248
s. 2	233
5 & 6 Ed. 6, c. 16, ss. 2, 3	91
1 & 2 Ph. & M. c. 12, s. 1	798
s. 2	803
2 Ph. & M. c. 7	594
5 Eliz. c. 4, s. 25	44, 937, 938
ss. 30, 41	44, 938
13 Eliz. c. 20, s. 1	94, 95
c. 30	120
31 Eliz. c. 6, s. 5	93, 94
c. 12	594
43 Eliz. c. 2, s. 7	413
21 Jac. 1, c. 3 (Statute of Monopolies)	102
s. 6	103
c. 16 (Statute of Limitations)	166, 210, 211, 212, 214, 215, 216, 218, 252, 258, 267, 439, 463, 748, 847, 1094, 1101
s. 3	202
s. 7	203
29 Car. 2, c. 3 (Statute of Frauds)	22, 23, 40, 42, 60, 67, 69, 122, 135, 171, 182, 189, 225, 298, 332, 416, 471, 473, 475, 478, 481, 505, 514, 531, 532, 634, 639, 651, 750, 1068, 1356
s. 1	42, 327
s. 2	43, 327
s. 3	43, 327
s. 4	19, 22, 28, 29, 33, 34, 36, 479, 1080, 1081
s. 12	244
s. 17	529
c. 7, s. 1	113
s. 3	113
2 W. & M. c. 5	794
s. 2	800, 801, 802, 804
s. 3	785, 799
8 & 9 Will. 3, c. 11	287, 290
s. 8	285
10 Will 3, c. 23	107
4 & 5 Anne, c. 3, s. 20	222
4 & 5 Anne, c. 16, s. 9	676, 684, 756
s. 10	676, 689, 756
s. 27	684
7 Anne, c. 12, s. 3	439, 791
8 Anne, c. 14	773
s. 1	791
s. 6	778
s. 7	778, 779, 781
9 Anne, c. 6, s. 56	107
c. 14, s. 1	108
12 Anne, c. 12	93
13 Anne, c. 11	93
9 Geo. 1, c. 19	107
2 Geo. 2, c. 22, s. 13	275
4 Geo. 2, c. 28, s. 1	733
s. 4	738
s. 6	720
8 Geo. 2, c. 24, s. 4	275
9 Geo. 2, c. 36	120
11 Geo. 2, c. 19	798, 802
s. 1	794
s. 2	795
s. 3	795
s. 4	796
s. 7	795
s. 8	782, 786, 800
s. 9	786, 802
s. 10	797
s. 14	682
s. 16	738
s. 17	739
s. 18	734
s. 19	799, 804
s. 23	222
12 Geo. 2, c. 28	107
14 Geo. 2, c. 20, s. 9	244
24 Geo. 2, c. 40, s. 12	110
26 Geo. 2, c. 33	1318
14 Geo. 3, c. 48	1213
s. 1	1223
c. 78, s. 83	1221
s. 86	768
17 Geo. 3, c. 30	1288
32 Geo. 3, c. 56	941
c. 57	940
38 Geo. 3, c. 5, ss. 4, 17, 18, 35	677
39 Geo. 3, c. 79, s. 29	114
42 Geo. 3, c. 116, ss. 123, 126	677
c. 119	107
43 Geo. 3, c. 84	94
48 Geo. 3, c. 58, s. 3	222
49 Geo. 3, c. 126	91
51 Geo. 3, c. 64, s. 4	222
54 Geo. 3, c. 96, s. 2	43, 937
55 Geo. 3, c. 184, s. 10	1378
sched.	1233

PAGE

55 Geo. 3, c. 194, s. 21 . . . 115
56 Geo. 3, c. 50, s. 11 . . . 746
57 Geo. 3, c. 52 738
c. 93, s. 1 . . . 803
s. 2 . . . 803
s. 4 . . . 803
s. 6 . . . 804
c. 99 94
4 Geo. 4, c. 17 1318
c. 76, s. 16 . . . 1319
s. 22 . 1320, 1322
s. 26 . . . 1319
5 Geo. 4, c. 83, s. 3 . . . 429
7 Geo. 4, c. 6, s. 3 1289
c. 46, ss. 9, 12, 13 . . 392
7 & 8 Geo. 4, c. 39 1058
9 Geo. 4, c. 14, s. 1 . 211, 214, 215
s. 3 . . . 217
s. 5 . . . 405
s. 7 . . 28, 529
s. 8 . . . 214
c. 94 94
10 Geo. 4, c. 44, s. 4 . . . 795
11 Geo. 4 & 1 Will. 4, c. 36, s. 15 . 519
c. 47, ss. 3, 4, 6 247
c. 65, ss. 16, 17 . . 407
c. 68, s. 1 . 1023, 1030, 1037, 1076
s. 2 . 1030, 1031
s. 3 . 1031
ss. 4, 5, 6, 7 . 1032
s. 8 . 1032, 1041, 1069
1 & 2 Will. 4, c. 32, ss. 17, 25, 27 . 110
c. 37, s. 1 . . . 117
ss. 2, 3, 4, 8 . 118, 119
s. 9 . . . 120
s. 23 . . . 119
3 & 4 Will. 4, c. 27 . . . 489
ss. 2, 3, 5, 16, 17, 18, 23, 28, 29, 40 . 199
s. 8 . . 201
s. 42 200, 201, 791
c. 42, s. 3 . 201, 202
s. 4 . . 203
s. 5 . . 210
s. 16 . . 285
s. 28 . 280, 281
s. 29 . . 280
ss. 37, 38 . 781
c. 74, s. 47 . . 519
c. 98 . . . 1289
s. 6 . . 167
4 & 5 Will. 4, c. 22 . . . 681
c. 76, ss. 56, 58, 59 . 414
5 & 6 Will. 4, c. 41, s. 1 . . 108
c. 54 . . . 1320
6 & 7 Will. 4, c. 32 . . 402, 1349
c. 71, s. 80 . . 677
ss. 81, 85 . 748
c. 85, s. 42 . . 1320
7 Will. 4 & 1 Vict. c. 26, s. 6 . . 244
1 Vict. c. 22 1320

PAGE

1 & 2 Vict. c. 74 . . . 663, 739
c. 98, ss. 1—6, 16 . . 1021
c. 110 251
s. 17 . . . 280
2 & 3 Vict. c. 11 251
c. 12, s. 2 . . . 114
c. 47, ss. 2, 67 . . 795
3 & 4 Vict. c. 65, s. 6 . . 835, 1108
c. 72 . . . 1320
c. 84 . . . 738
c. 110 404
c. 113, s. 42 . . . 93
5 & 6 Vict. c. 35, ss. 60, 103 . 677, 678
6 & 7 Vict. c. 40, s. 18 . . . 789
c. 73, s. 26 . . . 116
s. 37 . . . 953
c. 86 915
7 & 8 Vict. c. 32 1289
s. 26 . . . 392
c. 76 233
s. 6 . . . 448
c. 85, s. 11 . . . 1021
8 & 9 Vict. c. 16 481
s. 91 . . . 388
s. 97 . . . 387
s. 135 . . . 731
c. 18, s. 119 . . . 676
c. 20, s. 46 . . . 1066
s. 89 . . . 1020
s. 97 . . . 1058
c. 106 (Real Property Act, 1845), s. 3 . . 42, 481
s. 4 . 238, 448, 522
s. 5 . . . 311
s. 6 . . . 525
s. 9 . . . 233
c. 109 123
s. 18 . . 103, 104, 105, 106, 108
9 & 10 Vict. c. 88 93
c. 93 1075
c. 95, s. 96 . . . 786
10 & 11 Vict. c. 15, s. 14 . . 789
c. 17, s. 44 . . 789
s. 72 . . 678
11 & 12 Vict. c. 43, s. 34 . . 738
c. 63, s. 89 . . 440
12 & 13 Vict. c. 26 664
c. 92, s. 15 . . 799
c. 106, s. 129 . . 794
13 & 14 Vict. c. 17 664
c. 97 . . . 1345
14 & 15 Vict. c. 13 111
c. 25, s. 1 . . 746, 776
s. 2 . . . 791
s. 3 . . . 697
s. 4 . . . 747
15 & 16 Vict. c. 31 402
c. 76, s. 210 . 737, 738
s. 212 . . 738
16 & 17 Vict. c. 34, s. 40 . . 677
c. 45 . . . 1233
c. 59, s. 19 . . 858
c. 117, s. 1 . . 677
c. 119, ss. 1, 5, 6 . 107
17 & 18 Vict. c. 31 . . 1033, 1034
s. 2 . . 1059, 1061, 1063

PAGE

17 & 18 Vict. c. 31, s. 3 . . . 1063
s. 7 . 1022, 1034, 1043, 1045, 1049. 1053, 1072
c. 60, s. 1 . . . 799
c. 104, s. 99 . . 833
18 & 19 Vict. c. 67, s. 6 . . . 1256
c. 111 . . . 1014
s. 1 . 222, 590, 591
s. 3 . . 590, 981
c. 120, s. 149 . . 399
19 & 20 Vict. c. 97, s. 3 . . 39, 1081
s. 5 . . . 1102
s. 8 . . . 339
s. 9 . . . 202
s. 10 . 204, 210
s. 11 . 193, 204
s. 12 . . 204
s. 13 . . 211
s. 14 . . 218
c. 119, s. 17 1319, 1320
20 & 21 Vict. c. 77, s. 79 . 256, 415
ss. 81, 83 . 222
c. 85 . . . 1320
s. 21 . . 432
ss. 25, 26. . 431
21 & 22 Vict. c. 73, s. 1 . . . 796
c. 90, s. 31 . . 115
s. 32 . . 115
c. 95, s. 16 . . 256
c. 108, ss. 6—10 . 432
s. 8 . . 431
22 & 23 Vict. c. 35, s. 3 . . . 710
s. 7 . . . 1213
s. 27 . . 249
s. 29 . . 251
23 & 24 Vict. c. 38 . . . 251
c. 90 . . . 110
c. 126, s. 1 . 714, 738
c. 127, s. 28 . 963, 965
24 & 25 Vict. c. 10, s. 6 . . . 1014
s. 10 . . 835
c. 96, s. 100 . . 595
c. 99, s. 17 . . 167
25 & 26 Vict. c. 38 . . . 110
c. 61 . . . 117
c. 63, s. 55 . . 1125
c. 68, s. 1 . . . 6
c. 89 (Companies' Act, 1862),
s. 87 . . 792
s. 95 . . 222
s. 153 . . 967
s. 157 . . 222
s. 163 . . 792
c. 102, s. 96 . . 680
26 & 27 Vict. c. 41. . 766, 767, 769
ss. 1, 2, 3, 4 . 769
c. 61, ss. 1, 2 . . . 117
c. 92, s. 31 1043, 1044, 1049
c. 93, s. 14 . . 789
c. 105, s. 1 . . 1288
c. 113 . . . 111
27 & 28 Vict. c. 18, s. 15 . . 677
c. 32 . . . 392
c. 43 . . . 1233
c. 101, s. 20 . . 117
c. 112 . . . 251

PAGE

28 & 29 Vict. c 73, ss. 2, 4 . . 93
c. 83 . . . 915
c. 94, s. 1 . . . 1030
30 & 31 Vict. c. 29 . . . 639
c. 48, ss. 4—6 . . 476
s. 7 . . . 477
c. 131 (Companies' Act, 1867) . 1366
s. 38 . . 128
c. 144 . . 222, 1232
ss. 3—8 . . 1232
31 & 32 Vict. c. 4, s. 1 . . 413, 517
s. 2 . . . 413
c. 119, s. 14 1050, 1055
s. 16 1061, 1063
s. 17 1062, 1064
s. 18 . . 1062
s. 22 . . 1016
s. 36 . . 1021
c. 121 . . . 111
32 & 33 Vict. c. 24, sched. 2 . . 114
c. 41, s. 3 . . . 674
c. 46 . . 247, 250
c. 62 (Debtors Act, 1869), s. 5 . 420
c. 68 . . . 1312
c. 71, s. 111 . . 222
c. 94, ss. 12, 13 . 93
c. 117 . . . 111
33 & 34 Vict. c 10, s. 4 . . . 167
s. 6 . . 109, 167
s. 7 . . . 167
c. 14, s. 14 . . 437
c. 23 . . . 260
ss. 7, 9 . . 438
ss. 8, 12 . 260, 438
ss. 10, 13, 14, 24 260
ss. 17, 30 . 438
c. 28 . 78, 81, 894
ss. 4, 5 . . 895
s. 7 . 891, 894
s. 8 . 81, 895
ss. 9, 11 . . 81
s. 12 . . 81
c. 35 . . 776, 778
s. 2 . 170, 681
ss. 3, 6, 7 . 170
c. 71, ss. 22—25 . 222
s. 23 . . 417
c. 93 (Married Women's Property Act, 1870) . 262, 422
ss. 2, 8 . . 262
s. 12 . . 264
c. 99 . . . 1233
34 Vict. c. 17, s. 3 . . . 142
34 & 35 Vict. c. 31 . . . 404
s. 3 . . . 96
s. 9 . . 96, 404
c. 41, s. 18 . . 789
c. 43, s. 36 . . 253
c. 78, s. 12 1049, 1050, 1055
c. 79 . . . 762
c. 86 . . . 91
c. 87 . . . 113
c. 105 . . . 111
c. 116 . . . 222

PAGE

35 & 36 Vict. c. 44, s. 11 . . 859
c. 50, ss. 2, 3, 5 . 789
c. 92, s. 13 . . 800
c. 93 . . 828, 829
s. 6 . . . 829
s. 10 . . 828
s. 13 . . 829
s. 25 . . 829
36 & 37 Vict. c. 12, s. 2 . . 78
c. 48, s. 16 . . 1062
ss. 18, 19 . 1021
c. 66 (Jud. Act, 1873) . 312, 463, 775
s. 24 . 135, 298
s. 25 . 179
(2) . 210, 220
(5) . . 756
(6) . 80, 222, 224, 225, 226, 1232
(7) . 142, 502, 542, 875
(8) . . 439
(11) . 174
s. 34 . . 135
37 & 38 Vict. c. 42, s. 15 . 402, 403
c. 48, ss. 1, 2, 5 . 119
c. 50 (Married Women's Property Act, 1874), ss. 1, 2, 3 . 264
s. 5 . . . 265
c. 54, s. 3. . . 678
c. 57, s. 1. . 199, 664
s. 2. . . 199
ss. 4, 5 . . 204
s. 8. . . 200
s. 9. . . 199
c. 62 (Infants' Relief Act, 1874) 211, 647
s. 1. . 10, 404
s. 2. 10, 44, 405, 411
c. 68, s. 12 . . 116
c. 78 (V. & P. Act, 1874), s. 1. . . 488
s. 2. . 229, 489
s. 9. . . 489
38 & 39 Vict. c. 9 402
c. 13 . . . 142
c. 17 . 111, 1015, 1023
ss. 34, 35, 37, 43, 88 . . 1023
c. 35, s. 20 . . 541
c. 55, s. 5. . . 399
s. 150 . . 679
s. 173 . . 399
s. 174 . 378, 399
ss. 175—181 . 400
s. 210 . . 440
ss. 233—239 . 400
c. 60 . . . 1232
c. 63 . . . 111
c. 66 . . . 405
c. 77, s. 10 . . 423
c. 83 . . . 400
c. 86, ss. 4, 5, 17 . 936
c. 87, s. 2. . . 483
ss. 5—21. . 483

PAGE

38 & 39 Vict. c. 87, ss. 29—39 . 483
ss. 41—48, 87 . 483
c. 89 . . . 397
c. 90 . . . 936
s. 6. . . 940
s. 10 118, 120, 927
c. 92, s. 51 . . 725
39 & 40 Vict. c. 22 . . 96, 404
c. 31 . . . 397
c. 36 . . 85, 111
40 & 41 Vict. c. 39, s. 4 . . 825
c. 62, s. 2. . . 116
c. 63 . . . 402
41 & 42 Vict. c. 15 . . . 85
c. 18 . . . 397
c. 31 (Bills of Sale Act, 1878) . 27
s. 4 . . 818, 839
c. 38 . . . 771
c. 49 . . . 108
s. 19 . 108, 109
s. 21 . . 109
s. 25 . . 109
42 & 43 Vict. c. 21 . . . 111
c. 30 . . . 111
c. 47 . . . 111
c. 49, s. 27 . . 595
c. 59, s. 3. . . 259
c. 77 . . . 397
43 & 44 Vict. c. 24, ss. 146—149 . 111
c. 42 (Employers' Liability Act, 1880) . 78, 924
s. 1. . 925, 927
ss. 3, 4, 6, 8 . 928
c. 47, s. 3. . 89, 90
s. 4. . . 110
s. 8. . . 90
44 & 45 Vict. c. 31, s. 6. . . 754
c. 41 (Conveyancing Act, 1881), s. 2. . . 670
s. 3. 485, 487, 488, 489, 493, 494, 514
s. 4. . . 242
s. 6. . . 656
s. 7. 57, 238, 448, 521, 522
s. 8. . . 505
s. 10 43, 231, 232, 756
s. 11 . 230, 232
s. 12 . 232, 681
s. 13 . . 490
s. 14 709, 711, 714, 715, 736, 1213
s. 18 721, 758, 759, 780
s. 24 . . 780
s. 28 . . 319
s. 30 . . 243
ss. 41—43 407, 408
s. 49 238, 448, 522
s. 58 235, 236, 237
s. 59 . . 237
s. 60 237, 319, 320
s. 61 . 237, 319
sched. 2 . . 1213

PAGE

44 & 45 Vict. c. 44, ss. 8, 9 . . 895
c. 58, ss. 141, 190 . 92
c. 59 . . . 222
c. 60 . . . 115
c. 67 . . . 111
45 & 46 Vict. c. 43 (Bills of Sale Act, 1882) . 27, 818
ss. 5, 6, 7 . 839
s. 8 . . . 754
c. 51 . . . 1233
c. 56, s. 25 . . 790
c. 61 (Bills of Exchange Act, 1882) . . 222, 1242 *et seq.*
s. 1 . . . 1245
s. 2 . 1242, 1243, 1246, 1247, 1252, 1254, 1255, 1257, 1259, 1261, 1280, 1284
s. 3 . 1242, 1243, 1307, 1375
s. 4 . .1243, 1376
ss. 5, 6 . . . 1243
s. 7 . .1244, 1251
s. 8 . 1246, 1248, 1251, 1252, 1286
s. 9 . . 279, 1246, 1286
s. 10 1245, 1261, 1264, 1284, 1287, 1375
s. 11 . . . 1245
s. 12 1243, 1245
s. 13 1245, 1293, 1378
s. 14 . 58, 1264, 1271, 1272
s. 15 . . . 1251
s. 16 1247, 1251
s. 17 1242, 1261, 1264
s. 18 . . . 1261
s. 19 1243, 1261, 1262, 1263, 1269
s. 20 1243, 1249
s. 21 1248, 1252, 1253, 1264
s. 22 . 378, 412, 1300, 1306
s. 23 . 330, 362, 363, 424, 1265, 1301, 1303, 1304
s. 24 . 362, 858, 1257, 1259, 1301
s. 25 . 330, 1301
s. 26 . 330, 349, 1247, 1301
s. 27 83, 108, 129, 153, 1254, 1255, 1257, 1258
s. 28 . 459, 1260

PAGE

45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882),
s. 29 156, 362, 466, 1253, 1255, 1256, 1258, 1260, 1261, 1266, 1283, 1285, 1309
s. 30 74, 363, 466, 859, 1255, 1257, 1258, 1309
s. 31 1247, 1248, 1251, 1254
s. 32 1248, 1252, 1266
s. 34 1251, 1252
s. 35. 344, 1251, 1260
s. 36 1249, 1260, 1261, 1287, 1288
s. 37 . . 1283
s. 38 1256, 1260, 1309
s. 39 . . 1262
s. 40 . . 1262
s. 41 . . 1263
s. 42 . . 1263
s. 43 1263, 1298
s. 44 1263, 1264
s. 45 1268, 1269, 1287, 1290
s. 46 1260, 1269, 1271, 1287
s. 47 1272, 1298
s. 48 . . 1272
s. 49 . 136, 1273, 1275, 1276, 1278
s. 50 1260, 1272, 1278, 1279, 1280
s. 51 1276, 1278
s. 52 . 154, 1265, 1270, 1280
s. 53 . . 1243
s. 54 . 137, 362, 1265, 1266
s. 55 . . 1266
s. 57 . 281, 1266, 1278, 1298
s. 58 . 466, 1280
s. 59 . 179, 1250, 1259, 1260, 1283
s. 60 . . 859, 1259, 1260
s. 61 1260, 1283
s. 62 . 175, 1260, 1283
s. 63. 191, 1260, 1294
s. 64 . 189, 190, 1243, 1260, 1294, 1295, 1298
s. 65 1251, 1281
s. 66 . . 1281
s. 67 1251, 1281, 1282

PAGE

45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882),
s. 68 1251, 1275, 1282
ss. 69, 70. 156, 1298
s. 71 1283, 1284
s. 72 . 62, 1278
s. 73 . . 1289
s. 74 . 156, 1290
s. 75 . 855, 1291
s. 76 1246, 1291, 1293
ss. 77, 78 . 1291, 1293
ss. 79, 80, 81 . 1291, 1292, 1293
s. 82 1291, 1292, 1293
s. 83 1284, 1285, 1286, 1375, 1376
s. 84 1285, 1287
s. 85 . . 1285
s. 86 1286, 1287
s. 87 1286, 1287
s. 88 . . 1285
s. 89 . 175, 1284, 1287, 1288
s. 90 . . 1245
s. 91 . 424, 1242, 1284, 1306
s. 92 . 58, 1271, 1275
ss. 93, 94 . 1277
s. 95 1289, 1293
s. 97 1289, 1293, 1375
sched. 1 . . 1277
c. 75 (Married Women's Property Act, 1882) . 219, 262, 267, 271, 418, 421, 423
s. 1 . . 262, 272, 419
s. 2 . . 262, 421
s. 3 . . . 423
s. 4 . . . 422
s. 5 . 204, 262, 421
s. 6 . . . 262
ss. 7, 8, 9 . 263
s. 11 . 419, 1224
s. 12 . 419, 420
s. 13 218, 265, 267
s. 14 . 266, 734
s. 15 . . 266
s. 18 . 255, 420
s. 19 . 267, 421
ss. 20, 21 . 413
s. 23 . . 420
s. 24 218, 255, 262
46 & 47 Vict. c. 49 . . . 275
c. 52 (Bankruptcy Act, 1883),
s. 9 . . . 268
s. 10 . . 197
s. 18 . . 177
s. 19 . . 177

PAGE

46 & 47 Vict. c. 52 (Bankruptcy Act, 1883),
s. 28 . . 1104
s. 30 . 196, 1104
s. 35 . . 276
s. 37 . . 196
s. 38 . 275, 276
s. 41 . 931, 940
s. 42 . 197, 754, 774, 794
s. 44 . 270, 273
s. 48 . 85, 167
s. 49 164, 434, 435
s. 50 . . 268
s. 53 . . 274
s. 54 . . 268
s. 55 . 684, 702, 774
ss. 56, 57 . 271
s. 64 . 274, 435
s. 84 . . 435
s. 144 . . 1339
s. 152 . . 272
c. 55, s. 17 . . 1291
c. 61 693, 725, 740, 742
ss. 28, 33 . 730
47 & 48 Vict. c. 41 402
c. 43, s. 4 . . . 803
c. 44 93
c. 62, s. 8 . . . 1380
48 & 49 Vict. c. 30 400
c. 72, s. 12 . . 674
49 & 50 Vict. c. 3 1320
c. 38, ss. 2, 4 . . 1217
c. 48, s. 6 115, 873, 898
sched., pt. 2 . . 115
50 & 51 Vict. c. 21, s. 4 . . . 678
c. 28 . . . 569
s. 5 . . . 570
s. 17 . 569, 574
s. 18 . . 570
c. 29 . . . 111
c. 46 . . . 120
s. 2 . . 117, 118
ss. 5, 6 . . 119
s. 10 . . 118
c. 57, s. 4 . . . 177
c. 58 . . . 923
51 & 52 Vict. c. 21 . . 772, 789
s. 1 . . . 780
s. 4 . . 786, 787
s. 5 . . . 800
s. 6 . . 801, 802
s. 7 . . 780, 782
s. 8 . . . 804
c. 25 . 1043, 1063
s. 17 . . 1065
s. 25 . . 1060
s. 27 . . 1061
s. 28 . . 1055, 1060, 1062
s. 36 . . 1062
c. 41, ss. 64—72 . 397
c. 43, ss. 59, 60 . 739
s. 67 . 135, 514
s. 127 . . 740
s. 128 . . 740
s. 138 . . 739
s. 147 . 786, 787

PAGE

51 & 52 Vict. c. 43, s. 160 . . 791
s. 182 . . 111
c. 59, s. 8 . . . 220
c. 64 . . . 115
52 & 53 Vict. c. 11 . . . 111
c. 21 . . . 108
s. 3 . . . 109
ss. 20, 28, 30 . 110
c. 45 . . 619, 822
s. 1 . . 595, 822
s. 2 . 588, 822, 823
ss. 3, 4, 5, 6 . 823
s. 7 . . . 824
s. 8 . . 595, 824
s. 9 . . 588, 595, 821, 824
s. 10 . 588, 825
s. 11 . . 825
s. 12 . . 822
c. 49 . . 81, 743
s. 1 . . . 517
s. 2 . . . 194
sched. 1 . . 194
53 & 54 Vict. c. 5 (Lunacy Act, 1890), ss. 120, 341 . 436
c. 39 (Partnership Act, 1890) 357, 372
s. 5 . 359, 360, 363, 814, 851
s. 6 . 359, 360, 363, 370, 815
s. 7 . 359, 360, 363, 1105
s. 8 . 359, 360, 363
s. 9 . . 360, 363
ss. 10, 11, 12 . 359, 851
s. 13 . . 359
s. 14 . 364, 365
ss. 15, 16 . 360
s. 17 . . 365
s. 18 1087, 1105
s. 23 . . 361
s. 31 . . 367
s. 32 . . 367
s. 33 367, 930, 946
s. 34 . 89, 367
s. 36 . 367, 368
ss. 38, 39 . 368
s. 46 . . 357
c. 57 . . . 740
s. 2 . . 721, 758
c. 70, s. 12 . . 672
s. 75 . 673, 674
c. 71 (Bankruptcy Act, 1890), s. 3 . . 198
s. 11 . . 778
s. 28 . 197, 774, 794
54 & 55 Vict. c. 8 678
s. 1 . 90, 677, 678, 747, 748
ss. 2, 4 . . 677
s. 9 . . . 747
c. 15 . . . 569
c. 38 . . . 1327

PAGE

54 & 55 Vict. c. 39 (Stamp Act, 1891) . . 1124, 1327 *et seq.*
s. 1 . 1125, 1327, 1339
s. 2 . . 1284, 1328
s. 3 . . 1328, 1330
s. 4 . . 1330, 1357
ss. 5, 6 . . 1333
s. 7 . . 1335
s. 8 . . 1335, 1377
s. 9 . . 1131, 1335
s. 10 . . 1333
s. 11 . . 1333
ss. 12, 13 . 1335
s. 14 1329, 1334, 1377
s. 15 . . 1328
s. 22 . . 1361
s. 23 1348, 1352, 1362
s. 25 . 937, 1359
s. 29 . . 1373
ss. 30, 31 . 1374
s. 32 1242, 1374, 1375
s. 33 1284, 1375
s. 34 . . 1375
ss. 35, 36, 37 . 1376
s. 38 1334, 1377
s. 39 1283, 1377
s. 40 . . 1380
ss. 49, 50, 51 . 1360
s. 53 . 91, 116
s. 54 . . 646
s. 55 . 646, 1341
s. 56 . 646, 1341, 1342
s. 57 . 646, 1342
s 58. 646, 1342, 1353
s. 59 . 646, 1341, 1343, 1345, 1361, 1363
ss. 60, 61 . 646, 1344
s. 62 . 1344, 1358
ss. 63, 64 . 1340
s. 69 . . 1365
ss. 70, 71 . 1365
s. 72 . . 1340
s. 73 . . 1353
s. 75 1356, 1358
s. 76 . . 1356
s. 77 1330, 1332, 1357
s. 78 . . 1357
s. 79 . . 1367
s. 82 1349, 1350, 1352
ss. 83, 84 . 1352
s. 85 . . 1350
s. 86 . 817, 1233, 1346, 1352, 1373
s. 87 . . 1348
s. 88 . . 1349
s. 89 . 402, 1349
s. 90 . . 1378
s. 91 1125, 1380, 1384
s. 92 1125, 1380

PAGE

54 & 55 Vict. c. 39 (Stamp Act, 1891),
s. 93 1124, 1125, 1126, 1173, 1381
s. 94 1131, 1381
s. 95 1125, 1381
s. 96 1125, 1135, 1381
s. 97. 116, 959, 1125, 1382
s. 98 1383, 1384
ss. 99, 100 . 1384
ss. 101, 102, 103. 1386
ss. 104, 105 . 1354
s. 106 . . 1355
ss. 107, 108, 109. 1366
s. 110 . . 1367
s. 111 1365, 1366
s. 116 . . 1383
s. 117 90, 91, 1345
s. 118 1233, 1384
s. 119 . . 1328
s. 120 . . 1328
s. 121 . . 1335
s. 122 1327, 1333, 1341, 1349
sched. 1. 91, 646, 917, 1125, 1327, 1346, 1354, 1356, 1358, 1359, 1360, 1362, 1363, 1366, 1369, 1373, 1374, 1378, 1379, 1380, 1383, 1384, 1385
c. 43 . . . 649
c. 72, s. 1 . . . 167
c. 76 . . 679, 680
55 & 56 Vict. c. 4 412
c. 9, s. 1 . 104, 107, 123
c. 13 . . . 709
s. 2 . . 714, 716
s. 3 . . 26, 670
s. 4 . . . 714
s. 5 . . . 714
c. 18 . . . 108
c. 36 . . . 649
56 & 57 Vict. c. 7, s. 4 . . . 1350
c. 39, ss. 23, 35 . 401
ss. 58—61 . 402
c. 53, s. 16 . 241, 424
s. 42 . . 850
c. 63 (Married Women's Property Act, 1893) . 419, 422, 432
s. 1. 419, 422, 426
s. 2 . . . 422
s. 4 . . . 419
c. 71 (Sale of Goods Act, 1893) . 332, 526, 527
s. 1 . . . 527
s. 2 . . 409, 528
s. 3 . . . 528
s. 4 . 19, 22, 28, 171, 528, 529, 532, 538, 544, 825
s. 5 . . 28, 539
s. 6 . . 150, 540
s. 7 . . 150, 540
s. 8 . 540, 541, 581

PAGE

56 & 57 Vict. c. 71 (Sale of Goods Act, 1893),
s. 9 . . 541, 581
s. 10 58, 141, 542
s. 11 545, 555, 572
s. 12 450, 545, 559
s. 13 136, 139, 545, 563, 570, 571
s. 14 126, 451, 545, 565, 566, 568
s. 15 563, 570, 571
s. 16 541, 579, 585
s. 17 . . . 579
s. 18 . 579, 580, 581, 585
s. 19 . 588, 589
s. 20 . . . 591
s. 21 . 592, 828
s. 22 . . . 593
s. 23 . . . 594
s. 24 593, 594, 595
s. 25 . 588, 595, 596, 821, 824
s. 26 . . . 596
s. 27 140, 596, 607
s. 28 65, 140, 598
s. 29 140, 544, 599, 600
s. 30 139, 454, 553 600, 601, 605
s. 31 172, 601, 602
s. 32 . 580, 604
s. 33 . 602, 605
s. 34 . 146, 605
s. 35 558, 598, 606
s. 36 . . . 606
s. 37 583, 592, 596, 607
ss. 38, 39 . 607
s. 41 140, 197, 607, 608
ss. 42, 43. 607, 611
s. 44 . 607, 612
s. 45 607, 611, 613, 614, 616, 617
s. 46 . 607, 618
s. 47 607, 612, 619
s. 48 607, 620, 621, 622
s. 49 . . 622
s. 50 . . 625
s. 51 . 281, 626
s. 52 . . 628
s. 53 . 278, 545, 629, 630
s. 54 . 281, 632
s. 55 . . 527
s. 56 . 140, 558, 580, 606
s. 58 . 17, 633
s. 60 . . 527
s. 61 . 321, 322, 527, 561
s. 62 . 28, 527, 528, 540, 554, 564, 579, 594, 604, 607, 619, 629, 633
c. 73, ss. 3, 9, 12, 21, 24 . . 399

	PAGE
56 & 57 Vict. c 73, s. 25	117, 399
s. 27	110, 111
s. 46	117
57 & 58 Vict. c. 30, s. 39	1350
c. 47	402
c. 54, ss. 1, 2	1059
c. 56, sched. 1	115
c. 57	577
ss. 21, 22, 23	1023
c. 60 (Merchant Shipping Act, 1894)	831, 1031, 1060
s. 15	839
ss. 31—46	833
s. 34	832, 1112
s. 55	833
s. 57	832
s. 108	917, 937, 1363
ss. 113—125	917
s. 156	871
s. 157	936
s. 158	148, 936
s. 164	936
s. 167	835, 966
s. 168	917
ss. 169—181	936
ss. 309, 320	1363
s. 326	111
ss. 342, 395	1363
s. 434	870
s. 446	1015
s. 448	1014
s. 451	1129, 1164
s. 458	937
s. 493	981, 992
s. 494	908, 998
ss. 495—500	908
s. 497	909, 910, 992
ss. 498, 499	909, 910
s. 502	990, 993, 1173
s. 503	990, 991, 1173
s. 506	1125, 1381
s. 508	991
ss. 538—543	111
ss. 544—556	869
s. 563	1363
s. 633	991
s. 721	1363
s. 742	1130
58 & 59 Vict. c. 16, s. 9	1385
s. 12	1340, 1345
s. 13	1383
s. 14	1352
s. 15	1330
s. 16	1339
c. 24, s. 4	787
c. 27	740
s. 3	699
c. 39	428
ss. 4, 5	431
59 & 60 Vict. c. 8	1239
c. 25	400, 1232, 1233
s. 33	1362
ss. 62—67	404, 1222
s. 84	1222
c. 26	1233
ss. 1, 7	1234
59 & 60 Vict. c. 26, s. 13	1222
c. 28, s. 13	1383
c. 35 (Judicial Trustee Act, 1896),	
s. 1	251, 872, 958
s. 3	251
c. 44, ss. 1—4	120
60 & 61 Vict. c. 46	108
s. 1	109
c. 65 (Land Transfer Act, 1897)	241
s. 1	241
s. 2	241, 247
s. 3	241
s. 11	525
s. 16	521
sched. 1	483
61 & 62 Vict. c. 10, s. 5	1350
s. 6	1341
c. 46, s. 8	1386
c. 58, s. 15	1320
62 & 63 Vict. c. 9, s. 4	1350, 1366
ss. 5, 6	1367
s. 10	1374, 1376, 1377
s. 11	1383
s. 12	1333
c. 14, s. 4	398
c. 23, s. 1	111
s. 2	112
s. 19	111
c. 27	1320
c. 51	111
63 & 64 Vict. c. 7, s. 9	541
s. 10	1343
c. 50	740
s. 4	698
c. 51 (Moneylenders' Act, 1900),	
s. 1	412, 413, 810
s. 2	809
s. 5	412
s. 6	809
1 Edw. 7, c. 7, s. 10	541
s. 11	116, 1125, 1131, 1132, 1380, 1381
c. 22	679, 924
s. 149	764
2 Edw. 7, c. 7, s. 9	1345
3 Edw. 7, c. 6, s. 3	93
c. 8, s. 8	1381
c. 39, s. 12	674
c. 46, s. 7	1346
s. 8	1108, 1125, 1380
4 Edw. 7, c. 19	1060
c. 28	108
5 Edw. 7, c. 4, ss. 5, 8	1365
c. 15	574
s. 44	575
6 Edw. 7, c. 17, s. 1	1293
c. 21, s. 3	90
c. 27, s. 1	570
s. 10	570
c. 28 (Crown Lands Act, 1906)	484
c. 32, s. 2	1022
c. 34 (Prevention of Corruption Act, 1906), ss. 1, 2	944

PAGE

6 Edw. 7, c. 41 (Marine Insurance Act, 1906) . 1106 *et seq.*
s. 1 . . . 1107
s. 2 . 1107, 1108
s. 3 . . . 1108
s. 4 . 1109, 1110
s. 5 . . . 1108
s. 6 . 1111, 1137
s. 7 . . . 1109
ss. 8, 9 . . . 1110
s. 10 1111, 1144, 1145
s. 11 . . . 1111
s. 12 1109, 1111, 1142
s. 13 . . . 1111
s. 14 . 1112, 1113
s. 15 . . . 1113
s. 16 1115, 1132, 1160
s. 17 . . . 1116
s. 18 1111, 1116, 1121, 1127
s. 19 . 1121, 1127
s. 20 . 1106, 1122
s. 21 1107, 1124, 1125
s. 22 . . . 1124
s. 23 . . . 1125
s. 24 . . . 1126
s. 25 . 1125, 1131
s. 26 1111, 1125, 1126
s. 27 . 1132, 1160
s. 28 . . . 1132
s. 29 . 1132, 1133
s. 30 . 1133, 1134
s. 31 1106, 1155, 1156
s. 32 1158, 1160, 1205
s. 33 . . . 1161
s. 34 . 1161, 1162
s. 35 . 1161, 1166
s. 36 1161, 1167, 1168
s. 37 . 1161, 1165
s. 38 . 1161, 1166
s. 39 . 1161, 1162
ss. 40, 41 1161, 1165
s. 42 1137, 1140, 1165
ss. 43, 44, 45 . . 1168
s. 46 . . . 1169
s. 47 . . . 1172
s. 48 . . . 1171
s. 49 1140, 1170, 1183
s. 50 222, 1113, 1114
s. 51 1113, 1115, 1160
s. 52 . 1106, 1156
s. 53 1106, 1156, 1157
s. 54 . 1106, 1157
s. 55 . . . 1173
s. 56 . . . 1184
ss. 57, 58 . . 1185
s. 59 . . . 1152
s. 60 . 1132, 1185
s. 61 . . . 1185
s. 62 . 1186, 1188
s. 63 . . . 1189
s. 64 . . . 1196
s. 65 . 1196, 1203
s. 66 . . . 1197
s. 67 1132, 1197, 1204
s. 69 . . . 1206
ss. 70, 71 . . 1208
ss. 72, 73 . . 1210

PAGE

6 Edw. 7, c. 41 (Marine Insurance Act, 1906),
ss. 74, 75 . . 1211
s. 76 . . . 1199
s. 77 1205, 1206, 1211
s. 78 . . . 1203
s. 79 . . . 1211
s. 80 . 1161, 1212
s. 81 . . . 1161
s. 82 . 1106, 1157
s. 83 . . . 1157
s. 84 1106, 1111, 1137, 1157, 1158, 1160
s. 85 . . . 1106
s. 87 . . . 1135
s. 88 1106, 1141, 1148, 1156, 1164
s. 89 . 1107, 1125
s. 90 1108, 1109, 1141
s. 91 . . . 1124
sched. 1 . 1108, 1112, 1115, 1128, 1130, 1133, 1134, 1137, 1138, 1141, 1145, 1148, 1152, 1172, 1174, 1180, 1182, 1183, 1184, 1198, 1201
c. 47 (Trade Disputes Act, 1906), s. 4 96, 404
c. 48, s. 52 . . . 833
c. 56 740
c. 58 (Workmen's Compensation Act, 1906) 928, 929, 933
ss. 1, 2 . . . 929
s. 3 . . 78, 929
ss. 4, 8 . . . 929
s. 13 . . . 928
s. 15 . . . 78
sched. 1 . 928, 929
sched. 2, 3 . . 929
7 Edw. 7, c. 13, s. 7 . . . 1362
s. 8 . 1383, 1384
c. 18 (Married Women's Property Acts, 1907) . 262, 423
s. 1 . . . 424
s. 2 . . . 421
c. 21 111
c. 24 (Limited Partnerships Act, 1907) 371
ss. 4, 5 . . . 371
s. 6 . . 371, 372
s. 7 . . 89, 372
ss. 8—16 . . 372
c. 47, ss. 1, 3, 5 . . 1320
c. 54 740
8 Edw. 7, c. 16, s. 5 . 1125, 1380
s. 6 . . . 1380
c. 28 (Agricultural Holdings Act, 1908) . 69, 740, 758
s. 1 90, 741, 742, 745
s. 2 . 90, 741, 742
s. 3 90, 741, 742, 745
s. 4 . . 90, 741
s. 5 . 90, 741, 742
s. 6 . 741, 742, 743
ss. 7, 8 . . . 741

PAGE

8 Edw. 7, c. 28 (Agricultural Holdings Act, 1908), s. 9 . . 741, 742
ss, 10, 11 . . 741
s. 12 . . 741, 758
s. 13 . . . 743
ss. 15, 16, 17, 18, 19 742
s. 21 . . 698, 702
s. 22 . . . 725
s. 23 . . . 723
ss. 24, 25 . . 742
s. 26 . . 707, 753
s. 28 . . . 774
s. 29 . . 788, 789
s. 31 . . . 742
ss. 37, 38, 39, 40, 41 741
s. 42 . . 699, 741
s. 43 . . . 743
s. 45 721, 723, 730, 731
ss. 46, 47 . . 740
s. 48 . . 740, 741
s. 50 . . . 741
sched. 1 . 741, 742
2 . . 743
3, 4 . . 741
c. 36 (Small Holdings and Allotments Act, 1908), s. 13 483
s. 47 . . 699, 758
c. 53, s. 1 . . . 787
s. 2 . . . 788
s. 4 . . . 788
s. 5 . . . 787
s. 6 . . . 788
s. 8 . . . 762
ss. 30, 43, 44 . 789
c. 67 (Children Act, 1908), s. 7 404, 1222
s. 75 . . . 414
ss. 100, 131 . . 260
c. 68, s. 11 . . . 993
c. 69 (Companies' (Consolidation) Act, 1908) 379, 380, 638, 1106, 1235, 1366
ss. 2—9 . . 379
ss. 10—13 . . 379
s. 14 . . . 636
ss. 16, 17 . . 380
s. 22 . . 222, 637
s. 23 . . . 638
s. 25 . . . 638
s. 27 . . . 222
ss. 28, 29 . . 639
s. 36 . . . 1366
s. 37 . . . 637
ss. 46 *et seq.* . . 382
s. 57 . . . 379

PAGE

8 Edw. 7, c. 69, s. 63 . . 384, 1307
s. 76 . . 380, 387
s. 77 . . . 1306
ss. 78, 79 . . 381
s. 81 . . 127, 128
ss. 85, 86 . . 137
s. 87 . . 381, 815
ss. 93—100 . . 819
ss. 100—102 . . 638
s. 104 . . 383, 384
s. 105 . 293, 384, 650
s. 107 . . . 384
s. 115 . . . 385
s. 121 . . . 379
s. 131 . . . 792
s. 142 . . . 792
s. 151 . . . 385
s. 184 . . . 385
s. 186 . . . 385
s. 192 . . . 386
s. 205 . . . 640
s. 206 . . . 385
s. 211 . . . 792
s. 212 . . . 384
s. 244 . . . 380
s. 266 . . . 792
s. 268 . . . 372
s. 271 . . . 792
s. 285 . . . 792
First Sched., Table A., arts 21—23 . 638
9 Edw. 7, c. 12, s. 1 . . . 1110
c. 13, s. 1 . . . 414
c. 34, s. 19 . . . 1363
c. 43, s. 7 . . . 1361
s. 8 . . . 1357
s. 9 . . . 1367
s. 10 . 1376, 1377
c. 44, ss. 14, 15 . . 673
c. 49 . . 1212, 1222
s. 3 . . . 1234
ss. 13, 14 . . 183
s. 15 . . . 1235
ss. 16, 17, 18 . . 1236
s. 30 . . 183, 1235
ss. 31, 32, 33, 34 . 1234
s. 36 . . . 1234
scheds. 6, 7 . . 1236
10 Edw. 7, c. 8 (Finance (1909—10) Act, 1910), s. 73 . 1341
s. 74 . 1329, 1345, 1354
s. 75 . . . 1356
s. 76 . . . 1346
s. 77 . . . 1350
s. 78 . 91, 1350, 1351
s. 79 . . . 1351
sched. 6 . . 91

THE

LAW OF CONTRACT,

ETC.

BOOK I.

LAW OF CONTRACTS IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

SECTION I.

NATURE OF CONTRACTS.

Definition of a Contract.—A contract is defined by Pothier to be "an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act" (*a*). Every contract includes a concurrence of intention between two parties, one of whom promises something to the other, who on his part accepts such promise; but it does not necessarily include a mutuality or reciprocity of contract and liability. There must be two parties to every contract, a promisor or party making the promise, and a promisee or party to whom the promise is made; but there may be only one contracting party. When there is a mutual contract binding each party to the other, the contract is bilateral. When the contract binds one person to another without any engage-

(*a*) Pothier, Traité des Obligations, § 3.

ment being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial. The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for assuring the performance of another principal contract, such as guarantees or engagements of sureties. Contracts, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by parol, by deed, or by matter of record.

Sub-section I.

(1.) *Parol or simple contracts* are contracts which are either made by word of mouth, or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered. Such contracts cannot be enforced unless they are founded upon some good or valuable consideration. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" (*b*); or again, "any act of the plaintiff from which the defendant derives, or expects to derive, a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed or such inconvenience suffered by the plaintiff, at the request or with the consent, either expressed or implied, of the defendant" (*c*).

The consideration—Absence of consideration.—When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise (*d*). Bracton, who wrote in the time of Hen. III., is the first of our lawyers who treats of naked promises and promises clothed with a consideration, and advocates, in the language of the civilians, the well-known principle, "*ex nudo pacto non oritur actio*" (*e*). But if a man is entrusted with

(*b*) *Currie* v. *Misa*, L.R. 10 Ex. 153, 162; 44 L.J. Ex. 94; *Williamson* v. *Clements*, 1 Taunt. 523; *Edgware Highway Board* v. *Harrow District Gas Co.*, L.R. 10 Q.B. 92; 44 L.J. Q.B. 1; *Fleming* v. *Bank of New Zealand*, (1900) A.C. 577, 586; 69 L.J. P.C. 120.

(*c*) 1 Selw. N.P. 55 (ed. 13), adopted by Tindal, C.J., in *Laythoarp* v. *Bryant*, 5 L.J. C.P. 217, 220; 2 Bing. N.C. 735; and by Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256, 271; 62 L.J. Q.B. 257, 264.

(*d*) This is the definition of "consideration" given in the Indian Contract Act of 1872.

(*e*) Bracton, lib. 3, cap. 1, fol. 99, ed. 1569. Doct. & Stud., Dial. 2, chap. 24; Shep. Touch. 224, 225. *Elsee* v. *Gatward*, 5 T.R. 143, 148.

and receives money or goods on the faith of a promise to deal with them in a particular manner, whether for reward or gratuitously, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach of the promise, if he does not use ordinary diligence or skill in respect of the same (*f*).

A promise to give any particular thing, such as a horse, or a watch, to another, unaccompanied by an actual or constructive transfer or change of possession, is a mere *nudum pactum*, and cannot be enforced by compulsion of law (*g*). A promise by one man to pay a debt already incurred by another is a *nudum pactum;* so also, speaking generally, is a promise by a creditor to accept less than the full amount of an admitted debt, or to give time for the payment thereof (*h*); also a promise to pay money to a person not entitled to receive it (*i*); a promise by the heir to pay the bond of his ancestor, when the heir is not bound by the bond (*k*). And, where a specific sum is fixed as the price of goods sold and delivered, or as an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or the same services is a *nudum pactum* (*l*). Where, however, a man makes a representation on the faith of which another man alters his position, the man making the representation is bound to perform it, for in the eye of the law it is a contract (*m*). Where a husband promised before his marriage to leave property by will to his wife for life and afterwards conveyed the property to a third person, the conveyance constituted a breach of contract which entitled the wife to sue at once for damages (*n*).

A promise or agreement to make a duty of a limited nature more extensive, and to undertake a greater liability than is imposed by law upon the party making the promise, is a *nudum pactum*, unless there be some fresh consideration; the bare promise of an executor or administrator, for example, to pay

(*f*) Cf. notes to *Coggs* v. *Bernard*, 1 Smith's L.C. 173 (ed. 11).

(*g*) *Donaldson* v. *Donaldson*, Kay, 711, 718; 23 L.J. Ch. 788; *Milroy* v. *Lord*, 31 L.J. Ch. 798.

(*h*) *Fitch* v. *Sutton*, 5 East, 232; *Pinnell's case*, 5 Co. 117, a, 117, b; *Cooper* v. *Phillips*, 1 C. M. & R. 649; see further, *post*, pp. 183—188.

(*i*) *Clay* v. *Willis*, 1 B. & C. 364; 1 L.J. (O.S.) K.B. 144.

(*k*) *Barber* v. *Fox*, 2 Saund. 135, 137, h; 1 Vent. 159; *Lloyd* v. *Lee*, 1 Str. 94; *Goodwin* v. *Willoughby*, Latch. 142; *Fabian* v. *Plant*, 1 Show. 178.

(*l*) *Harris* v. *Watson*, Peake, R. 102; *Brown* v. *Crump*, 1 Marsh. 567; *Newman* v. *Walters*, 3 B. & P. 612.

(*m*) *Per* Bacon, V.-C., in *Dashwood* v. *Jermyn*, 12 Ch.D. 776, 781; citing *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 61, n.; cp. *Fickus, In re*, (1900) 1 Ch. 331; 69 L.J. Ch. 161. And see *post*, pp. 72, 306.

(*n*) *Synge* v. *Synge*, (1894) 1 Q.B. 466; 63 L.J. Q.B. 202; *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455.

the debt of his testator or intestate does not alter or extend his liability; the executor does not, by such a promise, render himself personally liable, but is only chargeable to the extent of the assets (*o*). But if a party makes a contract for a good consideration to do something which he was already bound to do, though no one was at the time sure that the duty already existed, the other party can sue upon the contract (*p*).

The performance of an act which the party is under a legal obligation to perform cannot constitute a good consideration for a promise (*q*). So, if a debt is released or discharged, the giving up of a deed or collateral security originally deposited with the creditor to secure the payment of the debt cannot form a good consideration for a promise; for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it (*r*). But the performance of an act which a person has agreed with another to perform is a good consideration to support a promise by a third person, if the latter derives a benefit from the performance (*s*).

A promise to pay money to a sheriff in consideration of his executing a writ is also a *nudum pactum* (*t*); so, also, is a promise to pay money to a witness regularly subpœnaed to give evidence at a trial, as a compensation for his loss of time, because, in each of these cases, the parties are bound by law to do the acts in question, without compensation or reward (*u*). A promise to pay money to the crew of a vessel, as an incitement to exertion during a storm, is a *nudum pactum*, and cannot be enforced, because the sailor is bound to do his utmost to save and preserve the vessel (*x*). Where, however, any extraordinary and additional services have been rendered beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will enforce its faithful performance (*y*); if, therefore, a vessel is so short-handed as to render it dangerous to life to proceed to sea, and the crew are not bound under their articles to sail with so

(*o*) *Pearson* v. *Henry*, 5 T.R. 6; *Rann* v. *Hughes*, 7 T.R. 350, n. See also Williams on Executors, vol. 2, p. 1416 (ed. 10).

(*p*) *Williams* v. *O'Keefe*, (1910) A.C. 186, 191; 79 L.J. P.C. 53.

(*q*) Pothier, by Evans, p. 25; *Dixon* v. *Adams*, Cro. Eliz. 538; *Bayley* v. *Homan*, 3 Bing. N.C. 915; 6 L.J. C.P. 309; *Jackson* v. *Cobbin*, 8 M. & W. 790; 10 L.J. Ex. 389.

(*r*) *Cowper* v. *Green*, 7 M. & W. 633, 641; 10 L.J. Ex. 346.

(*s*) *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L.J. Ex. 225.

(*t*) *Bridge* v. *Cage*, Cro. Jac. 103.

(*u*) *Willis* v. *Peckham*, 4 Moore, 300; *Collins* v. *Godefroy*, 1 B. & Ad. 956; 9 L.J. (O.S.) K.B. 158.

(*x*) *Harris* v. *Watson*, Peake, 102; *Stilk* v. *Myrick*, 2 Campb. 317; *Newman* v. *Walters*, 3 B. & P. 615; *Harris* v. *Carter*, 3 E. & B. 559; 23 L.J. Q.B. 295; *Frazer* v. *Hatton*, 2 C.B. N.S. 512; 26 L.J. C.P. 226.

(*y*) *England* v. *Davidson*, 11 Ad. & E. 856; 9 L.J. Q.B. 287.

small a complement of seamen, a promise of additional remuneration in consideration of the increased risk is valid and binding (*z*). A promise not to abuse the process of the law, as, for instance, to conduct proceedings in bankruptcy so as to avoid, as far as possible, injury to the debtor's credit, will form no consideration for a promise by the debtor (*a*).

Neither "love and affection," nor "blood relationship" (*b*), nor "friendship," constitute a sufficient cause or consideration for the fulfilment by coercion of law of an undertaking or promise not under seal (*c*).

Fraudulent consideration.—A corrupt or fraudulent consideration will not support a promise. Thus, where the defendants, in consideration of the plaintiff promising to obtain a contract from a company in relation to which he was in a position of trust, contracted to pay him a commission, it was held that he could not recover, for although the jury found that he had not been induced by such consideration to act corruptly, yet such consideration was in itself corrupt (*d*). So, also, illegal and immoral contracts, and such as are against public policy, cannot be enforced, either because the consideration for the promise is bad, or because, although the consideration is good, yet the promise is bad (*e*).

Sufficient consideration—Work and services.—If, at the request of the promisor, any act which the promisee is under no legal obligation to do is done as the consideration for the promise, there is a sufficient consideration to render the promise obligatory in law, whether the promisor has obtained for himself any advantage or the promisee has suffered any disadvantage. Thus, the mere delivery of a document which the promisee has a right to retain in his possession is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the delivery of the document (*f*). If one person agrees to transfer, and another person agrees to accept,

(*z*) *Hartley* v. *Ponsonby*, 7 E. & B. 872 ; 26 L.J. Q.B. 322.

(*a*) *Bracewell* v. *Williams*, L.R. 2 C.P. 196.

(*b*) *Tweddle* v. *Atkinson*, 1 B. & S. 393 ; 30 L.J. Q.B. 265.

(*c*) *Harford* v. *Gardner*, 2 Leon. 30 ; *Holliday* v. *Atkinson*, 5 B. & C. 501 ; 8 D. & R. 163 ; *Cluff* v. *Moore*, 1 Sid. 413 ; *Lampleigh* v. *Brathwait*, Hob. 105.

(*d*) *Harrington* v. *Victoria Graving Dock Co.*, 3 Q.B.D. 549 ; 47 L.J. Q.B. 59

(*e*) See *post*, p. 75.

(*f*) *Wilkinson* v. *Oliveira*, 1 Bing. N.C. 490 ; 1 Scott, 461 ; *Haigh* v. *Brooks*, 10 Ad. & E. 309, 320, 334 ; 9 L.J. Q.B. 194 ; *Hart* v. *Miles*, 4 C.B. N.S. 371 ; 27 L.J. C.P. 218 ; *Westlake* v. *Adams*, 5 C.B. N.S. 248 ; 27 L.J. C.P. 271 ; *Smith* v. *Smith*, 13 C.B. N.S. 429 ; 32 L.J. C.P. 49 ; *Fleming* v. *Bank of New Zealand*, (1900) A.C. 577 ; 69 L.J. P.C. 120.

shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract (*g*). If the defendant has promised the plaintiff to pay him a sum of money in consideration of the plaintiff's procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise (*h*).

A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself (*i*). It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking (*k*). If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual advantage has resulted to the promisor (*l*). Any trouble or labour, too, however slight, undertaken by the plaintiff at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labour may have been unsuccessful, and productive of no advantage to the defendant (*m*). Where the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary information, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward (*n*). And, where the father of an illegitimate child promised the mother to pay her 2*s*. 6*d*. a week for its maintenance if she would abstain from affiliating the child, and the mother did abstain, it was held that the father was bound by the promise, the consideration having been executed (*o*). But a promise, on the abandonment of an immoral connexion with a woman, to pay her a sum of money, or an annuity, in consideration that

(*g*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.

(*h*) *Seaman* v. *Price*, 1 Ry. & M. 195.

(*i*) See *Stackemann* v. *Paton*, (1906) 1 Ch. 774; 75 L.J. Ch. 590; where attention is called to the distinction between a good and a valuable consideration in the Fine Arts Copyright Act, 1862, 25 & 26 Vict. c. 68, s. 1.

(*k*) *Bunn* v. *Guy*, 4 East, 190, 194; *Jones* v. *Ashburnham*, *ib.* 455, 463.

(*l*) *Bailey* v. *Croft*, 4 Taunt. 611; *Williamson* v. *Clements*, 1 Taunt. 523.

(*m*) *Sturlyn* v. *Albany*, Cro. Eliz. 67; *March* v. *Culpepper*, Cro. Car. 70.

(*n*) *England* v. *Davidson*, 11 Ad. & E. 856; 9 L.J. Q.B. 287; *Smith* v. *Moore*, 1 C.B. 438; *Thatcher* v. *England*, 3 C.B. 254; 15 L.J. C.P. 241; *Lockhart* v. *Barnard*, 14 M. & W. 674; 15 L.J. Ex. 1; *Turner* v. *Walker*, L.R. 2 Q.B. 301; 36 L.J. Q.B. 112; *Bent* v. *Wakefield Bank*, 4 C.P.D. 1.

(*o*) *Linnegar* v. *Hodd*, 5 C.B. 437; 17 L.J. C.P. 106; *Crowhurst* v. *Laverack*, 8 Exch. 208, 213; 22 L.J. Ex. 57.

she will thenceforth lead a good and virtuous life, is not binding (*p*).

Work and services rendered to third party at request of promisor.—Any service, benefit or advantage rendered to a third person at the request of the promisor is a sufficient consideration for the promise. Thus, if one person should say to another, "heal such a poor man of his disease," or "make an highway, and I will give thee so much," and he does it, an action lies at the common law (*q*). A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain 20*l.*; and it was held that the leave of absence so given was a sufficient consideration for the defendant's promise(*r*). So, where the defendant promised the plaintiff to pay him 100*l.* if the plaintiff would bail the defendant's servant, who had been cast into prison, it was held that there was a sufficient consideration for the promise (*s*). Where the father of an illegitimate child promised to pay the mother an allowance of 60*l.* a year during her life, in consideration that she had at his request undertaken, and then had, the care and nurture of the child, and would thenceforth continue to take charge thereof, it was held that there was a sufficient consideration for the promise, and that the executors of the father, after his decease, were bound to continue the yearly payment to the mother (*t*).

Past consideration.—Bygone acts or services cannot, unless coupled with a previous request, be made a good consideration for a promise, for the acts or services having been done before the promise was made cannot be said to be a consideration for it; thus, a promise to pay the plaintiff 20*l.* in consideration that the plaintiff "had delivered" to the defendant twenty sheep, or a promise to lend the plaintiff 20*l.* in consideration that the plaintiff "had formerly lent" that sum to the defendant, is a *nudum pactum* and incapable of sustaining an action (*u*). And a mere moral obligation arising from a past benefit not conferred at the request of the defendant is not a good consideration (*x*). But if the act has been performed pur-

(*p*) *Binnington* v. *Wallis*, 4 B. & Ald. 650; *Jennings* v. *Brown*, 9 M. & W. 496, 501; 12 L.J. Ex. 86; *Beaumont* v. *Reeve*, 8 Q.B. 483, 487; 15 L.J. Q.B. 142.

(*q*) 1 Rolle Abr. Action sur Case.

(*r*) *Taylor* v. *Jones*, 1 Raym. 312.

(*s*) *Hunt* v. *Bate*, Dyer, 272, a.

(*t*) *Jennings* v. *Brown*, 9 M. & W. 496; 12 L.J. Ex. 86; *Hicks* v. *Gregory*, 8 C.B. 378; 19 L.J. C.P. 81.

(*u*) *Jeremy* v. *Goochman*, Cro. Eliz. 442; *Dogget* v. *Vowell*, Moore, 643; *Moore* v. *Williams*, *ib.* 220; Bacon's Abr. Assumpsit, D.; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 451; 9 L.J. Q.B. 409; *Wiyan* v. *English and Scottish Law Life Association*, (1909) 1 Ch. 291; 78 L.J. Ch. 120.

(*x*) *Eastwood* v. *Kenyon*, *supra*.

suant to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum* (*y*). Thus, where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff 20*l.* in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant, it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the instance of the defendant (*z*). So, where the defendant, having committed a murder, required the plaintiff to endeavour to obtain a pardon for him from the king, and the plaintiff journeyed at his own charges and laboured, by every means in his power, to effect the desired object, and the defendant, afterwards, and in consideration of the premises, promised to give the plaintiff 100*l.*, it was held that, although the consideration was past and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party, the promise was binding (*a*). But the thing done must, of course, have been advantageous to the defendant, or detrimental or troublesome or inconvenient to the plaintiff, and must be such an act or service as the law recognises as a legal consideration for a promise (*b*).

If a man pays a sum of money or buys goods for A. without his knowledge or request, and afterwards A. agrees to the payment or receives the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of the civil law, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*c*). A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right.

When the defendant retains the benefit of the consideration, the law will, under some circumstances, imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim (*d*).

Failure of consideration.—Although there be an apparent consideration for the promise, yet, if this consideration should turn out to be false, or to be a nullity, the contract has no legal force

(*y*) 1 Wms. Saund. 264.

(*z*) Dyer, 272, b; 1 Wms. Saund. 264, 264, a.

(*a*) *Lampleigh* v. *Brathwait*, Hob. 105; 1 Smith's L.C. 141 (ed. 11); *Sidnam* v. *Worthington*, Cro. Eliz. 42; *Harris' Case*, Dyer, 272, a, n. 31.

(*b*) *Kaye* v. *Dutton*, 7 M. & Gr. 807, 816; 13 L.J. C.P. 187; *Victors* v. *Davies*, 12 M. & W. 759; 13 L.J. Ex. 214.

(*c*) 1 Saund. 264, n. 1; notes to *Osborne* v. *Rogers*.

(*d*) *Post*, p. 446.

or effect (*e*). So, if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action, or the relinquishment of a contract void in law, or a discharge from an arrest illegally made, or a promise to pay a debt which never had an existence in point of law (*f*).

Written promises without consideration.—Generally speaking, no difference is recognised in law between a written contract and a contract by word of mouth (*g*). Where the defendant signed a written undertaking to the following effect, "I hereby agree to remain with Mrs. Lees for two years from the date hereof for the purpose of learning the business of a dressmaker, &c.," it was held that, as the engagement was all on one side, nothing being contracted to be done by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum* (*h*). So, where a memorandum of agreement was made in the following terms, "I, ..., do agree that I will work for and with J. S. at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said J. S. twelve months' notice in writing that I shall quit his service," it was held that the agreement was a *nudum pactum* (*i*).

Moral obligations.—The moral obligation which a parent is under to provide for his child imposes on him no liability to pay the debts incurred by the child, even for necessaries (*k*); and he cannot be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them (*l*), or the child has become chargeable upon the parish, and the parish authorities take the proper steps to enforce the performance of the parent's legal duty (*m*).

(*e*) *Gough* v. *Findon*, 7 Exch. 48; 21 L.J. Ex. 58.

(*f*) *Rosyer* v. *Langdale*, Sty. 248; *Hammon* v. *Roll*, March, 202; *Atkinson* v. *Settree*, Willes, 482; *King* v. *Hobbs*, Yelv. 25; *Randal* v. *Harvey*, Godb. 358; *Courtenay* v. *Strong*, 2 Ld. Raym. 1217; *Cockrane* v. *Willis*, L.R. 1 Ch. 58; 35 L.J. Ch. 36.

(*g*) *Rann* v. *Hughes*, 7 T.R. 350, 351, n.

(*h*) *Lees* v. *Whitcomb*, 5 Bing. 34; 6 L.J. (O.S.) C.P. 213.

(*i*) *Sykes* v. *Dixon*, 9 Ad. & E. 693; 8 L.J. Q.B. 102; *Bates* v. *Cort*, 2 B. & C. 474; 3 D. & R. 676; *James* v. *Williams*, 5 B. & Ad. 1109; 3 L.J. K.B. 97; *Young* v. *Timmings*, 1 Cr. & J. 331, 340; 9 L.J. Ex. 68; *Hulse* v. *Hulse*, 17 C.B. 725; 23 L.J. C.P. 177; but see *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L.J. Ex. 359; and *Whittle* v. *Frankland*, 2 B. & S. 49, 57; 31 L.J. M.C. 81. Probably at the present day an agreement to employ and retain would be inferred from the terms of the contract where they were not actually inconsistent with such a promise: see *Hartley* v. *Cummings*, 5 C.B. 247; 17 L.J. C.P. 84; *Reg.* v. *Welch*, 2 E. & B. 355; 22 L.J. M.C. 145.

(*k*) *Shelton* v. *Springett*, 11 C.B. 452.

(*l*) *Mortimore* v. *Wright*, 6 M. & W. 482; 9 L.J. Ex. 158; *Seaborne* v. *Maddy*, 9 C. & P. 497; *Urmston* v. *Newcomen*, 4 Ad. & E. 899; 5 L.J. K.B. 175; *Ruttinger* v. *Temple*, 4 B. & S. 491; 33 L.J. Q.B. 1

(*m*) *Shelton* v. *Springett*, 11 C.B. 452

In certain early cases (*n*), which, however, were not assented to in a later case (*o*), authority was inferred on very slight evidence. The only duties of the nature of mere moral obligations that will support an express promise are those which could be enforced at common law but for the intervention of some positive rule of law or statutory enactment, which, with a view to the general benefit, exempts the party in that particular instance from liability. Such are legal claims and demands barred by the Statute of Limitations, where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt remains a voluntary duty, binding only *in foro conscientiæ*.

The consideration which would have been sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated; thus, a man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt (*p*). But although an express promise revives a good precedent consideration, it can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision (*q*). With regard to the duties and obligations arising out of the debts and contracts of persons under age, it is to be observed that the Infants' Relief Act, 1874 (*r*), specially enacts that all contracts entered into by infants for loans or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void; and no action can be brought on any promise made after full age to pay any debt contracted during infancy or upon a ratification of any promise or contract made during infancy.

Forbearance of legal or equitable rights forms a good consideration for an undertaking, and will make it binding (*s*), and this even though no actual benefit accrue to the party undertaking. If the plaintiff, for example, at the request of the defendant, forbears to institute legal proceedings, or discontinues legal proceedings already commenced, against a third

(*n*) *Law* v. *Wilkin*, 6 Ad. & E. 718; 6 L.J. Q.B. 166; *Blackburn* v. *Mackey*, 1 C. & P. 1.

(*o*) *Mortimore* v. *Wright*, 6 M. & W. 482; 9 L.J. Ex. 158.

(*p*) *Flight* v. *Reed*, 1 H & C., 703, 715, 716; 32 L.J. Ex. 265, 269.

(*q*) *Wennall* v. *Adney*, 3 B. & P. 249, n. a; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 447; 9 L.J. Q.B. 409.

(*r*) 37 & 38 Vict. c. 62, ss. 1. 2.

(*s*) *Alliance Bank* v. *Broom*, 2 Dr. & S. 289; 34 L.J. Ch. 256; *Bracewell* v. *Williams*, L.R. 2 C.P. 196.

party for the enforcement of a lawful claim or demand, for any convenient or reasonable period, or suspends or withdraws an execution or a distress against the goods or the person of such third party, the suspension or withdrawal of such execution or distress, or the forbearance of further proceedings, forms a sufficient consideration for a promise by the defendant to pay money to the plaintiff, or to satisfy the full amount of his claim (*t*). The loss of collateral rights by the promisee is sufficient to support a promise, even though the main part of the consideration has failed (*u*). The abandonment and discontinuance of an action brought to enforce a doubtful right or claim are a sufficient consideration for a promise (*x*); and so is the compromise of a disputed claim made *bonâ fide*, even although it ultimately appears that the claim was wholly unfounded (*y*); and, if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amount claimed (*z*); and, in the case of all unliquidated claims, where the precise amount due has not been reduced to a certainty by the agreement of the parties, the payment or satisfaction of part of the demand is a good consideration for the discharge of the residue (*a*), although litigation has not been actually commenced (*b*). But unless the debt is unliquidated, or some doubt exists as to the exact amount due, a promise by the creditor to discharge the residue on receiving payment of part is *nudum pactum* (*c*), because the debtor is under a legal obligation to pay the whole demand. The mere putting an end to certain disputes and controversies, or ceasing to make com-

(*t*) *Hyams* v. *Stuart King*, (1908) 2 K.B. 696; *Smith* v. *Algar*, 1 B. & Ad. 603; 9 L.J. (O.S.) K.B. 79; 1 Roll. Abr. 24, pl. 33; *Morton* v. *Burn*, 7 Ad. & E. 19; 7 L.J. Q.B. 104; *Pilkington* v. *Green*, 2 B. & P. 151; *Sugars* v. *Brinkworth*, 4 Campb. 46; *Willatts* v. *Kennedy*, 8 Bing. 5; 1 L.J. C.P. 4; *Fullerton* v. *Provincial Bank of Ireland*, (1903) A.C. 309, 312; 72 L.J. P.C. 79.

(*u*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 273; 25 L.J. C.P. 300.

(*x*) *Longridge* v. *Dorville*, 5 B. & Ald. 117; *Stracey* v. *Bank of England*, 4 Moo. & P. 639; 8 L.J. (O.S.) C.P. 234; *Llewellyn* v. *Llewellyn*, 15 L.J. Q.B. 4; *Wilby* v. *Elgee*, L.R. 10 C.P. 497; 44 L.J. C.P. 254. But not the abandonment of a suit, which is unjust, or which cannot be enforced. *Tooley* v. *Windham*, Cro. Eliz. 206; *Jones* v. *Ashburnham*, 4 East, 455; 1 Smith's L.C. 188 (ed. 11); *Wade* v. *Simeon*, 2 C.B. 548; 15 L.J. C.P. 114; *Graham* v. *Johnson*, L.R. 8 Eq. 36; 38 L.J. Ch. 374.

(*y*) *Callissher* v. *Bischoffsheim*, L.R. 5 Q.B. 449, 452; 39 L.J. Q.B. 181; *Miles* v. *New Zealand Co.*, 32 Ch.D. 266; 54 L.J. Ch. 1035.

(*z*) *Edwards* v. *Baugh*, 11 M. & W. 641; 12 L.J. Ex. 427.

(*a*) *Wilkinson* v. *Byers*, 1 Ad. & E. 106, 113; 3 L.J. K.B. 144; *Watters* v. *Smith*, 2 B. & Ad. 889; 1 L.J. K.B. 31.

(*b*) *Cook* v. *Wright*, 1 B. & S. 559; 30 L.J. Q.B. 321.

(*c*) *Cumber* v. *Wane*, 1 Str. 425; 1 Smith's L.C. 338 (ed. 11); *Foakes* v. *Beer*, 9 App. Cas. 605; 54 L.J. Q.B. 130; *Underwood* v. *Underwood*, (1894) P. 204; 63 L.J. P. 109. See *post*, p. 151.

plaints, or to bore or annoy a man, is an insufficient consideration for an express promise (*d*).

Adequacy of consideration.—From the preceding remarks it will be perceived that the consideration for a simple contract or promise need not be adequate in point of value (*e*). "If there be *any* consideration, the court will not weigh the extent of it" (*f*); it has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction; and therefore will not enter into such an enquiry (*g*). If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them (*h*).

Thus, in the case of guarantees:—"Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me upon my guarantee" (*i*). So, if a person says, "In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you," the party indemnified is not therefore bound to employ the person designated by the guarantee; but, if he does employ him, then the guarantee attaches and becomes binding on the party who gave it (*k*). So where a railway company advertised for tenders for the supply of stores for a period of twelve months, and the defendant sent in a tender to supply the stores "in such quantities as the company's storekeeper might order from time to time," and the company accepted the tender, it was held that the defendant was bound to supply goods ordered before any notice had been given by the

(*d*) *Edwards* v. *Baugh*, *supra*; *Kaye* v. *Dutton*, 7 M. & Gr. 807; 13 L.J. C.P. 183; *White* v. *Bluett*, 23 L.J. Ex. 36.

(*e*) *Bainbridge* v. *Firmstone*, 8 Ad. & E. 743; *Haigh* v. *Brooks*, 10 Ad. & E. 309; 9 L.J. Q.B. 194; *Thomas* v. *Thomas*, 2 Q.B. 851; 11 L.J. Q.B. 104; *Smith* v. *Smith*, 13 C.B. N.S. 418; 32 L.J. C.P. 149; *Begbie* v. *Phosphate Sewage Co.*, 1 Q.B.D. 679; affirming L.R. 10 Q B. 491; 44 L.J. Q.B. 233; *Hyams* v. *Stuart King*, (1908) 2 K.B. 696; 77 L.J. K.B. 794.

(*f*) Ellenborough, C.J., *Phillips* v. *Bateman*, 16 East, 356, 372; *Hitchcock* v. *Coker*, 6 Ad. & E. 457; *Pinnell's case*, 5 Co. 117, a, 117, b.

(*g*) *Westlake* v. *Adams*, 5 C.B. N.S. 248, 265; 27 L.J. C.P. 271.

(*h*) But the consideration must be of some value. *Smith* v. *Smith*, 3 Leon. 88; 1 Roll. Abr. 23. See, as to the rule in equity, *Townend* v. *Toker*, L.R. 1 Ch. 446, 458; 35 L.J. Ch. 608, 614; *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784. As to the effect of the inadequacy being so great as to raise a presumption of fraud, see *Coles* v. *Trecothick*, 9 Ves. 234, 246; *Wood* v. *Abrey*, 3 Madd. 417, 423.

(*i*) *Morton* v. *Burn*, 7 Ad. & E. 19, 23; 7 L.J. Q.B. 104.

(*k*) *Kennaway* v. *Treleavan*, 5 M. & W. 501; 9 L.J. Ex. 20; *Offord* v. *Davies*, 12 C.B. N.S. 748; 31 L.J. C.P. 319.

defendant to the company of withdrawal of the tender (*l*). In these cases there is an offer which is intended to be accepted by the other party doing the act, which forms the consideration; and when the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act (*m*). But it does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and lighted with gas, there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for, gas any longer than either of them may think fit; the householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to do (*n*). So an advertisement of a sale by auction does not amount to a contract with anyone who may act upon it that all the things advertised will actually be put up for auction, and that such person will have an opportunity of bidding for them; it is a mere declaration of intention, and not an offer; and persons who attend the sale cannot maintain an action against the auctioneer, if the articles advertised are not put up for sale (*o*).

Bilateral contracts, also, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties; the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another (*p*). Such are all contracts of sale, where the promise or undertaking of the one party to sell forms the consideration for the promise of the other to buy, and where the "bargain is struck," and the contract concluded, by the mere assent of the parties (*q*). Such, also, are all agreements by simple contract between creditors for compounding their debts and releasing their debtor from their several claims, on receiving a part only of the amount due to them, the agreement by one to compound his debt and release the debtor being the consideration for the agreement of the other to do the same (*r*); also all contracts of marriage, where the promise of the one party is the consideration for the promise of the other party; also all contracts or

(*l*) *G. N. Ry.* v. *Witham*, L.R. 9 C.P. 16; 43 L.J. C.P. 1.

(*m*) *Fishmongers' Co.* v. *Robertson*, 6 Sc. N.R. 56, 106; 12 L.J. C.P. 185; *Jones* v. *Robinson*, 1 Exch. 454; 17 L.J. Ex. 36; *Mills* v. *Blackall*, 11 Q.B. 358; 17 L.J. Q.B. 31.

(*n*) *Hoddesdon Gas Co.* v. *Haselwood*, 6 C.B. N.S. 249; 28 L.J. C.P. 268.

(*o*) *Harris* v. *Nickerson*, L.R. 8 Q.B. 286; 42 L.J. Q.B. 171.

(*p*) *Tipper* v. *Bicknell*, 4 Sc. 462; 6 L.J. C.P. 194.

(*q*) 2 Bl. Com. 447; Noy's Maxims, c. 42.

(*r*) *Boothbey* v. *Sowden*, 3 Campb. 175; *Wood* v. *Roberts*, 2 Stark. 417.

agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration (*s*). By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, as being in the nature of a contract founded upon mutual promises (*t*). All contracts founded upon mutual promises between persons of full age must be obligatory upon both parties (*u*), so that each may have an action upon it, or neither will be bound. A written agreement, therefore, to submit disputes and differences to arbitration must be signed by all parties before anyone can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract; and, before a plaintiff can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award (*x*). The mutuality of obligation is the very essence of all contracts founded upon mutual promises (*y*).

Assent of the parties.—In order to make a contract, there must be an offer made by the one party to the other, an acceptance of that offer, and, unless it was clearly not required by the proposer in the first instance, a communication of such acceptance to him or his agent (*z*). A communication of acceptance to his own agent would not bind the acceptor. If the terms of a contract founded upon mutual promises have not been finally agreed upon, the contract is incomplete (*a*). Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain until the terms have been arranged and a written contract executed (*b*); but an acceptance enclosing a more formal memorandum for signature is sufficient, if the memo-

(*s*) *Gower* v. *Capper*, Cro. Eliz. 543; *ib.* 703, 888; *Mansfield* v. *Stephen*, Comb. 256; *Hebden* v. *Rutter*, 1 Sid. 180; *Holder* v. *Dickeson*, 1 Freem. 95; *Gibbons* v. *Prewd*, Hardr. 102.

(*t*) *Tobacco Pipe, &c. Co.* v. *Loder*, 16 Q.B. 765; 20 L.J. Q.B. 414.

(*u*) *Nichols* v. *Raynbred*, Hob. 88; *Arnold* v. *Poole* (*Mayor*), 4 M. & Gr. 860, 896; 12 L.J. C.P. 97.

(*x*) *Kingston* v. *Phelps*, Peake, 299; *Biddell* v. *Dowse*, 6 B. & C. 255. An action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Lievesley* v. *Gilmore*, L.R. 1 C.P. 570; 35 L.J. C.P. 351.

(*y*) *Holt* v. *Ward*, 2 Str. 938.

(*z*) *McIver* v. *Richardson*, 1 M. & S. 557; *Mozley* v. *Tinkler*, 1 C. M. & R. 692; 4 L.J. Ex. 84; *National Savings Bank Association, In re, Hebbs' case*, L.R. 4 Eq. 9; *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 661, 691.

(*a*) *Routledge* v. *Grant*, 4 Bing. 653; 6 L.J. (O.S.) C.P. 166; *Cope* v. *Albinson*, 8 Exch. 185; 22 L.J. Ex. 37; *Felthouse* v. *Bindley*, 11 C.B. N.S. 869; 31 L.J. C.P. 204; *Montreal Gas Co.* v. *Vasey*, (1900) A.C. 595; 69 L.J. P.C. 134.

(*b*) *Kingston-upon-Hull* v. *Petch*, 10 Exch. 610; 24 L.J. Ex. 23; *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638; *Honeyman* v. *Marryat*, 6 H.L. Cas. 112; 26 L.J. Ch. 619; *Appleby* v. *Johnson*, L.R. 9 C.P. 158; 43 L.J. C.P. 146; *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666; *Winn* v. *Bull*, 7 Ch.D. 29; 47 L.J. Ch. 139; *Harvey* v. *Barnard's Inn*, 50 L.J. Ch. 750; *May* v. *Thomson*, 20 Ch.D. 705; 51 L.J. Ch. 917; *Hawkesworth* v. *Chaffey*, 55 L.J. Ch.

randum contains no new terms (*c*). Where a vendor undertook to accept the highest net money tender he received, and B tendered 31,000*l*., and the plaintiff company tendered "such a sum as will exceed by 200*l*. the amount to-day offered by the other proposing purchaser," it was held that the latter tender did not answer the description of "the highest net money tender" (*d*). Where in a written acceptance of a building contract there is a reference made to the fact that a contract will afterwards be prepared, that may be only for the purpose of expressing the agreement already made in more formal language (*e*). It has been doubted whether the words "subject to the title being approved by our solicitor" would show that the contract is not complete (*f*). But, at all events, the words "this offer has been made subject to the conditions of the lease being modified to my solicitor's satisfaction" do not render the contract incomplete (*g*). If a man applies for shares in a company, and the directors allot them to him, and, after the allotment, but before it is communicated to the applicant, he withdraws his application, there is no complete contract, and he is not bound to accept them (*h*). But although the applicant must have notice of the fact of the allotment, yet it is not necessary that a formal notice should be sent to him. It is enough if he is made aware that the company have accepted his application; but the mere entry of his name on the register of shareholders is not sufficient for this purpose (*i*). An advertisement, offering a sum of money to any person who should contract influenza after using a specific remedy according to directions supplied by the advertiser, when coupled with the performance of the contract, constitutes a contract on the part of the advertiser to pay the sum of money, although no notification was given to him of the acceptance of the contract (*k*). An offer of a contract sent by letter cannot be withdrawn by

335; *Gray* v. *Smith*, 43 Ch.D. 208; 59 L.J. Ch. 145; *Filby* v. *Hounsel*, (1896) 2 Ch. 737; 65 L.J. Ch. 852; *North* v. *Percival*, (1898) 2 Ch. 128; 67 L.J. Ch. 321; *Santa Fé Land Co.* v. *Forestal Land, &c. Co.*, 26 T.L.R. 534. And see *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.

(*c*) *Gibbins* v. *N. E. Metropolitan Asylum District*, 11 Beav. 1; 17 L.J. Ch. 5; *Jones* v. *Daniel*, (1894) 2 Ch. 332; 63 L.J. Ch. 562.

(*d*) *South Hetton Coal Co.* v. *Haswell Shotton and Easington Coal and Coke Co.*, (1898) 1 Ch. 465; 67 L.J. Ch. 238.

(*e*) *Lewis* v. *Brass*, 3 Q.B.D. 667; *Rossiter* v. *Miller*, 3 App. Cas. 1124; 48 L.J. Ch. 10; *Bristol Bread Co.* v. *Maggs*, 44 Ch.D. 616; 59 L.J. Ch. 472; *Lloyd* v. *Nowell*, (1895) 2 Ch. 744; 64 L.J. Ch. 744. See *post*, p. 46.

(*f*) *Hussey* v. *Horne Payne*, 4 App. Cas. 311; 48 L.J. Ch. 352. As to what amounts to evidence of a concluded contract, see *Lever* v. *Koffler*, (1901) 1 Ch. 543; 70 L.J. Ch. 395.

(*g*) *Bonnewell* v. *Jenkins*, 8 Ch.D.70; 47 L.J. Ch. 758.

(*h*) *Hebbs' case*, L.R. 4 Eq. 9; 36 L.J. Ch. 748; *Graham, Ex parte*, 30 L.J. Bk. 42; 30 L.J. Ch. 861; *Pellatt's case*, L.R. 2 Ch. 527; 36 L.J. Ch. 613.

(*i*) *Gunn's Case*, L.R. 3 Ch. 40; 37 L.J. Ch. 40.

(*k*) *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256; 62 L.J. Q.B. 257.

merely posting a subsequent letter which does not in the ordinary course of the post arrive until after the offer has been accepted (*l*). A promise of marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time; the acceptance may be proved by the conduct of the party, as well as by express words (*m*). If an offer is made, coupled with a request, express or implied, that the other party must signify his acceptance by doing some particular thing, then, as soon as he does that thing, he is bound (*n*). Where in a lease there is an option to purchase upon giving notice, there is a binding contract as soon as notice is given (*o*). A mere quotation by a vendor of the lowest price at which he will sell contains no implied contract to sell at that price (*p*). A party who gives time to another to accept or reject a proposal is not bound to wait till the time expires, but may withdraw his proposal before acceptance or rejection (*q*).

A proposal once made is always open for acceptance until it is withdrawn to the knowledge of the other party, and such other party has the option of accepting the proposal until the moment when he receives notice of withdrawal (*r*). Where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that, if six weeks are given by one party to accept an offer, the other has the same period to put an end to it; the contract must be mutual; and the one party cannot be bound without the other (*s*). If, however, anything has been given or done as the consideration for the promise—if, for instance, the party to whom it is made has agreed to incur any expense or labour in consideration of the offer being continued or kept open for a certain time—then the party making the offer is not at liberty to retract it; when the promise has been accepted, the acceptance cannot be revoked, and neither party is at liberty, without the consent of the other, to rescind the contract (*t*). But, if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or con-

(*l*) *Byrne* v. *Van Tienhoven*, 5 C.P.D. 345; 49 L.J. C.P. 316.

(*m*) *Daniel* v. *Bowles*, 3 C. & P. 553; *Hutton* v. *Mansell*, 3 Salk. 16.

(*n*) *Brogden* v. *Metropolitan Ry.*, 2 App.Cas. 666, 691.

(*o*) *Mills* v. *Haywood*, 6 Ch.D. 196.

(*p*) *Harrey* v. *Facey*, (1893) A.C. 552; 62 L.J. P.C. 127; *Boyers & Co.* v. *Duke*, (1905) 2 Ir. R. 617. It is different, however, where the quotation is accompanied by a firm offer to sell at the terms quoted. *Philp & Co.* v. *Knoblauch*, (1907) S. 994.

(*q*) *Cooke* v. *Oxley*, 3 T.R. 653; *Stevenson* v. *McLean*, 5 Q.B.D. 346, 351.

(*r*) *Byrne* v. *Van Tienhoven*, 5 C.P.D. 345; 49 L.J. C.P. 316; *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; 61 L.J. Ch. 377.

(*s*) *Routledge* v. *Grant*, 4 Bing. 653; 6 L.J. (O.S.) C.P. 166.

(*t*) *Grant* v. *Hunt*, 1 C.B. 44; 14 L.J. C.P. 106.

dition is annexed to the acceptance, the party making the offer is, of course, not bound by the acceptance (*u*). But an acceptance is not made conditional by an addition which is immaterial (*x*), nor by the existence of a misunderstanding between the parties as to the construction of collateral terms not part of the agreement itself (*y*). So if there is a conditional application for shares and an unconditional allotment, there is no contract (*z*). If a time is prescribed within which the proposal must be accepted, the offer comes to an end at the expiration of that time, and a subsequent acceptance is ineffectual; but if no time is prescribed the acceptance must be made and notified within a reasonable time (*a*). An offer to sell may be withdrawn before acceptance without any formal notice, as where the person who makes the offer sells the thing to a third person; even, as it should seem, although the person to whom the offer was made has no knowledge of the sale (*b*). The contract dates from the acceptance, not from the date of the offer (*b*). Where a person accepts an offer he must not vary the proposed terms without calling the attention of the party making the offer to the fact of the variation (*c*).

Biddings at an auction are mere offers, which may be retracted at any time before the hammer is down (*d*). "An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to" (*e*). Sect. 58, sub-sect. 2, of the Sale of Goods Act, 1893 (*f*), now provides that "a sale" of goods "by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid."

Acceptance of offers by post.—Where the defendants wrote to the plaintiffs, making them an offer of merchandise at a fixed

(*u*) *Duke* v. *Andrews*, 2 Exch. 290; 17 L.J. Ex. 231; *Gilkes* v. *Leonino*, 4 C.B. N.S. 485, 501; *Jordan* v. *Norton*, 4 M. & W. 155, 161; 7 L.J. Ex. 281; *Addinell's case*, L.R. 1 Eq. 225; 35 L.J. Ch. 75; *Crossley* v. *Maycock*, L.R. 18 Eq. 180; 43 L.J. Ch. 379; *Stanley* v. *Dowdeswell*, L.R. 10 C.P. 102; *Jackson* v. *Turquand*, L.R. 4 H.L. 305; 39 L.J. Ch. 11; *Wynne's case*, L.R. 8 Ch. 1002; *Beck's case*, L.R. 9 Ch. 392; 43 L.J. Ch. 531.

(*x*) *Clive* v. *Beaumont*, 1 De G. & S. 397; *Bolton* v. *Lambert*, 41 Ch.D. 295; 58 L.J. Ch. 425.

(*y*) *Baines* v. *Woodfall*, 6 C.B. N.S. 657, 676; 28 L.J. C.P. 338.

(*z*) *Shackleford's case*, L.R. 1 Ch. 567; 35 L.J. Ch. 818; *Roger's case*, L.R. 3 Ch. 633.

(*a*) *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L.R. 1 Ex. 109; 35 L.J. Ex. 90; *Baily, Ex parte*, L.R. 3 Ch. 592; 37 L.J. Ch. 670.

(*b*) *Dickinson* v. *Dodds*, 2 Ch.D. 463; 45 L.J. Ch. 777.

(*c*) *English and Foreign Credit Co.* v. *Arduin*, L.R. 5 H.L. 64; 40 L.J. Ex. 108.

(*d*) As to retraction on the ground of mistake after fall of the hammer, see *Van Praagh* v. *Everidge*, (1903) 1 Ch. 434; 72 L.J. Ch. 260.

(*e*) *Payne* v. *Cave*, 3 T.R. 148; *Warlow* v. *Harrison*, 1 E. & E. 395; 28 L.J. Q.B. 18.

(*f*) 56 & 57 Vict. c. 71.

price, they "receiving an answer in course of post," it was held that there was a binding contract of sale the moment the letter accepting the offer was posted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; otherwise, it was observed, no contract could ever be completed by post. In this case the defendants misdirected a letter, and so caused a delay in its receipt and in the return of the answer, and, not having received the answer at the expected time, they sold their merchandise to another person; and it was held that, as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, the answer must be taken to have come back in due course of post (*g*). If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete (*h*), unless the miscarriage is owing to the fault of the sender. The true rule is that if the person making the offer may be deemed to have contemplated that the receiver of the offer will send an answer by post, the person making the offer is bound when the letter containing the acceptance is posted, on the ground that he has constituted the Post Office his agent to receive the acceptance; but that when there is no such inference from the facts, the person making the offer is only bound when the acceptance actually reaches him (*i*). A postman is not an agent of the Post Office to receive letters, and the delivery to him of a letter accepting an offer does not, for the purpose of fixing the time of the acceptance, amount to a posting of the letter (*k*).

Contracts by telegram.—Where an order is sent by telegram, the post-office authorities are only agents to transmit the message in the terms in which it is delivered to them, and if the telegraph clerk makes a mistake in the transmission there is no binding contract (*l*).

Contracts by deed are contracts in writing sealed and delivered by the parties to them. No cause, motive, or consideration beyond the mere will of the party making the contract, is necessary to give them validity; and no one can be permitted

(*g*) *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Potter* v. *Saunders*, 6 Hare, 1; *Newcombe* v. *De Roos*, 2 E. & E. 270; 29 L.J. Q.B. 4; *Taylor* v. *Merchants' Fire Insurance Co.*, 9 How. S.C. 390 (Amer.).

(*h*) *Dunlop* v. *Higgins*, 1 H.L.C. 381; *Duncan* v. *Topham*, 8 C.B. 225; *Household Fire Insurance Co.* v. *Grant*, 4 Ex.D. 216; 48 L.J. Ex. 577; overruling *British American Telegraph Co.* v. *Colson*, L.R. 6 Ex. 108; 40 L.J. Ex. 97.

(*i*) *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; 61 L.J. Ch. 377; *Household Fire Insurance Co.* v. *Grant*, *supra*; *Bruner* v. *Moore*, (1904) 1 Ch. 305; 73 L.J. Ch. 377.

(*k*) *London and Northern Bank, In re, Jones, Ex parte*, (1900) 1 Ch. 220; 69 L.J. Ch. 24.

(*l*) *Henkel* v. *Pape*, L.R. 6 Ex. 7; 40 L.J. Ex. 15.

(except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has avowed by deed (*m*). The courts, however, will not enforce specific performance of a voluntary covenant (*n*), or of a voluntary settlement of an expectancy or *spes successionis* (*o*); and, for the purpose of ascertaining whether a covenant is voluntary or otherwise, it may be shown that there was in fact no consideration although one is expressed on the face of the deed (*p*), or that there was a good consideration, although the deed only expresses a nominal one (*q*), or none at all (*r*).

Requisites of deeds.—Every deed ought to have writing, sealing, and delivery; and, if the parties be illiterate, it ought also to be read over to them. It may be printed, or written on parchment or paper; and it is good and valid, although it mention no time, or date, or place of making, or be dated at one time and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered; for "any agreement in writing sealed and delivered becometh a deed" (*s*). Signing is not essential to the validity of a deed at common law (*t*). But where a deed purported to be sealed, but bore no seal, and there was no evidence of any sealing, it was held to be invalid (*u*). It now rarely happens that the party executing a deed actually seals it with his own hands, or with his own seal. The seal is fixed or impressed on the deed by the person professionally employed, the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. It has been held also that one and the same seal may be the seal of half-a-dozen persons at the same time (*x*); but they must all be actually present consenting to the act; otherwise the execution is not good (*y*). The sealing, or the acknowledgment of the seal, must be made after the deed has been written, and before its delivery; for, if a blank piece of paper or parchment be sealed and delivered, and afterwards written

(*m*) *Sharington* v. *Strotton*, Plowd. 1, 308 a, 309; *Morley* v. *Boothby*, 3 Bing. 111; 10 Moore, 404; *Fallowes* v. *Taylor*, 7 T.R. 477; *Shubrick* v. *Salmond*, 3 Burr. 1639; 1 Fonbl. Eq. 344, n. a.; 2 Finch, 108, 110.

(*n*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176, 188; 21 L.J. Ch. 577.

(*o*) *Ellenborough, In re*, (1903) 1 Ch. 697; 72 L.J. Ch. 218.

(*p*) *Wilson* v. *Keating*, 28 L.J. Ch. 898.

(*q*) *Leifchild's case*, L.R. 1 Eq. 231.

(*r*) *Llanelly Railway and Dock Co.* v. *L. & N. W. Ry.*, L.R. 8 Ch. 942.

(*s*) 11 Co. 27 b, 28 a; Co. Litt. 171 b; Shep. Touch. 1 Ch. 4.

(*t*) 1 Sugd. Powers, 297; Prest. Shep. Touch. 56 b; *Hodgkinson, Ex parte*, 19 Ves. 291; *Taunton* v. *Pepler*, 6 Madd. 166; *Cooch* v. *Goodman*, 2 Q.B. 597; *Tupper* v. *Foulkes*, 9 C.B. N.S. 797, 803; 30 L.J. C.P. 214. As to the applicability to deeds of the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 4, see *post*, p. 22.

(*u*) *National Provincial Bank* v. *Jackson*, 33 Ch.D. 1.

(*x*) *Ball* v. *Dunsterville*, 4 T.R. 313; *R.* v. *Longnor*, 4 B. & Ad. 647; 2 L.J. M.C. 62.

(*y*) *Harrison* v. *Sykes*, 7 T.R. 207.

upon, it is no deed (*z*); and, if indorsements or schedules are written or annexed to deeds after their execution, the deeds must be re-sealed and re-delivered, or the subsequent addition to the contract will be nugatory and invalid (*a*). A bail bond, which had been executed before the condition was filled up, has been held to be void (*b*); and so has a deed of conveyance or transfer of shares, executed by the proprietor of such shares with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser (*c*). If a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor (*d*).

Delivery of deeds.—Until the sealed writing is delivered, it is not a deed. The delivery "may be made by the party himself that doth make the deed, or by any other, by his appointment or authority precedent, or assent or agreement subsequent" (*e*). Delivery of the deed to the party who is to take by it, or any other party for his use, is not essential; thus, where an instrument is formally sealed and delivered and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, and nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed (*f*). The law has not laid down any precise form in which delivery must be made, and there may be circumstances which are equivalent to it without actual delivery; thus, where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed (*g*). If it is proved that the defendant signed and sealed the deed, and the plaintiff has possession of and produces the instrument, this is *primâ facie* evidence of a delivery to the plaintiff (*h*); and, if a party sends forth a deed to the world as his deed, he will be estopped, as against a party who has acted on the faith of the representation, from

(*z*) Perkins, s. 118; Com. Dig. Fait. A. 1.

(*a*) *Weeks* v. *Maillardet*, 14 East, 570; *Sellin* v. *Price*, L.R. 2 Ex. 189; 36 L.J. Ex. 93.

(*b*) *Powell* v. *Duff*, 3 Camp. 181.

(*c*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; 9 L.J. Ex. 217. See *post*, p. 646.

(*d*) *Swan* v. *North British Australasian Land Co.*, 2 H. & C. 175; 32 L.J. Ex. 273.

(*e*) Shep. Touch. 1 ch. 4, p. 57; *Tupper* v. *Foulkes*, 9 C.B. N.S. 797; 30 L.J. C.P. 214.

(*f*) *Doe* v. *Knight*, 5 B. & C. 689, 692; 4 L.J. (O.S.) K.B. 161; *Thoroughgood's case*, 9 Rep. 163 a; *Tupper* v. *Foulkes*, *supra*; *Xenos* v. *Wickham*, L.R. 2 H.L. 296; 36 L.J. C.P. 313. But the fact of debentures being dated and sealed does not prove that they were delivered: *Mowatt* v. *Castle Steel and Iron Works Co.*, 34 Ch.D. 58.

(*g*) *Goodright* v. *Straphan*, Cowp. 201.

(*h*) *Hall* v. *Bainbridge*, 12 Q.B. 699; 17 L.J. Q.B. 317.

showing that the deed is not his deed, and that he never executed it. The mere placing of a seal to a written contract will not make the contract a deed. Thus, if seals have been affixed to a document through ignorance and by mistake, the placing of a seal opposite to the name of a party, though evidence of a deed and one of the formalities belonging to it, is not conclusive; and if the parties did not mean to contract by deed, the ignorance of the parties as to the effect of a seal could not make it so (*i*). A contract, bad as a deed, may yet, under certain circumstances, operate as a common agreement (*k*).

Delivery as escrow.—If a party signs and seals a deed, and places it in his drawer or on his table, and another person comes and takes it away, this is not a delivery (*l*); and, if it should appear that the document was delivered conditionally, and not with a view to its immediately taking effect as a deed, it is said to be delivered as an *escrow*, and an action cannot be maintained upon it until the condition has been performed (*m*). But it does not follow that, because a deed is to be executed in duplicate, its operation is suspended until both parts have been executed and interchanged (*n*).

Deeds inter partes *and deeds poll.*—When a deed is made between several persons, it is called a deed *inter partes*, and also an indenture. When it is made by one person alone, it is called a deed poll. The indenture or deed indented takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified (*o*). The deed poll was so called because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counterpart (*p*).

Contracts by matter of record are contracts acknowledged in open court before an officer of the court, and recorded in the presence of the party making the acknowledgment. A record

(*i*) *Clement* v. *Gunhouse*, 5 Esp. 83; *Goodright* v. *Gregory*, Lofft, 339; *Davidson* v. *Cooper*, 13 M. & W. 343; 13 L.J. Ex. 276.

(*k*) *R.* v. *Ridgwell*, 6 B. & C. 665; 5 L.J. (O.S.) M.C. 67; *Hunter* v. *Parker*, 7 M. & W. 322; 10 L.J. Ex. 281.

(*l*) *Stanton* v. *Chamberlain*, Ow. 95; Cro. Eliz. 122.

(*m*) *Per* Parke, B., *Bowker* v. *Burdekin*, 11 M. & W. 147; 12 L.J. Ex. 329; *Gudgen* v. *Bessett*, 6 E. & B. 986; 26 L.J. Q.B. 36; *Furness* v. *Meek*, 27 L.J. Ex. 34; *Millership* v. *Brookes*, 5 H. & N. 797; 29 L.J. Ex. 369; *Johnson* v. *Baker*, 4 B. & Ald. 440; *Watkins* v. *Nash*, L.R. 20 Eq. 262; *Pattle* v. *Hornibrook*, (1897) 1 Ch. 25; 66 L.J. Ch. 144.

(*n*) *Kidner* v. *Keith*, 15 C.B. N.S. 35. See as to qualified execution of a deed, *Exchange Bank of Yarmouth* v. *Blethen*, 10 App. Cas. 293; 54 L.J. P.C. 27.

(*o*) See *Stile's case*, 5 Co. 206.

(*p*) Co. Lit. 143 a; Shep. Touch. 50.

thus made forms unimpeachable evidence of the contract, so that the contract is proved and established by the mere production of the record. Contracts by statutes merchant and statutes staple are contracts of record; and so also are the recognizances entered into by witnesses to enforce their attendance to give evidence at a trial (*q*).

SECTION II.

OF THE AUTHENTICATION OF CONTRACTS.

Contracts requiring authentication by a signed writing.—Contracts for the sale of interests in land.—By sect. 4 of the Statute of Frauds (*r*), no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto (*s*) by him lawfully authorised. Deeds are apparently not within the Statute of Frauds (*t*), which, however, does apply to agreements not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period (*u*). Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing (*x*). Where anything is to be done which substantially amounts to a sale or parting with an interest in land, the contract is within the statute (*y*). A grant of a right to shoot and take away game has been held to be within the statute (*z*). Where it was agreed that the plaintiff should

(*q*) As to the power of the court to alter its record, see *Swire, In re, Mellor* v. *Swire*, 30 Ch.D. 239.

(*r*) 29 Car. 2, c. 3.

(*s*) *Mortlock* v. *Buller*, 10 Ves. 292, 311; 2 Dowl. 518; *Heard* v. *Pilley*, 4 Ch. App. 548; 38 L.J. Ch. 718; *Griffiths Cycle Corporation* v. *Humber & Co.*, (1899) 2 Q.B. 414; 68 L.J. Q.B. 959, explaining *Smith* v. *Webster*, 3 Ch.D. 49; 45 L.J. Ch. 528.

(*t*) *Holmes* v. *Mitchell*, 7 C.B. N.S. 361, 368; 28 L.J. C.P. 301; *Cherry* v. *Heming*, 4 Exch. 631; 19 L.J. Ex. 64; *Aveline* v. *Whisson*, 4 Man. & G. 801; 12 L.J. C.P. 58. It would follow that deeds are also not within the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 4.

(*u*) Sugd. V. & P. 122, n. (ed. 14).

(*x*) *Anon.*, Ventr. 361; *Poulteney* v. *Holmes*, Str. 405.

(*y*) *Kelly* v. *Webster*, 12 C.B. 290; 21 L.J. C.P. 163; Willes, J., *Smart* v. *Jones*, 15 C.B. N.S. 717; 33 L.J. C.P. 156.

(*z*) *Webber* v. *Lee*, 9 Q.B.D. 315; 51 L.J. Q.B. 485.

surrender her tenancy and prevail on her landlord to accept the defendant as tenant in her place, and that the defendant should then pay her for so doing 100*l.*, it was held that the contract amounted to a sale of an interest in land within the statute (*a*); so also a sale of debentures creating a floating charge on the property of a company which consisted in part of leaseholds is within the statute (*b*). Although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and assign his share of the partnership assets is within the statute (*c*). A verbal contract between a husband and wife, that if the husband would buy a particular house in which the wife desired to reside, she would pay him the amount of the purchase-money, was held not to be a contract or sale of an interest in lands (*d*). And a contract to receive a ship into a graving dock has been held not to be a contract to which the section applied (*e*). Generally, whenever the contract or promise sued upon forms part of one entire contract for an interest in land, it will fail to support an action, if it is not authenticated by writing (*f*).

Where there has been a part performance of a parol agreement by the person desiring to enforce it, that will take the case out of the operation of the Statute of Frauds (*g*); for the courts will not allow the statute to cover a clearly fraudulent act (*h*). In order to constitute a part performance, the parties must have put themselves in a different position from that in which they would have been had there been no contract, as, for instance, when possession is accepted (*i*), or when a tenant expends money upon a farm (*k*), or pays an increased rent (*l*). Where it is evident that the parties have pursued a course of action as if there were a contract, the court will enforce such contract (*m*). In order to constitute part performance, the act relied on must be unequivocal; it must have relation to the agreement in question, and to no other, and it must be sufficient of itself to satisfy the court of the existence

(*a*) *Cocking* v. *Ward*, 1 C.B. 868; 15 L.J. C.P. 245.

(*b*) *Driver* v. *Broad*, (1893) 1 Q.B. 744; 63 L.J. Q.B. 12.

(*c*) *Gray* v. *Smith*, 43 Ch.D. 208; 59 L.J. Ch. 145.

(*d*) *Boston* v. *Boston*, (1904) 1 K.B. 124; 73 L.J. K.B. 17.

(*e*) *Wells* v. *Kingston-upon-Hull*, L.R. 10 C.P. 402; 44 L.J. C.P. 257.

(*f*) *Hodgson* v. *Johnson*, E.B. & E. 685; 28 L.J. Q.B. 88; but see *Pulbrook* v. *Lawes*, 1 Q.B.D. 284; 45 L.J. Q.B. 178.

(*g*) *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140; *Caton* v. *Caton*, L.R. 1 Ch. 137, 148; 35 L.J. Ch. 292.

(*h*) *Haigh* v. *Kaye*, L.R. 7 Ch. 469; 41 L.J. Ch. 567.

(*i*) *Dale* v. *Hamilton*, 5 Hare, 381; 16 L.J. Ch. 126; *Morphett* v. *Jones*, 1 Swanst. 172; *post*, p. 652; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; 22 L.J. Ch. 419; *post*, p. 296.

(*k*) *Mundy* v. *Jolliffe*, 5 Myl. & Cr. 167; 9 L.J. Ch. 95; *post*, p. 651.

(*l*) *Miller* v. *Sharp*, (1899) 1 Ch. 622; 68 L.J. Ch. 322.

(*m*) *Blachford* v. *Kirkpatrick*, 6 Beav. 232; 12 L.J. Ch. 108.

of a contract which equity will enforce (*n*). Part payment of rent, unless possession is taken by a tenant, is not such a part performance as to take the case out of the statute (*o*). Where a father verbally promised his daughter a house as a wedding present, and put her in possession, and paid instalments to a building society in respect of it, and at his death there was still 110*l.* due to the society, it was held that the possession took the case out of the statute, and that the 110*l.* must come out of the father's estate (*p*). The mere payment of purchase-money is not a part performance (*q*), unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement (*r*). But where the defendant frequently visited a plot of land upon which a house was being erected and insisted upon material alterations and improvements which were carried out by the plaintiffs, it was held that her acts were unequivocal, and showed that she was interested in the matter on the footing of a legal contract, and that a parol contract entered into by her with the plaintiffs for the purchase of the said plot of land with a house on it could be specifically enforced (*s*). Where the defendant served as housekeeper to the intestate, who had made an unattested will, in which he left the defendant a life estate in a farm, it was held there was no part performance sufficient to exclude the statute (*t*). The above doctrine only applies to contracts in respect of land, or at all events does not apply to contracts of service (*u*).

Interest in land.—Contracts for furnished houses and lodgings.—These contracts, whether by the day, week, or month, are contracts for an interest in land, and must be authenticated by a signed writing, if the contract gives the party a right to any specific apartments (*x*); but a contract to receive a man into a house and provide him with board and lodging generally, not giving him a right to any specific rooms, has been held not to be a contract for an interest in land (*y*). An agreement to furnish a house, entered into between a landlord and an intended tenant, where the occupation of the house forms the substance

(*n*) *Alderson* v. *Maddison*, 8 App. Cas. 467; 52 L.J. Q.B. 737.

(*o*) *Thursby* v. *Eccles*, 70 L.J. K.B. 91.

(*p*) *Ungley* v. *Ungley*, 5 Ch.D. 887; 46 L.J. Ch. 854.

(*q*) *Per* James, L.J., *Hall, Ex parte*, 10 Ch.D. 619; 48 L.J. Bk. 79; *Clinan* v. *Cooke*, 1 Scho. & Lef. 40 (Ir.).

(*r*) *Per* Baggallay, L.J., in *Humphreys* v. *Green*, 10 Q.B.D. 148; 52 L.J. Q.B. 140.

(*s*) *Dickinson* v. *Barrow*, (1904) 2 Ch. 339; 73 L.J. Ch. 701.

(*t*) *Alderson* v. *Maddison*, 8 App. Cas. 467; 52 L.J. Q.B. 737.

(*u*) *Britain* v. *Ross ter*, 11 Q.B.D. 123; 48 L.J. Q.B. 362; *M'Manus* v. *Cooke*, 35 Ch.D. 681; 56 L.J. Ch. 662.

(*x*) *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 C. & J. 391; 9 L.J. (O.S.) Ex. 101.

(*y*) *Wright* v. *Stavert*, 2 E. & E. 720; 29 L.J. Q.B. 161.

of the contract, and the furnishing of it is bargained for only in connection with such occupation, is a contract for an interest in land (*z*); if the agreement does not form part of a contract for the letting and hiring of a house, it is then, of course, only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

Interest in land.—Agreements for the sale of a milk-walk, by which the plaintiff agrees to let the defendant into the occupation of premises, and the defendant agrees to pay rent, rates, and taxes, is a contract for an interest in land within the statute (*a*).

Interest in land.—Agreements to make alterations and repairs in buildings entered into between a landlord and an intended lessee or tenant, where the principal subject-matter of the agreement is the letting of the buildings, and the improvements and alterations are accessorial thereto, and contracted for only in connection with the lease, are contracts involving an interest in land within the statute and cannot be enforced unless they are authenticated by writing (*b*). But a collateral agreement that an intending landlord will do repairs if the intending tenant will take a lease, is not within the statute, as it does not bind the tenant to take the lease (*c*). And where a tenant in the actual occupation of a house under an existing demise orally agreed, in consideration that the landlord would put another story upon the house, to pay him 10*l.* per annum upon the cost of the erection, in addition to the rent, and the additional story was built, and the landlord brought his action for the increased payment, it was held that the want of a written contract formed no objection to the action (*d*). A contract of this kind made by a tenant in the actual occupation and enjoyment of the land, and not forming part of the original contract of demise, seems to be a contract for work and labour and the supply of materials, rather than a contract involving an interest in land. Where the defendant agreed to make good all damage done by his workmen in quarrying stone from the plaintiff's land, it was held that this was not an agreement respecting land within the statute (*e*).

Interest in land.—Contracts for services in connection with

(*z*) *Vaughan* v. *Hancock*, 3 C.B. 766; 16 L.J. C.P. 1; *Simmons* v. *Simmons*, 12 Jur. 1.

(*a*) *Smart* v. *Harding*, 15 C.B. 652; 24 L.J. C.P. 76.

(*b*) *Vaughan* v. *Hancock*, 3 C.B. 766; 16 L.J. C.P. 1; *Buttemere* v. *Hayes*, 5 M. & W. 456; 9 L.J. Ex. 44; *Falmouth* (*Earl*) v. *Thomas*, 1 Cr. & M. 89; 2 L.J. Ex. 57.

(*c*) *Angell* v. *Duke*, L.R. 10 Q.B. 174; 44 L.J. Q.B. 78. And see *Boston* v. *Boston*, (1904) 1 K.B. 124; 73 L.J. K.B. 17.

(*d*) *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433; *Seago* v. *Deane*, 1 Moo. & P. 227; 4 Bing. 459.

(*e*) *Griffiths* v. *Jenkins*, 10 Jur. N.S. 207.

the transfer of an interest in land.—Where a lessee, who was restrained from assigning his lease without licence, agreed to assign the lease for 100*l.*, to be paid by the assignee, and to pay to his landlord 40*l.* out of the 100*l.* for a licence, and the licence being given, and the assignment executed, and the money received, he then refused to pay the 40*l.*, on the ground that there was no written agreement, it was held that the landlord might recover the 40*l.* in an action for money had and received (*f*); and where the plaintiff had made an oral agreement with a third party for the purchase of an estate, and then agreed in writing with the defendant to sell him the bargain for 40*l.*, and the estate was afterwards at the plaintiff's request conveyed to the nominee of the defendant, it was held that the non-enforceability of the original agreement was no ground for a non-suit, and that the defendant was responsible for the payment of the 40*l.* (*g*); in these cases, the contract being executed, the action is in truth an action for a stipulated remuneration for services rendered. But where the defendant, having no interest in a public-house, agreed to get the plaintiff a lease of it, it was held that this was a contract for an interest in land within the statute (*h*). Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part founded on a promise to be performed after such execution; but one contract founded upon one consideration cannot be bisected so as to make a new contract and a new consideration out of one half (*i*).

Interest in land.—Agreements concerning landmarks and boundaries.—If two occupiers of adjoining lands agree that a wall or fence shall be built by one of them as a boundary common to both, and that the other shall pay his proportion of the expense, this is not a contract for an interest in land within the meaning of the statute (*k*).

Interest in land.—Contracts respecting growing crops, grass, timber, &c.—An agreement for the sale and purchase of growing grass, growing timber or underwood, growing fruit and hops, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a

(*f*) *Griffith* v. *Young*, 12 East, 513, 515. As to exaction of fine for licence to assign, see *post*, p. 670, 55 & 56 Vict. c. 13, s. 3.

(*g*) *Seaman* v. *Price*, 2 Bing. 437; 1 Ry. & M. 195; *Green* v. *Saddington*, 7 E. & B. 503.

(*h*) *Horsey* v. *Graham*, L.R. 5 C.P. 9; 39 L.J. C.P. 58.

(*i*) *Hodgson* v. *Johnson*, E. B. & E. 685; 28 L.J. Q.B. 88; *Pulbrook* v. *Lawes*, 1 Q.B.D. 284; 45 L.J. Q.B. 178.

(*k*) *Stuart* v. *Smith*, 7 Taunt. 158.

contract for the sale of an interest in land (*l*), as such things are not distinguishable from the land itself in legal contemplation until actual severance (*m*); but *fructus industriales*, such as growing turnips, potatoes, and corn, and crops of the soil annually raised by the labour of man, are considered goods and chattels, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity; and contracts for the sale of them as well as licence to come upon the land for the purpose of gathering and securing them, are not contracts or sales of an interest in land within the meaning of the statute (*n*). The sale of fruit at so much a bushel, or of timber at so much a foot, with immediate severance and delivery in view, is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled (*o*). But, where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and labour and materials expended in getting the lands ready for tillage, this is an entire contract for an interest in land; and the growing crops cannot in such a case be treated as goods and chattels (*p*); and a contract for the sale of the building materials of a house, with a proviso that all the materials were to be taken down and cleared off the ground within two months, has been held to be a contract for the sale of an interest in land (*q*).

Where a contract was entered into for the sale of a crop of corn on the land and the profit of the stubble afterwards, and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the tithe, it was held that this was not a contract

(*l*) *Crosby* v. *Wadsworth*, 6 East, 610; *Carrington* v. *Roots*, 2 M. & W. 248; 6 L.J. Ex. 95; *Scorell* v. *Boxall*, 1 Y. & J. 398; Sugd. V. & P. ch. 4, s. 2 (3) (ed. 14); *Petch* v. *Tutin*, 15 M. & W. 115; 15 L.J. Ex. 280.

(*m*) *Rodwell* v. *Phillips*, 9 M. & W. 504; 11 L.J. Ex. 217; *Waddington* v. *Bristow*, 2 B. & P. 455.

(*n*) *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 208; *Mayfield* v. *Wadsley*, 3 B. & C. 357; 3 L.J. (O.S.) K.B. 31; *Evans* v. *Roberts*, 5 B. & C. 829; 4 L.J. (O.S.) K.B. 313; *Smith* v. *Surman*, 9 B. & C. 561, 568; 7 L.J. (O.S.) K.B. 296; *Watts* v. *Friend*, 10 B. & C. 446; 8 L.J. (O.S.) K.B. 181; *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153. Growing crops are not, however, goods and chattels within the Bills of Sale Acts until severed. See *Brantom* v. *Griffiths*, 2 C.P.D. 212; 46 L.J. C.P. 408; *National Mercantile Bank, Ex parte*, 16 Ch. D. 104; 50 L.J. Ch. 231. They will pass in a will under the words "farming stock." See *Roose, In re*, 17 Ch.D. 696; 50 L.J. Ch. 197.

(*o*) Lord Abinger, *Rodwell* v. *Phillips*, 9 M. & W. 505; 11 L.J. Ex. 217; Rolfe, B., *Washbourn* v. *Burrows*, 1 Exch. 115; 16 L.J. Ex. 266.

(*p*) *Falmouth* (*Earl*) v. *Thomas*, 1 Cr. & M. 89; 2 L.J. Ex. 57; *Harvey* v. *Grabham*, 5 Ad. & E. 51, 62; 5 L.J. K.B. 235.

(*q*) *Lavery* v. *Pursell*, 39 Ch.D. 508; 57 L.J. Ch. 570.

for any interest in land, but a sale of goods and chattels as to all but the lay grass; and, as to that, a contract for the agistment of the purchaser's cattle (*r*).

If the contract is within sect. 4 of the Statute of Frauds as a contract for the sale of an interest in land, it must be authenticated by writing; and, if it does not fall within that section, but within sect. 4 of the Sale of Goods Act, 1893 (*s*), which replaces the repealed sect. 17 of the Statute of Frauds, as a contract for the sale of goods and chattels, it must still be in writing, unless the value of the subject-matter of the contract does not amount to 10*l.*, or the growing produce has been severed and delivered, or earnest has been given, or a part payment made, or there has been a part acceptance and receipt (*t*).

Authentication of executory contracts for sale of goods or chattels.—By sect. 4, sub-sect. 1, of the Sale of Goods Act, 1893, "a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." And by sub-sect. 2 of sect. 4, "the provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or delivery thereof, or rendering the same fit for delivery" (*u*). By sect. 62, "contract of sale" includes "an agreement to sell as well as a sale" (*x*). The note or memorandum must, in order to be available in an action on the contract, have been in existence when the action commenced (*y*).

Contracts for sale of fixtures and shares.—By the Sale of Goods Act, 1893 (*z*), "goods" include things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Contracts for the sale of

(*r*) *Jones* v. *Flint*, 10 Ad. & E. 753; 9 L.J. Q.B. 252.

(*s*) 56 & 57 Vict. c. 71.

(*t*) *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153.

(*u*) As to "existing or future goods," see sect. 5 (1); "future goods" are in sect. 62 defined to be goods to be manufactured or acquired by the seller after the making of the contract of sale. *Lee* v. *Griffin*, 30 L.J. Q.B. 252; 1 B. & S. 272.

(*x*) This definition reproduces the provisions of sect. 7 of 9 Geo. 4, c. 14.

(*y*) *Lucas* v. *Dixon*, 22 Q.B.D. 357; 58 L.J. Q.B. 161.

(*z*) 56 & 57 Vict. c. 71, s. 62.

unsevered fixtures are not within the operation either of the Act of 1893 or of the Statute of Frauds, inasmuch as they are not goods and chattels within the meaning of the former statute, nor do they constitute, although annexed to the freehold, an interest in land (*a*). Railway shares also, and shares in the profits of a mine, are neither interests in land, nor are they goods and chattels; and contracts for the purchase and sale of them are not, consequently, within the statute, and do not require to be authenticated by writing (*b*); but the transfer of the share in fulfilment of a contract of sale must, in general, be made in writing or by deed. If each shareholder in a mine has a joint interest in the land itself, that interest cannot pass except in the mode prescribed by sect. 4 of the Statute of Frauds; but, if each shareholder has merely a right to a divisible proportion of the profits of the adventure, the case is not within the statute (*c*).

Promises by executors and administrators.—By sect. 4 of the Statute of Frauds, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. The promise of an executor or administrator to pay the debt of his testator or intestate is a mere *nudum pactum*, and does not impose any personal liability upon the latter, or make him chargeable in his own right, unless there is some consideration for the promise (see *ante*, p. 3). The putting of the promise into writing pursuant to the statute does not do away with the necessity of a consideration; "the statute was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable" (*d*).

Promises to answer for debt, default, or miscarriage of another.—The Statute of Frauds further enacts (sect. 4), that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or

(*a*) *Hallen* v. *Runder*, 1 C. M. & R. 266; *Lee* v. *Risdon*, 7 Taunt. 191; Park, J., *Marson* v. *Short*, 2 Sc. 243, 249; 9 L.J. C.P. 270; *Pinner* v. *Arnold*, 2 C. M. & R. 613; 5 L.J. Ex. 1; *Lee* v. *Gaskell*, 1 Q.B.D. 700; 45 L.J. Q.B. 540.

(*b*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, 214; 9 L.J. Ex. 217; *Humble* v. *Mitchell*, 11 Ad. & E. 205; 9 L.J. Q.B. 29; *Bradley* v. *Holdsworth*, 3 M. & W. 422; 7 L.J. Ex. 153; *Tempest* v. *Kilner*, 3 C.B. 249; *Bowlby* v. *Bell*, 3 C.B. 284; 16 L.J. C.P. 18.

(*c*) *Watson* v. *Spratley*, 10 Exch. 222, 243; 24 L.J. Ex. 53; *Powell* v. *Jessop* 18 C.B. 336, 354; 25 L.J. C.P. 199.

(*d*) *Rann* v. *Hughes*, 7 T.R. 350, n.

miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This clause does not apply to the case where a party giving a guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusively the debt, default, or miscarriage of another (*e*). But it applies to a promise to be answerable for a tortious act as well as a breach of contract; such as a promise to the lender of a horse to be answerable for the safe riding and re-delivery of it by the borrower, or a promise to the owner of a horse injured by an act of trespass, to make good the damage on condition that he would not sue the trespasser (*f*). It has, however, been held that the statute applies only to promises made to the person to whom another is answerable (*g*), and the promise must be one to answer for a debt of, or a default in some duty by, that other person towards the promisee (*h*), and, therefore, a promise by B. to indemnify A. against all liability, if he would become bail for the appearance of C. to answer a charge of misdemeanour, is not a promise to answer for the debt or default of another within the statute, since no debt or duty was owing from C. to A. (*i*), nor is a promise to indemnify another against liability in any event, which promise is not conditional upon default being made by a third party, a promise within the section (*k*); so where it was verbally agreed between the defendant and stockbrokers that the defendant should introduce to them clients for whom the brokers were to carry out transactions on the Stock Exchange, upon the terms that the defendant should receive one-half the commission earned and should pay the brokers one-half of any loss sustained, it was held that this agreement was not a promise to answer for the debt of another within the statute (*l*). On the other hand, a promise to indemnify another from the consequences of becoming bail for a third person in a civil action has been held to be within the statute, a decision which is to be supported, if at all, on the

(*e*) *Orrell* v. *Coppock*, 26 L.J. Ch. 269; *Couturier* v. *Hastie*, 8 Exch. 56; 22 L.J. Ex. 97.

(*f*) *Birkmyr* v. *Darnell*, Salk. 27; 1 Sm. L. C. (ed. 11) 299; *Kirkham* v. *Marter*, 2 B. & Ald. 613.

(*g*) *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 446; 9 L.J. Q.B. 409.

(*h*) *Hargreaves* v. *Parsons*, 13 M. & W. 561, 570; 14 L.J. Ex. 250; *Thomas* v. *Cook*, 8 B. & C. 728; *Reader* v. *Kingham*, 13 C.B. N.S. 344; 32 L.J. C.P. 108; *Harburg India Rubber Comb Co.* v. *Martin*, (1902) 1 K.B. 778; 71 L.J. K.B. 529.

(*i*) *Cripps* v. *Hartnoll*, 4 B. & S. 414; 32 L.J. Q.B. 381; *Wildes* v. *Dudlow*, L.R. 19 Eq. 198; 44 L.J. Ch. 341.

(*k*) *Guild & Co.* v. *Conrad*, (1894) 2 Q.B. 885; 63 L.J. Q.B. 721.

(*l*) *Sutton* v. *Grey*, (1894) 1 Q.B. 285; 63 L.J. Q.B. 633.

ground that the person bailed is legally bound to indemnify his bail by surrendering or paying the debt (*m*). There can be no suretyship unless there be a principal debtor, who, however, need not be so at the time, but may be constituted in the course of the transaction by matters *ex post facto*. So, also, there must be a debt to be guaranteed (*n*). If A., in consideration that B. will stay proceedings in an action he has commenced against C., to recover a sum of money due to him from C., promises to pay that money, such promise is a promise to answer for the debt of another within sect. 4 of the statute (*o*). But a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promisor's interests in a suit (*p*).

The operation of the statute is not confined to collateral undertakings to be answerable for a subsisting debt or duty; it extends to undertakings made before the debt accrues or the duty arises; and a guarantee, consequently, which a tradesman, before he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if the latter has been treated by the tradesman as his debtor (*q*). Thus, where the plaintiff, having commenced certain business for one Fox, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was held that this promise was within the statute (*r*): and, where the defendant verbally promised that, if the plaintiff would supply A. with iron and take A.'s acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and, not being in writing, could not be enforced, on the ground that a contract to give a guarantee is required to be in writing as much as a guarantee itself (*s*).

But the sale may be to one man, although the goods are to be delivered to another; and a person may promise to pay for goods supplied to, or for work done at his request or by his directions for a third party, as the real debtor, and not in the character of a surety; and, if he has been treated by the person who has

(*m*) *Green* v. *Cresswell*, 10 Ad. & E. 453; 9 L.J. Ex. 63; but see *Batson* v. *King*, 4 H. & N. 739; 28 L.J. Ex. 327; and *Cripps* v. *Hartnoll*, *ante*, p. 30.

(*n*) *Lakeman* v. *Mountstephen*, L.R. 7 H.L. 17, 24; 43 L.J. Q.B. 188.

(*o*) *Fish* v. *Hutchinson*, 2 Wils. 94.

(*p*) *Adams* v. *Dansey*, 6 Bing. 506; 8 L.J. (O.S.) C.P. 165.

(*q*) *Peckham* v. *Faria*, 3 Doug. 13; *Parsons* v. *Walter*, *ib.* 14, n. c.; *Matson* v. *Wharam*, 2 T.R. 80.

(*r*) *Barber* v. *Fox*, 1 Stark. 270.

(*s*) *Mallet* v. *Bateman*, L.R. 1. C.P. 163; 35 L.J. C.P. 40.

furnished the goods, or done the work, as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the case is out of the statute (*t*). If two come to a shop, and one buys, and the other to gain him credit promises the seller, "if *he* does not pay you, *I* will," this is a collateral undertaking, void without writing by the statute. But, if he says, "Let him have the goods, I will be your paymaster," this is an undertaking as for himself; and he shall be intended to be the very buyer (*u*). Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff to pay him a reasonable sum for such materials out of such monies received by him as should become due to the workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt or default of another, within the meaning of the statute, but an original independent contract (*x*). If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted, by reason of his minority (*y*).

The contract of a factor binding him in the terms implied by a *del credere* commission is not within the Statute of Frauds. The contract is the factor's own contract: and the debt of another comes in incidentally only as a measure of damages (*z*). Where the defendant, in consideration that the plaintiff would discharge a debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor (*a*). Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute. And, if the original debt be discharged and extinguished by the substitution in lieu thereof of a new contract

(*t*) *Hargreaves* v. *Parsons*, 13 M. & W. 561; 14 L.J. Ex. 250; *Mountstephen* v. *Lakeman*, L.R. 7 Q.B. 196; 41 L.J. Q.B. 67.

(*u*) *Birkmyr* v. *Darnell*, Salk. 27; *Watkins* v. *Perkins*, Raym. 224; *Seaman* v. *Price*, 1 C. & P. 586; 10 Moore, 34.

(*x*) *Andrews* v. *Smith*, 2 C. M. & R. 627; 5 L.J. Ex. 80; *Sweeting* v. *Asplin*, 7 M. & W. 165, 173; 10 L.J. Ex. 3; *Gerish* v. *Chartier*, 1 C.B. 13; 14 L.J. C.P. 84.

(*y*) *Harris* v. *Huntbach*, 1 Burr. 373; *Duncombe* v. *Tickridge*, Aleyn, 94; 1 Wms. Saund. 211, d.

(*z*) *Wolff* v. *Koppell*, 5 Hill, 458 (Amer.); *Couturier* v. *Hastie*, 8 Exch. 56; 22 L.J. Ex. 97.

(*a*) *Goodman* v. *Chase*, 1 B. & Ald. 297; *Butcher* v. *Steuart*, 11 M. & W. 857; 12 L.J. Ex. 391; *Lane* v. *Burghart*, 1 Q.B. 933; 10 L.J. Q.B. 343; *Bird* v. *Gammon*, 3 Bing. N.C. 883; 6 L.J. C.P. 258.

by a third person to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another (*b*). Thus where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them it was held that this was a substitution of a new contract of sale and a new purchaser, in lieu of the original contract of sale; and that, the debt of the original purchaser being extinguished, the promise was not a promise to be answerable for the debt of another (*c*).

A contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute (*d*). If the plaintiff has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities, upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the Statute of Frauds (*e*). Where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant, upon the faith of an undertaking by the defendants to pay the rent, it was held that the undertaking was not within the statute (*f*). The consideration need not appear in writing, see *post*, p. 1080.

Agreements in consideration of marriage.—The 4th section of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This does not extend to the marriage contract itself. Promises of marriage, consequently, are binding, though not reduced into writing, and signed by the party sought to be charged thereon (*g*). But all promises and agreements made

(*b*) *Hodgson* v. *Anderson*, 5 D. & R. 746, 747; 3 B. & C. 842, 856; *Lacy* v. *M'Neile*, 4 D. & R. 7; *Taylor* v. *Hilary*, 1 C. M. & R. 743; 4 L.J. Ex. 72.

(*c*) *Browning* v. *Stallard*, 5 Taunt. 450.

(*d*) *Walker* v. *Hill*, 5 H. & N. 419.

(*e*) *Barker* v. *Birt*, 10 M. & W. 61; 11 L.J. Ex. 375; *Barrell* v. *Trussell*, 4 Taunt. 117; *Meredith* v. *Short*, Salk. 25; *Castling* v. *Aubert*, 2 East, 325; *Walker* v. *Taylor*, 6 C. & P. 752; *Fitzgerald* v. *Dressler*, 7 C.B. N.S. 374; 29 L.J. C.P. 113.

(*f*) *Edwards* v. *Kelly*, 6 M. & S. 204; *Bampton* v. *Paulin*, 12 Moore, 497; 5 L.J. (O.S.) C.P. 168; 1 Wms. Saund. 211, d, 211, e (ed. 5).

(*g*) *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, 1 Raym. 386.

by one person in consideration of the completion of a marriage by another are within the statute, and must be reduced into writing. The solemnization of the marriage does not take the case out of the operation of the statute (*h*). A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage-portion of 500*l*., was held a sufficient promise in writing within the statute (*i*). A promise before marriage, by the husband to the wife, that, if she will forego a contemplated settlement, he will make the same provision for her by his will, is within the statute, and cannot be enforced if not made in writing (*k*).

Agreements not to be performed within a year.—Sect. 4 of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. This extends to all contracts which are not by the terms of them to be fully and completely executed within a year. Part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus, where a person had become a subscriber to the "Boydell Shakspeare," which was published in numbers, and could not be, and was not intended to be, completed within a year, and after taking and paying for several numbers as they came out, refused to continue his subscription and complete the set, it was held that an action could not be maintained against him for his subscription, as there was no written contract signed by him according to the section (*l*). But, if the contract has been wholly performed on the part of the plaintiff, it is no answer that there is no memorandum in writing; for the section does not apply where the consideration is executed (*m*). If the contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the section (*n*). A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which,

(*h*) *Caton* v. *Caton*, L.R. 1 Ch. 137; 35 L.J. Ch. 292; L.R. 2 H.L. 127; 36 L.J. Ch. 886.

(*i*) *Mountacue* (*Countess*) v. *Maxwell*, 1 Str. 236; *Bird* v. *Blosse*, 2 Ventr. 361; Bac. Abr. Agreements (C) 3.

(*k*) *Caton* v. *Caton*, *supra*; but see *Williams* v. *Williams*, 37 L.J. Ch. 854.

(*l*) *Boydell* v. *Drummond*, 11 East, 154, 158; *Sweet* v. *Lee*, 4 Sc. N.R. 90; *Roberts* v. *Tucker*, 3 Exch. 632.

(*m*) *Knowlman* v. *Bluett*, L.R. 9 Ex. 307; 43 L.J. Ex. 151.

(*n*) *Dobson* v. *Collis*, 1 H. & N. 84; 25 L.J. Ex. 267.

by the custom of the trade, is determinable at any time within that period, on payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the section (*o*). The memorandum must state the date of commencement of a service to satisfy the statute (*p*). A contract to serve for a year from the day after the contract is made is not within the section (*q*); but a contract to serve for a year from the second day or longer after the making of the contract is within the section, and must be evidenced by writing (*r*). A contract of general hiring for one year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has, however, been held not to extend beyond the time limited by the section, and is not consequently within the provisions of the section (*s*).

The section does not extend to contracts which are to be performed upon the happening of some uncertain event, and which consequently may or may not be completed within a year (*t*); but, where it appears, by the whole tenor of the agreement, that it is to be performed after the year, a note is necessary (*u*). An agreement to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year (*x*). So too a verbal promise founded upon a good consideration, to leave the plaintiff a legacy of a certain amount, has been held to be binding (*y*). And where an oral promise was made to pay so much money on the return of a ship, which did not happen for two years, it was held that the promise was not within the statute, for the ship might have returned within the year, though by accident it happened that it did not (*z*). Neither does the statute apply where the contract is wholly executed, or intended to be so, by one of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a

(*o*) *Birch* v. *Liverpool* (*Earl*), 9 B. & C. 392.

(*p*) *Alexander's Timber Co., In re*, 70 L.J. Ch. 767, where it was stated that the nature of the service ought also to be set forth.

(*q*) *Smith* v. *Gold Coast and Ashanti Explorers*, (1903) 1 K.B. 538; 72 L.J. K.B. 235; following *dicta* in *Cawthorn* v. *Cordrey*, 13 C.B. N.S. 406; 32 L.J. C.P. 152; and *Britain* v. *Rossiter*, 11 Q.B.D. 123; 48 L.J. Ex. 362.

(*r*) *Britain* v. *Rossiter*, *supra*; and see *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Snelling* v. *Huntingfield* (*Lord*), 1 C. M. & R. 25; 4 L.J. Ex. 232.

(*s*) *Beeston* v. *Collyer*, 4 Bing. 309; 5 L.J. (O.S.) C.P. 180; *Giraud* v. *Richmond*, 2 C.B. 835; 15 L.J. C.P. 180.

(*t*) *McGregor* v. *McGregor*, 21 Q.B.D. 424; 57 L.J. Q.B. 591; questioning *Davey* v. *Shannon*, 4 Ex.D. 81; 48 L.J. Ex. 459.

(*u*) *Wells* v. *Horton*, 4 Bing. 43, 44; 5 L.J. (O.S.) C.P. 41; *Smith* v. *Neale*, 2 C.B. N.S. 67; 26 L.J. C.P. 143.

(*x*) *Peter* v. *Compton*, Skin. 353; Holt, 326; *Smith* v. *Westall*, 1 Raym. 316.

(*y*) *Ridley* v. *Ridley*, 34 L.J. Ch. 462.

(*z*) *Anon.*, Salk. 280; *Fenton* v. *Emblers*, 3 Burr. 1282; 1 W. Bl. 353.

landlord agreed to lay out 50*l.* in improvements upon the demised premises, and the tenant agreed to pay 5*l.* per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the 50*l.* was expended within the year, and the landlord afterwards brought his action for the arrears of the 5*l.*, it was held that he was entitled to recover, though the agreement had not been put into writing and signed (*a*). A contract, which is not enforceable by reason of the provisions of sect 4, is nevertheless not void but existing, and no fresh contract can be implied from acts done in pursuance of it (*b*).

Requisites of written memorandum of contract.—If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy sect. 4 of the Statute of Frauds, and charge the sender, provided the terms of the contract can be ascertained from the written proposal construed in connexion with the surrounding circumstances (*c*). A letter making an offer or tendering certain terms for acceptance may be interpreted by the aid of other letters between the same parties referring to the same subject-matter for the purpose of establishing the terms of a contract within sect. 4 of the statute (*d*), provided no extrinsic evidence is required to connect them (*e*). Indeed, any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement" (*f*). But the names of the parties and the terms of the contract must appear from a comparison of the writings themselves; and they must manifestly refer to the same contract and transaction, and must not be contradictory to each other (*g*); so where the defendants' clerk drew up with their

(*a*) *Donellan* v. *Read*, 3 B. & Ad. 899, 906; 1 L.J. K.B. 269; *Cherry* v. *Heming*, 4 Exch. 631; 9 L.J. Ex. 63; *Mavor* v. *Pyne*, 11 Moore, 2; 4 L.J. (O.S.) C.P. 36; *Lavelette* v. *Riches & Co.*, 24 T.L.R. 336. But see *Reeve* v. *Jennings*, (1910) 2 K.B. 522; 79 L.J. K.B. 1137.

(*b*) *Britain* v. *Rossiter*, 11 Q.B.D. 123; 48 L.J. Ex. 362.

(*c*) *Smith* v. *Neale*, 2 C.B. N.S. 67; 26 L.J C.P. 143; *Reuss* v. *Picksley*, L.R. 1 Ex 342; 35 L.J. Ex. 218; *Peek* v. *North Staffordshire Ry.*, 4 B. & S. 627; 32 L.J. Q.B. 241; *Warner* v. *Willington*, 3 Drew. 523; 25 L.J. Ch. 662; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 28 L.J. Ex. 122.

(*d*) *Peek* v. *North Staffordshire Ry.*, *supra*; *Ridgway* v. *Wharton*, 6 H.L.C. 238; 27 L.J. Ch. 46.

(*e*) *Chapman* v. *Callis*, 9 C.B. N.S. 769; 30 L.J. C.P. 241; *Peek* v. *North Staffordshire Ry.*, *supra*.

(*f*) *Bird* v. *Blosse*, 2 Ventr. 361; *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; 4 L.J. K.B. 201; *Coe* v. *Duffield*, 7 Moore, 252; *Stead* v. *Liddard*, 8 *ib.* 2; 1 L.J. (O.S.) C.P. 52; *Baumann* v. *James*, L.R. 3 Ch. 508.

(*g*) *Kenworthy* v. *Schofield*, 2 B. & C. 945, 948; 2 L.J. (O.S.) K.B. 175; *Cooper* v. *Smith*, 15 East, 103; *Jackson*

authority a letter addressed to them containing the terms upon which the plaintiff was to serve them for three years, and the plaintiff signed the letter, it was held that the letter constituted a sufficient memorandum of the contract within the section (*h*). It has also been held that parol evidence might be admitted to identify an unsigned agreement as being the one referred to in a signed minute in a minute-book (*i*); or a receipt by the defendant for a deposit as being given in respect of the same subject-matter as an agreement signed only by the plaintiff (*k*); or a reference in a signed letter by the defendant to a memorandum signed by the plaintiff (*l*); or to connect an envelope addressed to a vendee with a letter which it enclosed and which set out the terms of the contract but did not contain the name of the vendee (*m*).

If two parties have entered into an agreement for the performance of particular acts or duties, it is not necessary to show that the memorandum of the agreement has been signed by both parties, in order to render the one who has signed it liable upon the contract (*n*). But, although it is not necessary that both parties should sign the memorandum, they must be specified either nominally or by a sufficient description or reference (*o*), unless the plaintiff has estopped himself from repudiating the contract (*p*). Thus, in the case of a bargain and sale of goods and chattels, it must appear from the memorandum signed by the purchaser that the plaintiff is the vendor; for, if that is left wholly uncertain, the memorandum will be insufficient (*q*). But parol evidence may be given of the relative trades of the parties; and if from that it can be inferred with reasonable

v. *Lowe*, 1 Bing. 9; *Smith* v. *Surman*, 9 B. & C. 561; 7 L.J. (O.S.) K.B. 296; *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*h*) *Evans* v. *Hoare*, (1892) 1 Q.B. 593; 61 L.J. Q.B. 470.

(*i*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314; 46 L.J. Q.B. 219.

(*k*) *Long* v. *Millar*, 4 C.P.D. 450; 48 L.J. C.P. 596; *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 51 L.J. Ch. 353; *Studds* v. *Watson*, 28 Ch.D. 305; 54 L.J. Ch. 626; *Oliver* v. *Hunting*, 44 Ch.D. 205; 59 L.J. Ch. 255.

(*l*) *Cave* v. *Hastings*, 7 Q.B.D. 125; 50 L.J. Q.B. 575.

(*m*) *Pearce* v. *Gardner*, (1897) 1 Q.B. 688, 691; 66 L.J. Q.B. 457.

(*n*) *Hatton* v. *Gray*, 2 Ch.Cas. 164; *Fowle* v. *Freeman*, 9 Ves. 351; *Seton* v. *Slade*, 7 Ves. 264; *Laythoarp* v. *Bryant*, 2 Bing. N.C. 735; 5 L.J. C.P. 217; *Egerton* v. *Mathews*, 6 East, 307; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 24 L.J. Ex. 122; *Allen* v. *Bennet*, 3 Taunt. 169.

(*o*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1; *Sale* v. *Lambert*, L.R. 18 Eq. 1; 43 L.J. Ch. 470; *Commins* v. *Scott*, L.R. 20 Eq. 11; 44 L.J. Ch. 563; *Catlin* v. *King*, 5 Ch.D. 660; 46 L.J. Ch. 384; *Williams* v. *Jordain*, 6 Ch.D. 517; 46 L.J. Ch. 681; *Coombs* v. *Wilkes*, (1891) 3 Ch. 77; 61 L.J. Ch. 42; *Filby* v. *Hounsell*, (1896) 2 Ch. 733; 65 L.J. Ch. 852; *Carr* v. *Lynch*, (1900) 1 Ch. 613; 69 L.J. Ch. 345.

(*p*) *Thomas* v. *Brown*, 1 Q.B.D. 714; 45 L.J. Q.B. 811.

(*q*) *Champion* v. *Plummer*, 1 N.R. 252; *Graham* v. *Musson*, 5 Bing. N.C. 603; 8 L.J. C.P. 324; *Sarl* v. *Bourdillon*, 1 C.B. N.S. 195; 26 L.J. C.P. 78; *Vandenbergh* v. *Spooner*, L.R. 1 Ex. 316; 35 L.J. Ex. 201; *Potter* v. *Duffield*, L.R. 18 Eq. 4; 43 L.J. Ch. 472; *Jarrett* v. *Hunter*, 34 Ch.D. 182; 56 L.J. Ch. 141.

certainty which was the seller and which the buyer, that will be sufficient (*r*). Where a price is agreed upon at the time of the sale, it must be set forth on the face of the memorandum (*s*). So also before the court will decree specific performance of a contract for sale of real property, it must be sufficiently described in the receipt or memorandum (*t*). Again, if the contract is a contract for the performance by the parties of mutual recurring acts and services from time to time, both must be bound by the contract, or neither can be made liable upon it (*u*), except in respect of acts done and services actually rendered. Thus, if a servant signs a memorandum of agreement by which he undertakes to serve his employer for more than a year, and enters upon the service, he is, nevertheless, not bound by his agreement to serve for a year, unless the memorandum is also signed by the employer; for, if the latter is not bound to employ for the term specified, the servant is not bound to serve (*x*); but in all other respects, as regards work actually done and services rendered, the servant would be bound by the terms of his signed writing (*y*).

In the case of a written memorandum of an agreement for a lease, if the memorandum, construed in connexion with other writings therein referred to and with surrounding circumstances, leaves the commencement or the duration of the term wholly uncertain, there is no binding contract (*z*). If a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute (*a*). The agreement must be completed before the letter can be evidence of a binding contract (*b*).

It was formerly held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another must disclose upon the face of it the consideration for

(*r*) *Newell* v. *Radford*, L.R. 3 C.P. 52; 37 L.J. C.P. 1.

(*s*) *Goodman* v. *Griffiths*, 1 H. & N. 574, 576; 26 L.J. Ex. 145. As to the requisites of the memorandum of a contract of sale of goods, see further, *post*, p. 529.

(*t*) *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 51 L.J. Ch. 353.

(*u*) *Hoddesdon Gas Company* v. *Haselwood*, 6 C.B. N.S. 249; 28 L.J. C.P. 268.

(*x*) *Sykes* v. *Dixon*, 9 Ad. & E. 693; 8 L.J. Q.B. 102.

(*y*) *Collis* v. *Botthamley*, 7 W. R. 87; *Souch* v. *Strawbridge*, 2 C.B. 808; 15 L.J. C.P. 172.

(*z*) *Bayley* v. *Fitzmaurice*, 8 E. & B. 679; 27 L.J. Q.B. 143; *Clarke* v. *Fuller*, 16 C.B. N.S. 24; *Nesham* v. *Selby*, L.R. 13 Eq. 191; 41 L.J. Ch. 551. In the case of a contract of service, also, the date of commencement of the service must be stated. *Alexander's Timber Co., In re*, 70 L.J. Ch. 767.

(*a*) *Bailey* v. *Sweeting*, 9 C.B. N.S. 843; 30 L.J. C.P. 154; *Wilkinson* v. *Evans*, L.R. 1 C.P. 407; 35 L.J. C.P. 224; *Buxton* v. *Rust*, L. R. 7 Ex. 279; 41 L.J. Ex. 173.

(*b*) *Munday* v. *Asprey*, 13 Ch.D. 855; 49 L.J. Ch. 216.

the promise (*c*); but by the Mercantile Law Amendment Act, 1856 (*d*), s. 3, "no such promise, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The consideration, therefore, may be supplied by oral evidence, but not the nature and extent of the promise itself (*e*). In the case of a guarantee the name of the party to whom it is given must be stated on the face of the memorandum; for parol evidence is inadmissible to supply the omission (*f*). But, if the writing is not strictly a guarantee—if it is a general order or authority to any person who may choose to act upon it, authorising the supply of goods to a third party, and promising to pay for the goods so supplied—it may be sued upon as an original contract (*g*). A written admission by a purchaser to his agent that he had bought certain goods for him is a sufficient note or memorandum of the bargain between him and the vendor (*h*).

Signature to memorandum.—If a man writes his name in the first person, as, "I, J. S., promise to pay" (*i*), or in the third person, as, "Mr. Stanley" (*k*), this is a sufficient signature. But the mere insertion of the name of the contracting party in the body of a written contract is not of itself a sufficient signature. The signature must be so introduced as to govern or authenticate every material and operative part of it (*l*). So, where one Moore wrote instructions for a lease in these words: "the lease renewed; Mrs. Stokes to pay the king's tax, also to pay Moore 24*l.* a year half yearly; Mrs. Stokes to keep the house in good and tenantable repair," &c., it was held that he had not signed an agreement for the renewal of the lease within the intent and meaning of the statute (*m*). If the agreement concludes "as witness our hands," or contains any words showing that the names of the contracting parties were to be sub-

(*c*) *Powers* v. *Fowler*, 4 E. & B. 511.

(*d*) 19 & 20 Vict. c. 97.

(*e*) *Holmes* v. *Mitchell*, 7 C.B. N.S. 361; 28 L.J. C.P. 301.

(*f*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*g*) *M'Kune* v. *Joynson*, 5 C.B. N.S. 218; 28 L.J. C.P. 133.

(*h*) *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5.

(*i*) *Taylor* v. *Dobbins*, 1 Str. 399; *Propert* v. *Parker*, 1 Russ. & Myl. 625; *Bleakly* v. *Smith*, 11 Sim. 150.

(*k*) *Lobb* v. *Stanley*, 5 Q.B. 574; 13 L.J. Q.B. 117; *Johnson* v. *Dodgson*, 2 M. & W. 653; 6 L.J. Ex. 185.

(*l*) *Caton* v. *Caton*, L.R. 2 H.L. 127; 36 L.J. Ch. 886; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Kronheim* v. *Johnson*, 7 Ch.D. 60; 47 L.J. Ch. 132.

(*m*) *Stokes* v. *Moore*, 1 Cox, 222, 223.

scribed, there is no signing within the statute, unless the names of the parties are duly subscribed at the foot of the instrument (*n*).

A party may under certain circumstances be bound by his signature, although he subscribed in form as a witness (*o*). What, within the legal intent of the statute, will amount to a signing is the same question in equity as at law (*p*). Where an offer was accepted by the defendant by telegram, and the instructions for the message were signed by the defendant, and the telegram received by the plaintiff contained the message with the names of the sender and receiver written by the telegraph clerk on the usual printed form, it was held that there was a sufficient signature within the statute (*q*). If a letter is signed and sent in an envelope containing a separate unsigned document by the same writer, and headed "supplement," and commencing, "I had quite omitted to tell you," but without any other reference to the letter or the letter to it, it was held that the unsigned document did not satisfy the Statute of Frauds (*r*). If a man writes his name in the vendor's order book, intending it as an order or authority to the vendor to send him certain goods specified therein with the prices, this is a sufficient signature (*s*). So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, specifying the goods and the price, with intent to denote that he has purchased the contents, this is a sufficient signature; and the name may be written in pencil as well as in ink (*t*). A man may sign also by his initials, or by his mark (*u*), or perhaps by a stamp (*x*), and it is quite immaterial upon what part of the paper the mark or signature is to be found. But the signature must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon (*y*).

(*n*) *Hubert* v. *Treherne*, 3 M. & Gr. 743; 11 L.J. C.P. 78.

(*o*) *Welford* v. *Beezely*, 1 Ves. senr. 6; *Gosbell* v. *Archer*, 2 Ad. & E. 508; 5 L.J. K.B. 35.

(*p*) *Morison* v. *Turnour*, 18 Ves. 183.

(*q*) *Godwin* v. *Francis*, L.R. 5 C.P. 295; 39 L.J. C.P. 121.

(*r*) *Kronheim* v. *Johnson*, 7 Ch.D. 60; 47 L.J. Ch. 132.

(*s*) *Sarl* v. *Bourdillon*, 1 C.B. N.S. 195; 26 L.J. C.P. 78; *ante*, p. 37; *Newell* v. *Radford*, L. R. 3 C.P. 52; 37 L.J. C.P. 1.

(*t*) *Geary* v. *Physic*, 5 B. & C. 234; 4 L.J. (O.S.) K.B. 147.

(*u*) *Hubert* v. *Moreau*, 12 Moore, 216; 5 L.J. (O.S.) C.P. 56; *Phillimore* v. *Barry*, 1 Camp. 513; *Hyde* v. *Johnson*, 2 Bing. N.C. 776, 780; 5 L.J. C.P. 291; *Jacob* v. *Kirk*, 2 Moo. & R. 221.

(*x*) *Bennett* v. *Brumfitt*, L.R 3 C.P. 28; 37 L.J. C.P. 25.

(*y*) *Coldham* v. *Showler*, 3 C.B. 312 15 L.J. C.P. 261; *Hawkins* v. *Holmes* 1 P. Wms. 770; *Doe* v. *Pedgriph*, 4 C. & P. 312.

It seems that it is not essential that the signature should be placed for no other purpose than to authenticate the contract, as where a chairman of a company signed a minute in the minute-book for the purpose of verifying the accuracy of the entry, but the entry was in terms an admission of the contract (*z*); but where shareholders signed as between themselves articles of association in which there was a clause stating that the plaintiff should be solicitor to the company, it was held that the signatures were made *alio intuitu*, and that the plaintiff could not sue on the contract (*a*).

Signature by agents.—Where the note or memorandum is signed by an agent, it is not necessary that the agent should obtain his authority by any written instrument. Consequently, the name of the party sought to be charged, printed by a printer in particulars of sale, or in any other printed paper embodying the terms of the contract, may be a signature by "a person lawfully authorised" within the meaning of the statute. If the party has recognised and adopted his printed name or signature—for instance, by sanctioning or permitting the distribution of printed handbills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it (*b*). If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature (*c*). But the mere introduction of a name into a written or printed paper unrecognised by the party, and not brought home to him as having been written or printed by his authority is, of course, no signature within the meaning of the statute (*d*). A mere clerk or traveller of one partner cannot be treated as an agent to bind the other, unless it be shown that he has received specific and express authority so to do (*e*). One of two or more partners may bind the others by signing the customary trading name of the firm to contracts for the purchase and sale of articles usually dealt in by the firm

(*z*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314; 46 L.J. Q.B. 219.

(*a*) *Eley* v. *Positive Assur. Co.*, 1 Ex. D. 20, 88; 45 L.J. Ex. 451.

(*b*) *Schneider* v. *Norris*, 2 M. & S. 288; *Maclean* v. *Dunn*, 1 Moo. & P. 776; 6 L.J. (O.S.) C. P. 184; *Saunderson* v. *Jackson*, 2 B. & P. 238.

(*c*) *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; 26 L.J. Q.B. 114; *Bigg* v. *Strong*, 4 Jur. N.S. 983; 3 Sm. & G. 592.

(*d*) *Hubert* v. *Treherne*, 3 M. & Gr. 743; 11 L.J. C.P. 78.

(*e*) *Graham* v. *Musson*, 7 Sc. 769; 8 L.J. C.P. 324; *Graham* v. *Fretwell*, 4 Sc. N.R. 25; 11 L.J. C.P. 41; *Blore* v. *Sutton*, 3 Mer. 245; *Durell* v. *Evans*, 1 H. & C. 174; 31 L.J. Ex. 337; *Murphy* v. *Boese*, L.R. 10 Ex. 126; 44 L.J. Ex. 40.

in the course of its business (*f*). An auctioneer effecting a sale by auction, or an auctioneer's clerk, if specially authorised, taking down the biddings in the presence of the purchaser, is, during the continuance of the sale, but no longer (*g*), the authorised agent of the vendor and purchaser, and is enabled to sign for both or either of the parties, so as to satisfy the Statute of Frauds (*h*); and so is a broker who is employed to sell goods and who signs and delivers bought and sold notes (*i*). Neither of the contracting parties themselves can be the agent of the other for such a purpose (*k*): the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signature (*l*). If the signature was made by the auctioneer's clerk, the auctioneer may then sue upon the contract (*m*). The agency of an auctioneer, and his authority to bind the bidder by his signature, may be rebutted by showing a substantial error (*n*), or a contract between vendor and bidder inconsistent with such agency (*o*).

Unconscientious use of Statute of Frauds.—Where by the fraud of one of the parties to a contract it has not been reduced into writing, he will not be allowed to set up the statute (*p*).

Executory promises requiring authentication by deed.—All unilateral or one-sided undertakings and engagements, where there is no mutuality of contract, and nothing is given or agreed to be done, and nothing has been done, as the consideration or inducement for the promise, must be authenticated by deed in order to enable the promisee to maintain an action for the non-performance of them (*ante*, p. 2).

Authentication of leases, &c.—By sect. 3 of the Real Property Act, 1845 (*q*), a lease required by law to be in writing (*r*),

(*f*) *Norton* v. *Seymour*, 3 C.B. 792; 16 L.J. C.P. 100.

(*g*) *Mews* v. *Carr*, 1 H. & N. 488; 26 L.J. Ex. 39; *Bell* v. *Balls*, (1897) 1 Ch. 663; 66 L.J. Ch. 397.

(*h*) *Hinde* v. *Whitehouse*, 7 East, 568; *Phillimore* v. *Barry*, 1 Camp. 513; *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Bird* v. *Boulter*, 4 B. & Ad. 447; *Sims* v. *Landray*, (1894) 2 Ch. 318; 63 L.J. Ch. 535. As to the authority of an auctioneer's clerk, see *Bird* v. *Boulter*, *supra*; *Peirce* v. *Corf*, L.R. 9 Q.B. 210, 214; 43 L.J. Q.B. 52; *Bell* v. *Balls*, *supra*.

(*i*) *Thompson* v. *Gardiner*, 1 C.P.D. 777.

(*k*) *Wright* v. *Dannah*, 2 Campb. 203; *Sharman* v. *Brandt*, L.R. 6 Q.B. 720; 40 L.J. Q.B. 312.

(*l*) *Farebrother* v. *Simmons*, 5 B. & Ald. 33.

(*m*) *Bird* v. *Boulter*, 4 B. & Ad. 443; 1 N. & M. 313.

(*n*) *Van Praagh* v. *Everidge*, (1903) 1 Ch. 434; 72 L.J. Ch. 260.

(*o*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792; 5 L.J. K.B. 169; *Glengall* (*Lord*) v. *Barnard*, 1 Keen, 769; 6 L.J. Ch. 25.

(*p*) *Lincoln* v. *Wright*, 4 De G. & J. 16; 28 L.J. Ch. 705; *Haigh* v. *Kaye*, L.R. 7 Ch. 469; 41 L.J. Ch. 567; *Booth* v. *Turle*, L.R. 16 Eq. 182. See *James* v. *Smith*, (1891) 1 Ch. 384.

(*q*) 8 & 9 Vict. c. 106.

(*r*) By the Statute of Frauds (29 Car. 2, c. 3, s. 1), "all leases, estates, interests of freehold or terms of years, or

of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. It has been held in Ireland that this statute refers only to legal estates, so that an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing without being under seal (*s*). A lease by simple contract for a term exceeding three years in duration, though void as a lease, will operate as an agreement to grant a lease for the term specified (*t*), and may be specifically enforced (*u*); and a lease or agreement for a lease void as to the duration of the lease may regulate the terms upon which the tenancy subsists in other respects (*x*). An agreement void in law as a lease under the above section may be valid in equity, and may thus be a "lease" for the purposes of sect. 10 of the Conveyancing Act, 1881 (*y*).

The authority of an agent to make or execute a deed for his principal must be under seal (*z*), except in the case of joint-contractors, one of whom, it has been held, may execute a deed for himself and the others without an authority under seal, provided he execute the deed for himself and the others *in the presence* of the others (*a*).

And, while a contract of apprenticeship need not now be by deed, yet to be enforceable in law against both the servant and the master, it must be evidenced by writing (*b*).

any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, except (sect. 2) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised;" and (sect. 3) "no leases, estates, or interest either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted or surrendered unless it be by DEED, or *note in writing* signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

(*s*) *Stamers* v. *Preston*, 9 Ir. C.L.R. 351, 355.

(*t*) *Bond* v. *Rosling*, 30 L.J. Q.B. 227; 1 B. & S. 371; *Drury* v. *Macnamara*, 5 E. & B. 616; 25 L.J. Q.B. 5; *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235.

(*u*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L.J. Ch. 812.

(*x*) *Doe* v. *Bell*, 5 T.R. 471; *Richardson* v. *Gifford*, 1 Ad. & E. 52; 3 L.J. K.B. 122; *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 268; *Tooker* v. *Smith*, 1 H. & N. 732; *Tress* v. *Savage*, 4 E. & B. 43; 23 L.J. Q.B. 339.

(*y*) *Rickett* v. *Green*, (1910) 1 K.B. 253; 79 L.J. K.B. 193.

(*z*) *Steigiltz* v. *Egginton*, 1 Holt, 141.

(*a*) *Ball* v. *Dunsterville*, 4 T.R. 313.

(*b*) The Apprentices Act, 1814, 54

Confirmation of promises by infants.—By sect. 2 of the Infants' Relief Act, 1874 (*c*), "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Geo. 3, c. 96, which repealed the 5 Eliz. c. 4, enacts by s. 2, that indentures, deeds, and agreements in writing entered into for the binding of apprentices shall be valid and effectual. See also *Kirkby* v. *Taylor*, (1910) 1 K.B. 529; 79 L.J. K.B. 267.

(*c*) 37 & 38 Vict. c. 62, see *post*, pp. 405, 411.

CHAPTER II.

OF THE INTERPRETATION OF CONTRACTS.

SECTION I.

GENERAL PRINCIPLES OF INTERPRETATION.

Construction of contracts.—Every contract ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu ut res magis valeat quam pereat.* One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected (*a*). The terms of the contract "are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like acquired a peculiar sense distinct from the popular sense of the same words" (*b*). Technical words of law, however, are to have their legal effect, unless from subsequent inconsistent words it is very clear that the parties used them in a sense different from their legal meaning; and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument (*c*). If the parties have used technical terms, unintelligible to the ordinary reader, but having a distinct meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed (*d*). Bad spelling is of no consequence, so long as it appears with certainty what is meant (*e*).

(*a*) *Parkhurst* v. *Smith*, Willes, 332; *Solly* v. *Forbes*, 2 B. & B. 38; 4 Moore, 463; *Eyston* v. *Studd*, Plowd. 465; *Trenchard* v. *Hoskins*, Winch, 93.

(*b*) Lord Ellenborough, *Robertson* v. *French*, 4 East, 137; *Mallan* v. *May*, 13 M. & W. 511; 14 L.J. Ex. 48; *Scott* v. *Bourdillon*, 2 B. & P. N.R. 213; *Hart* v. *Standard Marine Ins. Co.*, 22 Q.B.D. 499; 58 L.J. Q.B. 284; *McCowan* v. *Baine*, (1891) A.C. 401.

(*c*) *Lees* v. *Mosley*, 1 You. & C. 589; 5 L.J. Ex. (Eq.) 78; *Elliott* v. *Turner*, 2 C.B. 446; 15 L.J. C.P. 49.

(*d*) *Goblet* v. *Beechy*, 3 Sim. 24; 9 L.J. (O.S.) Ch. 200, V.C.; 2 Russ. & Myl. 624, L.C.

(*e*) *Hulbert* v. *Long*, Cro. Jac. 607; *Osborn's case*, 10 Co. 130, a; 2 Roll. Abr. 147.

But an agreement, the terms of which are unintelligible (*f*), or too vague (*g*), cannot be enforced: where, however, it is confirmed by Act of Parliament, no objection can be taken to any provision in it on the ground of uncertainty (*h*). Where a grant is clear, but there is an exception so framed as to be bad for uncertainty, the grant will be operative though the exception fails (*i*).

Evidence of surrounding circumstances.—To enable the real intention of the parties to be arrived at and a correct application of the language of the contract to the subject-matter thereof to be made, all the surrounding circumstances may be taken into consideration, so as to place the reader in the same situation as the party who made the contract, and thus to enable him to judge of the meaning of the words and of the correct application of the language to the things described (*k*). But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of arriving at the intention of the parties, nor can words deleted from the document and initialed by the parties as deleted, be used for such purpose (*l*). Where the court has to find a contract in a correspondence, and not in one particular agreement formally signed, the whole of the correspondence which has passed must be taken into consideration (*m*).

Latent ambiguity.—From the admission of such evidence, and from bringing the words of the writing into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the words to the subject-matter of the contract and the objects professed to be described: this is called a LATENT AMBIGUITY, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed

(*f*) *Guthing* v. *Lynn*, 2 B. & Ad. 232; *Vince, In re, Baxter, Ex p.*, (1892) 2 Q.B. 478; 61 L.J. Q.B. 836.

(*g*) *Pearce* v. *Watts*, L.R. 20 Eq. 492; 44 L.J. Ch. 492; *Taylor* v. *Portington*, 7 De G. M. & G. 328; *Reis, In re, Clough, Ex p.*, (1904) 2 K.B. 769; 73 L.J. K.B. 929.

(*h*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L.J. Ch. 468.

(*i*) *Savill Bros.* v. *Bethell*, (1902) 2 Ch. 523; 71 L.J. Ch. 652.

(*k*) *Shore* v. *Wilson*, 9 Cl. & Fin. 355, 499—578; *Macdonald* v. *Longbottom*, 29 L.J. Q.B 256; 1 E. & E. 987; *Mumford* v. *Gething*, 29 L.J. C.P. 105; 7 C.B. N.S. 305; *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L.J. Q.B. 256; *Doe* v. *Hubbard*, 20 L.J. Q.B. 67; *Boulter, In re*, 4 Ch.D. 241; 46 L.J. Bank. 11. As to evidence of translators and experts, see *Chatenay* v. *Brazilian Co.*, (1891) 1 Q.B. 79; 60 L.J. Q.B. 295.

(*l*) *Inglis* v. *Buttery*, 3 App. Cas. 552.

(*m*) *Hussey* v. *Horne Payne*, 4 App. Cas. 311; 48 L.J. Ch. 846; *Bristol Bread Co.* v. *Maggs*, 44 Ch.D. 616; 59 L.J. Ch. 472.

by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim '*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*'" (*n*). But the judgment of the court in expounding a document must be simply declaratory; it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used (*o*). And, "when the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words . . . such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves, and evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible" (*p*).

Patent ambiguity.—Where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is inadmissible to remove it (*q*). If a blank, for instance, has been left in a deed, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was intended to have been inserted (*r*). Evidence merely explanatory of what the party has written is admissible, but not to show what he intended to have written (*s*). But, if the ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument, when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favour of the manifest intention, and will draw all such reasonable inferences from the language and general context of the deed as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated (*t*). If an important word has been omitted by mistake, and it clearly appears from the general context of the instrument, and the

(*n*) Tindall, C.J., *Miller* v. *Travers*, 1 Moore & Sc. 342, 345; *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129; 6 L.J. Ex. 59; *Doe* v. *Hiscocks*, 5 M. & W. 363; 9 L.J. Ex. 27; *Raffles* v. *Wichelhaus*, 33 L.J. Ex. 160; 2 H. & C. 906.

(*o*) *Clayton* v. *Nugent* (*Lord*), 13 L.J. Ex. 363; 13 M. & W. 200.

(*p*) Tindal, C.J., *Shore* v. *Wilson*, 9 Cl. & Fin. 565, 566; *Jones* v. *Newman*, 1 W. Bl. 60.

(*q*) Tindal, C.J., *Saunderson* v. *Piper*, 5 Bing. N.C. 431; 8 L.J. C.P. 227.

(*r*) *Baylis* v. *Church*, 2 Atk. 239; *Hunt* v. *Hort*, 3 Br. C.C. 311.

(*s*) *Miller* v. *Travers*, *supra*; *Clayton* v. *Nugent* (*Lord*), *supra*; and *Shore* v. *Wilson*, *supra*.

(*t*) *Sampson* v. *Easterby*, 9 B. & C. 505; 5 L.J. (O.S.) K.B. 291; affirmed *nom.* *Easterby* v. *Sampson*, 6 Bing. 644; 4 M. & P. 601; *Saltoun* v. *Houston*, 1 Bing 433; 2 L.J. (O.S.) C.P. 93; *Bache* v. *Proctor*, 1 Doug. 383.

light thrown thereon by surrounding circumstances, what the parties really meant, the court, in furtherance of the obvious intent, will construe the deed as if the word had been duly inserted (*u*). Where the name of the obligee of a bond was omitted in the obligatory part of an instrument, but it afterwards appeared, from the condition, who he was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred (*x*). So, where the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation (*y*). A deed, therefore, will not, in such cases, be construed to be of no effect; *nam benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat* (*z*). The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation (*a*).

Where the language of a grant is plain and unambiguous no evidence of user will prevail against its terms (*b*); but where a question arises as to the extent of a grant which is not unambiguous in itself, evidence is admissible of acts of user not only contemporaneous with, but also prior to, the date of the grant as leading up to and explaining the grant (*c*).

Figures and words at length.—The meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, "because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word" (*d*).

Repugnant and void limitations of liability.—If a man covenants in his own name for the performance of some particular act, and then seeks by proviso to relieve himself from ALL LIABILITY upon the covenant, the proviso will be rejected as being repugnant to the covenant (*e*). If two persons make a grant by

(*u*) *Coles* v. *Hulme*, 8 B. & C. 568; 7 L.J. (O.S.) K.B. 29; *Phipps* v. *Tanner*, 5 C. & P. 488; *Jarvis* v. *Wilkins*, 7 M. & W. 410; 10 L.J. Ex. 104.

(*x*) *Langdon* v. *Goole*, 3 Lev. 21.

(*y*) *Say and Seal's case*, 10 Mod. 40, 46.

(*z*) Platt on Covenant, ch. 2; Bac. Abr. (Covenant); *Fazakerly* v. *M'Knight*, 6 E. & B. 795, 805; 26 L.J. Q.B. 30.

(*a*) *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*b*) *North Eastern Ry.* v. *Hastings*, (1900) A.C. 260.

(*c*) *Van Diemen's Land Co.* v. *Table Bay Marine Board*, (1906) A.C. 92; 75 L.J. P.C. 28.

(*d*) *Saunderson* v. *Piper*, 5 Bing. N.C. 425, 431; 8 L.J. C.P. 227.

(*e*) Jenk. Cent. 96, pl. 86.

deed, and it is provided that the deed shall not charge one of the grantors, the proviso is void; for it restrains all the effect of the grant as against him (*f*). If a company authorises its agent to issue bills of exchange with restricted liability as regards the shareholders, such restriction of liability is repugnant and void (*g*). Where by indenture the defendants, churchwardens, covenanted for themselves and their successors, &c., with the plaintiff, that they, the said churchwardens, &c., and their successors, would pay to the plaintiff a certain sum by instalments, provided that nothing in the indenture should be deemed, or construed to be, any personal covenant of the defendants, but should be binding upon the churchwardens and overseers of the parish, and their successors for the time being, it was held that, as the defendants could not covenant so as to bind their successors, the covenant was their own personal covenant, and that the proviso, being in direct contradiction to the covenant, must be rejected as repugnant (*h*). But a proviso limiting the liability without destroying it is valid (*i*).

Limitation of liability to particular fund.—When a covenant has been entered into for the payment of money, a proviso by the same deed exonerating the covenantor from all liability upon the covenant is not nugatory, if a particular fund is charged with the payment of the money. In the case of covenants to pay an annuity, if the land of the covenantor is charged with the payment, a proviso exonerating the person and personalty of the grantor is good; and Lord Coke, in commenting upon sect. 220, in Littleton, says, "It appeareth that when in a general grant the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and leave the party to the other. But, where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso would be repugnant to the grant." Consequently a proviso restricting the liability, good at the beginning, may become repugnant and void, as, if a man by deed grants a rent for life issuing out of his land, with a proviso that it shall not charge his person, this is a good proviso; yet, if the rent is in arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore the proviso is now become repugnant, and, by consequence,

(*f*) Bro. Abr. CONDITIONS, pl. 238.

(*g*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

(*h*) *Furnivall* v. *Coombes*, 5 M. & G. 736; 12 L.J. C.P. 265.

(*i*) *Williams* v. *Hathaway*, 6 Ch.D. 544

void (*k*). Covenants to pay out of a particular fund do not of necessity imply that the payment is not to be made, unless the fund is raised, and do not therefore make the contract conditional and contingent on the realization of the fund. Such a covenant is an absolute covenant to pay the money, unless there is an express limitation of the liability (*l*). In the case of simple contracts, however, where the party has looked to the anticipated realization of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and, if the project miscarries, and funds are not realized, he has no claim upon anybody or for anything (*m*). When it is not said at whose option one of two alternatives is to take place, the rule of law is that the option is in the party who is to do the first act (*n*). Thus a loan for nine or six months gives the borrower the option (*o*). A lease for seven, fourteen, or twenty-one years, without saying at whose option, is at the option of the lessee (*p*).

Words amounting to a covenant.—No precise form of words is necessary to constitute a covenant. Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant he will be held liable (*q*). The words in a contract under seal, "I will be answerable," or "I will be accountable," to A. for 10*l.*, or "I am content to give to A. 10*l.* at Michaelmas," amount to a covenant to pay the money (*r*); and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant (*s*). An action of covenant will lie on general words of contract and agreement contained in a deed, although the parties profess not to contract "by way of covenant," as where they "resolved and agreed, and did, by way of declaration and not of covenant, spontaneously and fully consent and agree;" and Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting (*t*). Where a lessee

(*k*) *Mildmay's case*, 6 Co. 41 b.

(*l*) *Bain* v. *Kirk*, 18 L.J. Q.B. 83; *Pilbrow* v. *Pilbrow's Co.*, 5 C.B. 440, 472; 17 L.J. C.P. 166; *Sunderland Marine Ins. Co.* v. *Kearney*, 20 L.J. Q.B. 417; 16 Q.B. 925.

(*m*) *Rennie* v. *Clarke*, 5 Exch. 292; 19 L.J. Ex. 278; *Landman* v. *Entwistle*, 7 Exch. 632; 21 L.J. Ex. 208.

(*n*) *Price* v. *Nixon*, 5 Taunt. 338.

(*o*) *Reed* v. *Kilburn Co-operative Soc.*, L.R. 10 Q.B. 264; 44 L.J. Q.B. 126.

(*p*) *Dann* v. *Spurrier*, 3 B. & P. 399.

(*q*) *Isaacson* v. *Harwood*, L.R. 3 Ch. 225; 37 L.J. Ch. 209.

(*r*) 3 Leon. 119, pl. 169; *Brice* v. *Carre*, 1 Lev. 47; 1 Keb. 155.

(*s*) *Bret* v. *Cumberland*, Cro. Jac. 399.

(*t*) *Ellison* v. *Bignold*, 2 J. & W. 503, 510; *Wood* v. *Copper Miners' Co.*, 7 C.B. 906; 18 L.J. C.P. 293; *Sampson* v. *Easterby*, 9 B. & C. 505, 514; 5 L.J. (O.S.) K.B. 291, affirmed *nom. Easterby* v. *Sampson*, 6 Bing. 644; 1 M. & P. 601; *Williams* v. *Burrell*, 1 C.B. 402, 429; 14 L.J. C.P. 98; *James* v. *Cochrane*, 21

covenanted that he would plough, sow, manure, and cultivate the demised premises, "except the rabbit-warren and sheep-walk," it was held that, as the parties clearly meant by the exception that neither the warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently, was maintainable for the doing of it (*u*). So, when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was held that the lessor might have an action of covenant against him on these words for cutting down the trees (*x*). Words of recital in a deed will constitute an agreement between the parties upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so (*y*). Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued (*z*). So the recital in a deed of a previous agreement to do a certain act amounts to a covenant in the deed for the performance of it; for the recital operates as a solemn confirmation of the "agreement and intent precedent" (*a*). But a recital does not necessarily imply a covenant; and whether it does so or not in each case depends on what is to be collected as the intention of the parties from the whole instrument (*b*). Thus where a marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled, and the corresponding operative part was a covenant by the husband alone, it was held that the covenant was not controlled by the recital, and was not binding on the wife (*c*). When there is an acceptance of a trusteeship under seal, that does not amount to a covenant to perform the duties of the office (*d*).

Words of proviso and condition may be construed as an express covenant, when such a construction is necessary to give effect to the apparent intention of the parties (*e*). Thus, where

L.J. Ex. 229; 7 Exch. 170; affirmed, 22 L.J. Ex. 201; 8 Exch. 556; *Mason* v. *Cole*, 4 Exch. 375, 379; 18 L.J. Ex. 478; *Marryat* v. *Marryat*, 28 Bea. 224; 29 L.J. Ch. 665; *Jackson* v. *N.E. Ry.*, 7 Ch.D. 573; 47 L.J. Ch. 303.

(*u*) *St. Albans* (*Duke*) v. *Ellis*, 16 East, 532.

(*x*) March 9, pl. 22; Dy. 19, b. pl. (115); *Stevinson's case*, 1 Leon. 324.

(*y*) *Severn & Clerk's case*, 1 Leon. 122; *Aspdin* v. *Austin*, 5 Q.B. 671, 683; 13 L.J. Q.B. 155; *Courtney* v *Taylor*, 6 Man. & G. 851; 12 L.J. C.P. 330; *Farrall* v. *Hilditch*, 5 C.B. N.S. 853; 28 L.J. C.P. 221; *Lay* v. *Mottram*, 19 C.B. N.S. 479.

(*z*) *Holles* v. *Carr*, 3 Swanst. 638, 648; 2 Freem. 3.

(*a*) *Barfoot* v. *Freswell*, 3 Keb. 465.

(*b*) *Ivens* v. *Elwes*, 24 L.J. Ch. 249; 3 Drew. 25.

(*c*) *Young* v. *Smith*, L.R. 1 Eq. 180; 35 Beav. 87.

(*d*) *Holland* v. *Holland*, L.R. 4 Ch. 449; 38 L.J. Ch. 398.

(*e*) *Brookes* v. *Drysdale*, 3 C.P.D. 52.

a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff 500*l.*, it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money (*f*). Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farmhouse and premises, "the said farmhouse and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to put the house into repair, and not merely to a qualification of the covenant of the lessee (*g*). So, where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, or that he should not exercise thereon a particular trade or business (*h*), it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeasance of the deed or of the estate and interest thereby created, and not in the nature of an agreement, as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable (*i*). If a lessee for years covenant to repair, "provided always and it is agreed that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but, if the lessee had covenanted to repair provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee (*k*).

Covenants by implication of law.—If a lessee covenants that he will "fold sheep" (*l*), or supply burnt lime from the demised quarries (*m*), it is no answer to an action on the covenants respectively to say that no sheep are kept and no lime burnt. If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the

(*f*) *Clapham* v. *Moyl*, 1 Keb. 842, 897.

(*g*) *Connock* v. *Jones*, 3 Exch. 233; 18 L.J. Ex. 204.

(*h*) *Hodson* v. *Coppard*, 30 L.J. Ch. 20; 29 Beav. 4.

(*i*) *Geery* v. *Reason*, Cro. Car. 128; *Simpson* v. *Titterell*, Cro. Eliz. 242; *Wolveridge* v. *Steward*, 3 Moore & Sc. 561; 3 L.J. Ex. 360.

(*k*) 1 Rolle Abr. 518; tit. Covenant (C.) 19; Bac. Abr. Cov. 340.

(*l*) *Webb* v. *Plummer*, 2 B. & Ald. 746.

(*m*) *Shrewsbury* (*Earl*) v. *Gould*, 2 B. & Ald. 487.

owner; if he detains it beyond that time, it is a breach of covenant (*n*).

Bonds and obligations.—No precise form of words is necessary to create a bond or obligation (*o*). Any memorandum in writing under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of—such, for example, as "I, A. B., have borrowed 10*l.* of C. D.," or "Memorandum that A. owes B. 10*l.*," or "I have agreed to pay J. S. 19*l.*" Every word which proves a man to be a debtor, if it be under seal, will charge him with the payment of the money (*p*). If no time is limited in a bond for the payment of money acknowledged to be due, such money is due immediately, and payable on demand. If it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound to do the act until the next leap-year, when February has twenty-nine days (*q*).

Dependent and independent covenants.—There are three kinds of covenants: first, mutual and independent covenants, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, conditional and dependent covenants, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; thirdly, covenants which are mutual conditions to be performed at the same time, and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act (*r*).

Conditions precedent.—Stipulations in a contract as to something future to be done often constitute conditions precedent to be performed by one party before any liability attaches to the other. Whether particular stipulations are to be conditions

(*n*) *Randall* v. *Lynch*, 12 East, 179, 182.

(*o*) *Per* Denman, C.J., in *Wolveridge* v. *Steward*, *supra*, note (*i*).

(*p*) *Core's case*, Dyer, 22, b; *Bedow's case*, 1 Leon. 25; Bac. Abr. p. 804; *Sawyer* v. *Mawgridge*, 11 Mod. 218; 1 Rolle Abr. 146; *Watson* v. *Snead*, 1 Vent. 238.

(*q*) 1 Leon. 101, pl. 132.

(*r*) *Kingston* v. *Preston*, cited 2 Doug. 689; *Stavers* v. *Curling*, 3 Sc. 740, 754; 6 L.J. C.P. 41; *Thorpe* v. *Thorpe*, 1 Salk. 171; *Peeters* v. *Opie*, 2 Saund. 350.

precedent or not depends upon the intention of the parties, to be gathered from the language of the particular instrument (*s*). Where a tenant covenanted to repair, the landlord "finding, allowing, and assigning timber sufficient for such reparations to be cut and carried by the lessee," it was held that the finding and assigning the timber by the lessor was a condition precedent to the liability of the lessee to repair (*t*); but, if the landlord is ready and willing, and offers to find and allow the timber, there is a sufficient performance of the condition on his part (*u*). If the covenant has annexed to it a mere licence to take timber for the purpose of repairs, the licence does not amount to a qualification of the covenant, so as to exonerate the tenant from his liability to repair in case there should happen to be no timber on the demised premises fit for repairs (*x*). Whenever it appears to have been the intention of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention (*y*); but, where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent (*z*). Where a landlord granted all the coal lying and being within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay 40*l.* a year whether the whole of an acre should be gotten or not, it was held that the *finding* of coal was not a condition precedent to the landlord's right to receive the 40*l.* a year (*a*). A covenant in a mining lease by the lessee to work and win the whole of the coal in the mine in a proper manner is an absolute covenant which the lessee must perform, even though the performance thereof should prove unremunerative (*b*). Where there was a covenant by the lessee to pay rent and to do repairs, and also a covenant by the lessor for quiet enjoyment, "the lessee paying the rent when due and observing the covenants on his part," it was held that the covenant for quiet enjoyment was an independent covenant (*c*).

The word "upon" may mean *before* the act done to which it

(*s*) *Havelock* v. *Geddes*, 10 East, 555; *Seeger* v. *Duthie*, 8 C.B. N.S. 45, 72; 30 L.J. C.P. 65.

(*t*) *Thomas* v. *Cadwallader*, Willes, 496; *Neale* v. *Ratcliff*, 15 Q.B. 916; 20 L.J. Q.B. 130.

(*u*) *Martyn* v. *Clue*, 18 Q.B. 661; 22 L.J. Q.B. 147.

(*x*) *Bristol* (*Dean*) v. *Jones*, 28 L.J. Q.B. 201; 1 E. & E. 484.

(*y*) *Christie* v. *Borelly*, 7 C.B. N.S. 561; 29 L.J. C.P. 153; *Dodd* v. *Ponsford*, 6 C.B. N.S. 324.

(*z*) *Roberts* v. *Brett*, 34 L.J. C.P. 241; 11 H.L. Cas. 337.

(*a*) *Jowett* v. *Spencer*, 1 Exch. 647; 17 L.J. Ex. 367.

(*b*) *Charlesworth* v. *Watson*, (1906) A.C. 14; 75 L.J. K.B. 137.

(*c*) *Edge* v. *Boileau*, 16 Q.B.D. 117; 55 L.J. Q.B. 90.

relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the instrument (*d*). Where a singer engaged to attend for rehearsal six days before appearance, but neglected to do so, it was held that this was not a breach of a condition precedent, as it did not go to the root of the contract (*e*); but where the plaintiff was, through illness, quite unfit to undertake the earlier performances promised, it was held that the defendant was excused from his part of the contract, as the plaintiff's inability to perform did go to the root of the matter (*f*).

Waiver of conditions precedent.—Where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement, for the breach of which compensation must be sought in damages (*g*).

Independent covenants and promises.—"If there be a day set for the payment of the money, or for the doing of the thing which one promises and agrees to do for another thing, and that day is to happen, or may happen, before the other thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy upon the contract," and not upon a previous or concurrent performance (*h*). If in a contract of hiring and service it is stipulated that the hire shall be paid before the time appointed for the rendering of the service, there the servant may bring an action for the money before the service has been performed (*i*). So, if there are mutual covenants for the sale and purchase of an estate, and a fixed day is appointed for the payment of the purchase-money, and another and later day for the conveyance of the property, the money must be paid on the day appointed, although the purchaser has not got the estate (*k*). Where a purchaser agreed to pay for goods, not on, but after, delivery, it was held that actual delivery was precedent to the right of the vendor to sue for the price, unless

(*d*) *Reg.* v. *Humphery*, 10 Ad. & E. 335, 370; 2 P. & D. 691.

(*e*) *Bettini* v. *Gye*, 1 Q.B.D. 183; 45 L.J. Q.B. 209.

(*f*) *Poussard* v. *Spiers*, 1 Q.B.D. 410; 45 L.J. Q.B. 621.

(*g*) *Behn* v. *Burness*, 3 B. & S. 751; 32 L.J. Q.B. 204; *Pust* v. *Dowie*, 5 B. & S. 20, 33; 34 L.J. Q.B. 127.

(*h*) Holt, C.J., *Thorp* v. *Thorp*, 12 Mod. 455, 461; *Parker* v. *Rawlings*, 5 L.J. (O.S.) C.P. 174; 4 Bing. 280; *Judson* v. *Bowden*, 1 Exch. 162; 17 L.J. Ex. 172; *Terry* v. *Duntze*, 2 H. Bl. 389. *Cutler* v. *Bower*, 11 Q.B. 973; 17 L.J. Q.B. 217; *Dicker* v. *Jackson*, 6 C.B. 103. 114; 17 L.J. C.P. 234.

(*i*) *Pool's case*, 1 Wms. Saund. 320, b.

(*k*) *Sibthorp* v. *Brunel*, 3 Exch. 826; *Yates* v. *Gardiner*, 20 L.J. Ex. 327; *Pordage* v. *Cole*, 1 Wms. Saund. 319, b; *Mattock* v. *Kinglake*, 10 Ad. & E. 50; 8 L.J. Q.B. 215; *Spiller* v. *Westlake*, 2 B. & Ad. 155; 9 L.J. (O.S.) K.B. 224; *Walker* v. *Harris*, 1 Anstr. 245.

the defendant had refused to receive the goods, and by his own act had prevented the performance of the contract by the plaintiff (*l*). So, where a vendor agreed to deliver forthwith fifty tons of iron for the price of 9*l.* per ton, the price to be paid in cash in fourteen days, it was held that the delivery of the iron was a condition precedent to the payment of the price (*m*). Where a charterparty provided that a ship should proceed forthwith to a port and there load, it was held that if she proceeded to that port within a reasonable time the charterers could not refuse to load (*n*). If a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them is dependent upon the interest, or some portion thereof, being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional; and he is consequently liable upon them, whether the interest he professes to convey does or does not pass (*o*).

Covenants founded on a mutuality of obligation and liability must be mutually binding upon the parties to them. If, therefore, one of several parties to a deed *inter partes* founded on mutual covenants neglects to execute the deed, the contract is not binding on the others who have executed it (*p*). And, if a deed of covenant *inter partes*, originally binding upon all, becomes ineffectual and inoperative as to one by matter *ex post facto*, such as bankruptcy, the deed is wholly void (*q*). But, where the covenant is not founded upon some interest to be created by deed, or upon a mutuality of obligation and liability, the general rule of law is that, where a party has a covenant made to him, and he in return is to make a covenant, he may sue on the covenant made to him, even though he himself has not executed the deed (*r*).

Implied stipulations.—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will do nothing of his own motion to

(*l*) *Ripley* v. *M'Clure*, 4 Exch. 345; 18 L.J. Ex. 419.

(*m*) *Staunton* v. *Wood*, 16 Q.B. 638.

(*n*) *Hudson* v. *Hill*, 43 L.J. C.P. 273. And see *Roberts* v. *Brett*, 4 C.B. N.S. 611; 28 L.J. C.P. 323.

(*o*) *Walter* v. *Norwich* (*Dean*), 1 Brownl. & Gold. 21; Owen, 136; *Jones* v. *King*, 4 M. & S. 188; *Northcott* v. *Underhill*, 1 Raym. 388.

(*p*) *Antram* v. *Chace*, 15 East, 209.

(*q*) *Kearsey* v. *Carstairs*, 2 B. & Ad. 716; 9 L.J. (O.S.) K.B. 323; *Marsh* v. *Wood*, 9 B. & C. 659; 7 L.J. (O.S.) K.B. 327.

(*r*) *Morgan* v. *Pike*, 14 C.B. 473; 23 L.J. C.P. 64.

put an end to that state of circumstances under which alone the arrangement can be operative (*s*). Where a contract as expressed in writing would not carry out the intention of the parties, the law will imply any term obviously intended by them which is necessary to make the contract effectual (*t*). Where two parties agree for their mutual benefit that for a certain time the one shall be sole agent for the other to sell goods in a particular town, there is no implied condition that the business itself shall be continued (*u*); but it is otherwise where there is an express contract to employ the agent or to pay him an annual sum during the period (*x*).

Usual covenants.—Prior to the Conveyancing Act, 1881, it was a very frequent stipulation in an agreement for a lease that the lease should contain all "usual covenants," and the courts have had frequently to decide what is or is not a "usual covenant" (*y*). Thus it has been held that covenants to pay rent (*z*), to repair (*a*), for quiet enjoyment (*b*), and to pay rates and taxes when net rent is fixed (*c*), are usual covenants. And, upon the other hand, that covenants not to underlet or assign (*d*), not to carry on a particular trade (*e*), are not "usual." In mining leases it has been held that a proviso for re-entry upon a forfeiture by bankruptcy or assignment (*f*), and a covenant that the lease should determine when the mines could not be worked to a profit (*g*), are not "usual."

Computation of time.—In legal documents the primary meaning of the word "month" is lunar month, but it will be understood in its secondary meaning of calendar month if it appears to be the intention of the parties to use it in that sense (*h*); and such an intention may readily be inferred from the general

(*s*) *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L.J. Q.B. 1; *McIntyre* v. *Belcher*, 14 C.B. N.S. 654; 32 L.J. C.P. 254; *Hamlyn* v. *Wood*, (1891) 2 Q.B. 488; 60 L.J. Q.B. 734.

(*t*) Per Bowen, L.J., in *Oriental Steamship Co.* v. *Tylor*, (1893) 2 Q.B. 518, 527; 63 L.J. Q.B. 128, 132; *Holford* v. *Acton Urban Council*, (1898) 2 Ch. 240; 67 L.J. Ch. 636.

(*u*) *Rhodes* v. *Forwood*, 1 App. Cas. 256; 47 L.J. Ex. 396.

(*x*) *Turner* v. *Goldsmith*, (1891) 1 Q.B. 544; 60 L.J. Q.B. 247; *Ogden's Lim.* v. *Nelson*, (1905) A. C. 109; 74 L.J. K.B. 433.

(*y*) As to covenants implied by sect. 7 of 44 & 45 Vict. c. 41, see *post*, p. 448.

(*z*) *Taylor* v. *Horde*, 1 Burr. 60.

(*a*) *Kendall* v. *Hill*, 6 Jur. N.S. 968.

(*b*) Davidson's Precedents, vol. 5, pt. 1, p. 51 (3rd ed.).

(*c*) *Bennett* v. *Womack*, 7 B. & C. 627; 6 L.J. (O.S.) K.B. 175.

(*d*) *Hampshire* v. *Wickens*, 7 Ch.D. 555; 47 L.J. Ch. 243; *Buckland* v. *Papillon*, L.R. 2 Ch. 67; 36 L.J. Ch. 81; *Bishop* v. *Taylor*, 60 L.J. Q.B. 556.

(*e*) *Propert* v. *Parker*, 3 Myl. & K. 280; *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L.J. Ch. 208; and see *Doe* d. *Bute* (*Marquis*) v. *Guest*, 15 M. & W. 160.

(*f*) *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622; 44 L.J. Ch. 680; see *Anderton and Milner's Contract, In re*, 45 Ch.D. 476; 59 L.J. Ch. 765.

(*g*) *Strelley* v. *Pearson*, 15 Ch.D. 113; 49 L.J. Ch. 406.

(*h*) *Bruner* v. *Moore*, (1904), 1 Ch. 305; 73 L.J. Ch. 377; *Simpson* v. *Margitson*, 11 Q.B. 23, 31; 17 L.J. Q.B. 81.

context or the surrounding circumstances (*i*). When time is to be computed from a particular day, or from the day of an act being done or of a particular event happening, such day is to be excluded from the computation; for our law rejects fractions of a day. When, therefore, goods were sold on the 5th of October to be paid for in two months, it was held that the day on which the contract was made was to be excluded from the computation, and that an action for the price could not be maintained until after the expiration of the 5th of December (*k*).

In considering whether, upon a contract to do an act or enter into an engagement at or for a definite time "from" a certain date, the time is to be reckoned exclusively or inclusively of the last day, it is impossible to lay down any fixed rule; each case must depend on its own circumstances and subject-matter (*l*). But in general the first day is excluded (*m*), and the last day is to be included (*n*).

Interpretation of contracts made in one country and enforced in another.—All contracts made in one country concerning land and houses and immovable property situate in another country must be interpreted according to the law of the country in which the property is situate, the "*lex loci rei sitæ*," and not by the "*lex loci contractûs*," or the law of the country where the contract is made (*o*). A contract or settlement, therefore, made in consideration of marriage, which deals with heritable property situate in Scotland will be construed in England according to the law of Scotland (*p*); and the English courts will enforce the stipulations of an unsealed lease made between Englishmen in England, conveying a right of sporting over land in Scotland, because by Scotch law an instrument under seal is not necessary for the conveyance of a right to an incorporeal hereditament (*q*). But a contract of marriage made in Scot-

(*i*) *Lang* v. *Gale*, 1 M. & S. 111; *Jolly* v. *Young*, 1 Esp. 186; *Cockell* v. *Gray*, 6 Moore, 483, 486; 3 B. & B. 186.

(*k*) *Webb* v. *Fairmaner*, 3 M. & W. 473; 7 L.J. Ex. 140; *Young* v. *Higgon*, 6 M. & W. 49; 9 L.J. M.C. 29; *Mercantile Marine Insurance Co.* v. *Titherington*, 34 L.J. Q.B. 11; 5 B. & S. 765. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10, *post*, p. 542.

(*l*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714.

(*m*) *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, (1891) 1 Q. B. 402; 60 L.J. Q.B. 47; *North, In re, Hasluck, Ex parte*, (1895) 2 Q.B. 264; 64 L.J. Q.B. 694; *Goldsmiths' Co.* v. *West Metropolitan Ry.*, (1904) 1 K.B. 1; 72 L.J. K.B. 931. As to bills of exchange, see 45 & 46 Vict. c. 61, ss. 14 and 92, *post*, p. 1271.

(*n*) *Ackland* v. *Lutley*, 9 Ad. & E. 879; 8 L.J. Q.B. 164; *Webb* v. *Fairmaner*, *supra*; *Watson* v. *Pears*, 2 Campb. 294; *Lester* v. *Garland*, 15 Ves. 248; *Isaacs* v. *Royal Insurance Co.*, L.R. 5 Ex. 296; 39 L.J. Ex. 189; *Bellhouse* v. *Mellor*, 4 H. & N. 116; 28 L.J. Ex. 141; *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, *supra*.

(*o*) Story's Confl. of Laws, ss. 424, 428.

(*p*) *Duncan* v. *Cannan*, 7 De G. M. & G. 78; 24 L.J. Ch. 460.

(*q*) *Adams* v. *Clutterbuck*, 10 Q.B.D. 403; 52 L.J. Q.B. 607.

land in which trusts were declared in English form as to English real property, and in Scotch form as to Scotch personalty, was construed as to the English property by English law (*r*). Where a contract as to personalty is entered into between persons residing in different countries, where different systems of law prevail, it is a question in each case with reference to what system of law the parties contracted, and what was their intention as to the law which should determine their rights under the contract (*s*). Such contracts in general receive their interpretation either from the law of the country in which the contract is made, the "*lex loci contractûs*," or the law of the country in which the contract is to be performed, the *lex loci solutionis* (*t*). The law of the place where the contract is made is *primâ facie* that which the parties intended should apply, and therefore in the absence of circumstances indicating a different intention that law ought to determine the rights that are acquired on the one side, and the liabilities incurred on the other (*u*). If the contract is governed by the *lex loci contractûs* and valid by that law, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to the public policy of, the country where the contract is sought to be enforced (*x*); for remedies must be pursued by the means which the law points out in the place where the remedy is sought to be obtained (*y*). "So much of the law of the country where the contract is made," observes Tindal, C.J., "as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the *lex fori* of that country where the action is brought" (*z*). An agreement entered into abroad relating to

(*r*) *Chamberlain* v. *Napier*, 15 Ch.D. 614; 49 L.J. Ch. 628; and see *Fitzgerald, In re, Surman* v. *Fitzgerald*, (1904) 1 Ch. 573; 73 L.J. Ch. 436.

(*s*) *Hamlyn* v. *Talisker Distillery*, (1894) A. C. 202; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739; *Spurrier* v. *La Cloche*, (1902) A.C. 446; 71 L.J. P.C. 101.

(*t*) *Robinson* v. *Bland*, 1 W. Bl. 234, 256, 259; *Gibbs* v. *Fremont*, 9 Exch. 25; 22 L.J. Ex. 302.

(*u*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; *Jacobs* v. *Credit Lyonnais*, 12 Q.B.D. 589; 53 L.J. Q.B. 156; *Missouri Steamship Co., In re*, 42 Ch. D. 321; 58 L.J. Ch. 721; *South African Breweries Co.* v. *King*, (1900) 1 Ch. 273; 69 L.J. Ch. 171.

(*x*) *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417; *Grell* v. *Levy*, 16 C.B. N.S. 79; *Kaufman* v. *Gerson*, (1904) 1 K.B. 591; 73 L.J. K.B. 320. But see *Saxby* v. *Fulton*, (1909) 2 K. B. 208; 78 L.J. K.B. 781; *Moulis* v. *Owen*, (1907) 1 K.B. 746; 76 L.J. K.B. 396.

(*y*) *Robinson* v. *Bland*, 2 Burr. 1077; 1 W. Bl. 234, 257; *Forbes* v. *Cochrane*, 2 B. & C. 448, 471; 2 L.J. (O.S.) K.B. 67; *Guepratte* v. *Young*, 4 De G. & Sm. 217.

(*z*) *Huber* v. *Steiner*, 2 Sc. 304; 4 L.J. C.P. 233; *Leroux* v. *Brown*, 12 C.B. 801; 22 L.J. C.P. 1; *De la Vega* v. *Vianna*, 1 B. & Ad. 284; 8 L.J. (O.S.) K.B. 388; *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L.J. Q.B. 245; *Williams*

a trust of lands cannot be enforced in the courts of this country if it does not comply with the Statute of Frauds (*a*). Where a policy of life insurance granted by an English company was assigned by a person domiciled in Cape Colony to his wife, it was held that the assignment was governed by the law of Cape Colony (*b*). Where an assignment of a reversionary interest in personalty in England was executed in a foreign country, by the law of which notice of the assignment was not required, and subsequently a mortgage of the same property was executed in England, notice of which was duly given, it was held that the mortgage had priority over the assignment (*c*). The law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power there ruling, or as temporary residents owe that power a temporary allegiance (*d*). But a contract between an Englishman domiciled and resident in England, and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed by the rules of English law (*e*). And, when the government of a state contracts a loan in another country, the contract is governed by the law of the borrowing state, and not by that of the country where the contract is made (*f*).

When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the document on ordinary principles of construction (*g*). Where mutual debts are contracted in a foreign country, the law of that country as to set-off will apply (*h*).

Foreign bonds, bills, and notes—Conflict of laws.—If a bond or obligation for the payment of a sum of money be made in France, and no place of payment is designated on the face of

v. *Wheeler*, 8 C.B. N.S. 299; *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L.J. Q.B. 81.

(*a*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L.J. Ch. 74.

(*b*) *Lee* v. *Abdy*, 17 Q.B.D. 309.

(*c*) *Kelly* v. *Selwyn*, (1905) 2 Ch. 117; 74 L.J. Ch. 567.

(*d*) *Peninsular & Oriental St. Nav. Co.* v. *Shand*, 3 Moo. P.C. N.S. 272; *Jacobs* v. *Credit Lyonnais*, 12 Q.B.D. 589; 53 L.J. Q.B. 156.

(*e*) *Cood* v. *Cood*, 33 Beav. 314; 33 L.J. Ch. 278.

(*f*) *Smith* v. *Weguelin*, L.R. 8 Eq. 198; 38 L.J. Ch. 465.

(*g*) *Di Sora* v. *Phillips*, 10 H.L. Cas. 624; 33 L.J. Ch. 129; *Chatenay* v. *Brazilian Co.*, (1891) 1 Q.B. 79; 60 L.J. Q.B. 295.

(*h*) *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L.J. Q.B. 245; *sed quære.*

the contract, the extent of obligation and liability incurred on the one side, and the right acquired on the other, will be regulated by the law of France (*i*); but, if the money is to be paid in England, the legal effect of the contract will be determined by the English law, the "*lex loci solutionis*" (*k*). Where a bill of exchange is drawn generally, the liabilities of the drawer, acceptor and indorsers are governed by the laws of the countries in which the drawing, acceptance and indorsement respectively take place, but where a bill is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable according to the *lex loci contractûs—i.e.*, the law of the country where the bill was drawn and not that of the country where the bill was made payable (*l*). Where a bill of exchange drawn in one country on a person in another, and which makes no mention of interest, is dishonoured, the amount of interest recoverable is to be calculated according to the *lex loci contractûs* (*m*). The indorsement of a bill in blank does not, according to the French law, pass the property in the bill absolutely, but only subject to all the exceptions which would be available against the indorser himself; but such an indorsee is entitled to sue on the bill in his own name in France, and therefore can do the same in this country (*n*). If the bill is drawn and accepted and payable in England, an indorsement in blank in France (which by the law of France would give the indorsee no right to sue in his own name) by a French subject residing there will give to the holder a right to sue the acceptor in this country (*o*). But where a bill of exchange payable in England has been indorsed in a foreign country according to the law of that country, but so that the indorsement is not good by English law, and has also been indorsed by the same indorser according to English law to another person, the title of the former has been held to prevail (*p*); and where a policy of insurance granted by an English company has been assigned in another country, the validity of the assignment will be determined by the law of that country (*q*). Where bills of exchange drawn in France by a domiciled Frenchman, in the French

(*i*) *Melan* v. *de Fitzjames* (*Duke*), 1 B. & P. 138.

(*k*) *Robinson* v. *Bland*, 1 W. Bl. 234, 256; *Moulis* v. *Owen*, (1907) 1 K.B. 746; 76 L.J. K.B. 396, discussed in *Saxby* v. *Fulton*, (1909) 2 K.B. 208; 78 L.J. K.B. 781.

(*l*) *Allen* v. *Kemble*, 6 Moore, P.C. 314.

(*m*) *Gibbs* v. *Fremont*, 9 Exch. 25; 22 L.J. Ex. 302.

(*n*) *Bradlaugh* v. *De Rin*, L.R. 5 C.P. 473; 39 L.J. C.P. 254; overruling *Trimbey* v. *Vignier*, 1 Bing. N.C. 151; 3 L.J. C.P. 246.

(*o*) *Lebel* v. *Tucker*, L.R. 3 Q.B. 77 37 L.J. Q.B. 46.

(*p*) *Alcock* v. *Smith*, (1892) 1 Ch. 238; 61 L.J. Ch. 167; *Embiricos* v *Anglo-Austrian Bank*, (1905) 1 K.B. 677; 74 L.J. K.B. 326.

(*q*) *Lee* v. *Abdy*, 17 Q.B.D. 309.

language, in English form, on an English company who accepted the bills, were indorsed by the drawer and sent to an Englishman in England—such indorsements being informal and invalid (as well as the drawing of the bills), according to French law—it was held that the acceptor was liable (*r*).

By the Bills of Exchange Act, 1882, sect. 72, where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà protest*, is determined by the law of the place where such contract was made. Provided that (a) where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (b) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà protest* of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(*r*) *Marseilles Extension Ry. Co., In re, Smallpage's case*, 30 Ch. D. 598; 55 L.J. Ch. 116

(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Foreign purchases—Affreightments.—The fulfilment of a contract for the sale of goods, so far as it relates to the transfer and delivery of the goods to the purchaser, according to quantity, weight, or measure, will be regulated by the law of the country where the delivery is to be made (*s*). If a contract is made in England to load a full cargo on board a vessel at a foreign port, the meaning of the words "full cargo" will be regulated by the law of the foreign port, and not by the law of England. If an order is sent from England for the purchase of goods in Russia, to be delivered on board an English ship in a Russian port, the rights and liabilities growing out of the contract, such as the right to stop *in transitu*, will be governed by the law of Russia (*t*).

The validity of a bottomry bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractûs*, or the law of the country to which the vessel belongs (*u*).

What determines the locus contractûs.—When contracts are entered into between parties residing in different countries through the medium of letters, the place where the final assent has been given by one party to an offer made by another is the place where the contract is considered to have been made (*x*). "If I send my agent to Scotland, and he in my name makes a contract there, it is the same as if I were myself on the spot; and the contract must be considered as a contract entered into in Scotland" (*y*). In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place (*z*).

(*s*) 3 Burge on Colon. Law, p. 771; *Rosseter* v. *Cahlmann*, 8 Exch. 361; 22 L.J. Ex. 128; *Meyer* v. *Dresser*, 33 L.J. C.P. 289; 16 C.B. N.S. 646.

(*t*) *Inglis* v. *Usherwood*, 1 East, 515; *The Gaetano and Maria*, 7 P.D. 137; 51 L.J. P. 67; *The August*, (1891) P. 328; 60 L.J. P. 57.

(*u*) *Duranty* v. *Hart*, 2 Moo. P.C. N.S. 289; 33 L.J. Adm. 116.

(*x*) 3 Burge on Colon. Law, 753.

(*y*) *Albion Fire Insurance Co.* v. *Mills*, 3 Wils. & S. 218, 233 (Sc.).

(*z*) *Snaith* v. *Mingay*, 1 M. & S. 87.

SECTION II.

OF THE ADMISSIBILITY OF ORAL EVIDENCE IN WRITTEN CONTRACTS.

Inadmissibility of oral evidence to add to, alter, or contradict, a written contract.—It is a fundamental rule of the common law that oral evidence shall not be given to add to, subtract from, or alter or vary, any description of written contract: "*quoties in verbis nulla est ambiguitas nulla expositio contra verba fienda est.*" This general rule or principle of law has been established on the ground that writing stands higher in the scale of evidence than oral testimony, and that the stronger evidence ought not to be controlled or altered by the weaker (*a*). It has been held that oral evidence is inadmissible to show that a grant of an annuity, not made subject to redemption on the face of the deed, was nevertheless intended to be redeemable (*b*); also that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, unless the declaration has been fraudulently made (*c*). If, in a contract of charter-party, a person states himself to be the owner of a vessel, and then lets or charters the vessel for a certain term, he cannot by oral testimony show that he acted only as the agent of the owner (*d*). If a written contract of purchase and sale describes the nature and character of the things sold, oral evidence is inadmissible to add to or alter the written description (*e*); if it fixes the time for the completion of the purchase, or the time for the delivery of the goods, a contemporary agreement to substitute another day must be expressed in writing (*f*): and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency, or be made out of a particular fund. So that, on a written contract for a weekly hiring, oral evidence is inadmissible to show that a yearly hiring was intended (*g*). A covenant in a lease that the lessee will "pay" the rent in advance is a covenant that he will pay it in cash in advance; and

(*a*) *Davis* v. *Symonds*, 1 Cox, 402, 404; *Parteriche* v. *Powlet*, 2 Atk. 383; *Woollam* v. *Hearn*, 7 Ves. 211, 218; *May* v. *Platt*, (1900) 1 Ch. 616; 69 L.J. Ch. 357; *Houlder* v. *Public Works Commissioners*, (1908) A.C. 276; 77 L.J. P.C. 58.

(*b*) *Haynes* v. *Hare*, 1 H. Bl. 659.

(*c*) *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Shelton* v. *Livius*, 2 Cr. & J. 411; 1 L.J. Ex. 139; *Higginson* v. *Clowes*, 15 Ves. 516; *Eden* v. *Blake*, 13 M. & W 614; 14 L.J. Ex. 194.

(*d*) *Humble* v. *Hunter*, 17 L.J. Q.B. 350; 12 Q.B. 310.

(*e*) *Smith* v. *Jeffryes*, 15 L.J. Ex. 325; 15 M. &. W. 561; *Harnor* v. *Groves*, 15 C.B. 667; 24 L.J. C.P. 53.

(*f*) *Stead* v. *Dawber*, 10 Ad. & E. 57; 9 L.J. Q.B. 101; *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L.J. Ex. 126; *Stowell* v. *Robinson*, 3 Bing. N.C. 928; 6 L.J. C.P. 326.

(*g*) *Evans* v. *Roe*, L.R. 7 C.P. 138.

therefore an antecedent parol agreement that he will give bills at three months for the rent in advance is inconsistent with the covenant, and evidence of it is inadmissible (*h*). And on a written contract to make a marketable title to certain freeholds, oral evidence is inadmissible to show that the purchaser knew that it would be impossible for the vendor to make a marketable title (*i*). And, on a contract to manufacture and deliver goods at a specified time for a specified price, oral evidence is inadmissible to show that a portion of the price agreed to be paid for the goods was in consideration of the undertaking to deliver them at the times specified, and that the market price was much less than that agreed to be paid (*k*). Oral evidence is inadmissible to make a promissory note, absolute upon the face of it, conditional or payable upon a contingency (*l*), or to make a contract which, by the terms of it, is to commence *in præsenti*, to commence *in futuro* (*m*); or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed (*n*); but, where bought and sold notes differed, oral evidence was admitted to prove an arrangement between the broker and the purchaser, by which the apparent variance was explained and shown to be immaterial (*o*).

A warranty, made orally on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of such warranty (*p*); but a loose and incomplete memorandum of sale will not exclude oral evidence of a warranty (*q*). If a written demise be silent as to the payment of the ground rent (*r*), or land tax (*s*), oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale imports that the delivery of the goods and the payment of the price are to be concurrent acts, oral evidence is inadmissible to show that credit was bargained for and intended to have been given (*t*). But a writing containing only part of the contract,

(*h*) *Henderson* v. *Arthur*, (1907) 1 K.B. 10; 76 L.J. K.B. 22.
(*i*) *Cato* v. *Thompson*, 9 Q.B.D. 616.
(*k*) *Brady* v. *Oastler*, 3 H. & C. 112; 33 L.J. Ex. 300.
(*l*) *Rawson* v. *Walker*, 1 Stark. 361; *Moseley* v. *Hanford*, 10 B. & C. 729; 8 L.J. (O.S.) K.B. 261; *Foster* v. *Jolly*, 1 C. M. & R. 703; 4 L.J. Ex. 65; *Free* v. *Hawkins*, 1 Moore, 535; 8 Taunt. 92; *Adams* v. *Wordley*, 1 M. & W. 374; 5 L.J. Ex. 158; *Abrey* v. *Crux*, L.R. 5 C.P. 37: 39 L.J. C.P. 9.
(*m*) *Williams* v. *Jones*, 5 B. & C. 108.
(*n*) *Hoare* v. *Graham*, 3 Campb. 57; *Young* v. *Austen*, L.R. 4 C.P. 553; 38 L.J. C.P. 233; *New London Credit Syndicate* v. *Neale*, (1898) 2 Q.B. 487; 67 L.J. Q.B. 825.
(*o*) *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L.J. Ex. 191.
(*p*) *Powell* v. *Edmunds*, 12 East, 6; *Harnor* v. *Groves*, 15 C.B. 667; 24 L.J. C.P. 53.
(*q*) *Allen* v. *Pink*, 4 M. & W. 140; 7 L.J. Ex. 206.
(*r*) *Preston* v. *Merceau*, 2 W. Bl. 1249.
(*s*) *Rich* v. *Jackson*, 4 Br. C.C. 514.
(*t*) *Ford* v. *Yates*, 2 Sc. N.R. 645; 10 L.J. C.P. 117. See also 56 & 57 Vict. c. 71, s. 28.

and not being evidence of a concluded agreement, does not shut out oral evidence of the time of payment. Where the defendant by letter ordered the plaintiff to send goods to a wharf, oral evidence was admitted to show that the order was given on the faith of a promise made by word of mouth by the plaintiff to the defendant, that the defendant should have six months' credit for the payment of the goods (*u*). Where an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included than those actually mentioned, or that a greater rent was to be paid than that actually expressed, or that the rent was to be paid quarterly, when by the agreement it is to be paid yearly, or that the rent was to commence at a later day than that named (*x*). Oral evidence is, however, admissible to show that there is a consideration for a deed other than and additional to that mentioned therein (*y*). But the contract may be evidenced and established, through the medium of several writings, as well as by one document (*z*); and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended, by a contemporaneous agreement in writing (*a*), provided it be shown that both papers refer to the same subject-matter, persons, and things. Where there is a proposal only in writing, oral evidence may be given to show that that proposal has been accepted, but not of what passed at the time of making the proposal for the purpose of varying the contract (*b*). And where there was a discrepancy between a lease and its counterpart, the counterpart was looked at to ascertain where the mistake lay (*c*); so also where there was a patent ambiguity in the lease (*d*).

But, although, as we have already seen (*ante*, p. 64), verbal evidence cannot in general be given to add to, subtract from, or to vary or qualify the written contract, yet an agreement upon a distinct matter may be shown to have been made by word of mouth, and may be enforced (*e*). Moreover, where an agreement has been reduced into writing, the parties may,

(*u*) *Lockett* v. *Nicklin*, 19 L.J. Ex. 403; 2 Exch. 93; *Stones* v. *Dowler*, 29 L.J. Ex. 122.

(*x*) *Veres* v. *Ansell*, 3 Wils. 275; *Henson* v. *Coope*, 3 Sc. N.R. 48.

(*y*) *Clifford* v. *Turrell*, 1 Y. & C. 138; *Frith* v. *Frith*, (1906) A.C. 254; 75 L.J. P.C. 50.

(*z*) See *ante*, p. 36.

(*a*) *Brown* v. *Langley*, 12 L.J. C.P. 62; 5 Sc. N.R. 249.

(*b*) *Hotson* v. *Browne*, 9 C.B. N.S. 442; 30 L.J. C.P. 106.

(*c*) *Burchell* v. *Clark*, 2 C.P.D. 88; 46 L.J. C.P. 115.

(*d*) *Matthews* v. *Smallwood*, (1910) 1 Ch. 777; 79 L.J. Ch. 322.

(*e*) *Lindley* v. *Lacey*, 34 L.J. C.P. 7; 17 C.B. N.S. 578; *Morgan* v. *Griffith*, L.R. 6 Ex. 70; 40 L.J. Ex. 46; *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 849; *Angell* v. *Duke*, L.R. 10 Q.B. 174; 44 L.J. Q.B. 78; *De Lassalle* v. *Guildford*, (1901) 2 K.B. 215; 70 L.J. K.B. 533.

at any subsequent time before breach of it, by a new contract not in writing, either altogether waive or annul the former agreement, or add to, subtract from, or vary its items, and thus make a new contract, which may be proved partly by the written agreement, and partly by the subsequent verbal term engrafted upon it, provided the new contract be not of such a nature as is required to be authenticated by writing; for, when that is the case, the new substituted contract cannot be proved partly by writing and partly by oral testimony (*f*), and will not operate as a rescission of the original contract (*g*), which will remain in force (*h*). Parol evidence is admissible where it goes to show, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant; for in such a case the Statute of Frauds does not apply (*i*), and it is immaterial whether the request for forbearance was made before or after the contract was broken (*k*). And evidence of subsequent acts of the parties to a contract may be admissible for the purpose of preventing one of the parties from insisting on a strict performance of the original agreement (*l*).

Proof of contracts partly by writing and partly by oral testimony.—Oral testimony in aid of insufficient written evidence of a contract is admissible, when the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be supported by, oral testimony (*m*). Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional circumstances necessary to constitute a contract is admissible (*n*).

(*f*) *Per* Denman, C.J., *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58, 65; 2 L.J. K.B. 127; *Stead* v. *Dawber*, 10 Ad. & E. 57, 65; 9 L.J. Q.B. 101; *Crowley* v. *Vitty*, 21 L.J. Ex. 135; 7 Exch. 319; *Sanderson* v. *Graves*, L.R. 10 Ex. 234; 44 L.J. Ex. 210.

(*g*) *Vezey* v. *Rashleigh*, (1904) 1 Ch. 634; 73 L.J. Ch. 422.

(*h*) *Noble* v. *Ward*, 36 L.J. Ex. 91; L.R. 2 Ex. 135; *Plevins* v. *Downing*, 1 C.P.D. 220; 45 L.J. C.P. 695.

(*i*) *Ogle* v. *Vane* (*Lord*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77.

(*k*) *Hickman* v. *Haynes*, L.R. 10 C.P. 598; 44 L.J. C.P. 358.

(*l*) *Bruner* v. *Moore*, (1904) 1 Ch. 305; 73 L.J. Ch. 377; following *Hughes* v. *Metropolitan Ry.*, 2 App. Cas. 439; 46 L.J. C.P. 583.

(*m*) *Eden* v. *Blake*, 13 M. & W. 614, 618; 14 L.J. Ex. 194; *Bolckow* v. *Seymour*, 17 C.B. N.S. 107; *Stones* v. *Dowler*, 29 L.J. Ex. 122.

(*n*) *Knapp* v. *Harden*, 1 Gale, 47; 6 Car. & P. 745; *Ingram* v. *Lea*, 2 Campb. 521.

Oral evidence is admissible to show that a party named in an insurance of goods as a vendor was not in reality the vendor (*o*). Where the plaintiff signed a consignment note, which stated that certain goods were delivered by him to a railway company to be carried to N., but the charge for carriage was not mentioned, and oral evidence was given that the company's agreement with the plaintiff before the note was signed was to carry to K., but that the plaintiff did not read the note, and that the sum to be charged, and which was paid, was for the carriage to K., it was held that the evidence was admissible on the ground that the note was not a complete contract (*p*). Generally, oral evidence is admissible for the purpose of showing that the real contract between the parties is not in writing, and that a document purporting to be a contract, signed by the parties, was not intended to contain (*q*), or that a subsequent written contract does not contain, and was not intended to contain, the whole agreement between them (*r*); but where a written proposal, signed by the defendant, was adopted in terms by the plaintiff, though not in writing, it was held that evidence of what passed at the time of making the proposal was not admissible for the purpose of varying the construction of the writing (*s*). Oral evidence is always admissible for the purpose of identifying the subject-matter of the contract, as, for instance, to show that a contract referring to a bill as of the 24th of October was intended to apply to one dated the 25th (*t*); or to explain what was meant by the words "your wool" in a contract for the purchase of wool so described (*u*), or the words "your employ" in a contract of service (*x*), or the words "the lease" in an agreement to procure a lease (*y*). All facts are admissible which tend to show the sense the words bear in reference to the surrounding circumstances concerning which the words were used, but such facts as only tend to show that the writer intended to use words bearing a particular sense must be rejected (*z*).

In equity a defendant may prove a parol variation or addition to a written contract where he is resisting specific per-

(*o*) *Holding* v. *Elliott*, 5 H. & N. 117; 29 L.J. Ex. 134.

(*p*) *Malpas* v. *L. & S. W. Ry.*, L.R. 1 C.P. 336; 35 L.J. C.P. 166, explaining *Jeffery* v. *Walton*, 1 Stark. 267.

(*q*) *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L.J. Ex. 241.

(*r*) *Harris* v. *Rickett*, 4 H. & N. 1; 28 L.J. Ex. 197.

(*s*) *Hotson* v. *Browne*, 9 C.B. N.S. 442; 30 L.J. C.P. 106; *ante*, p. 66.

(*t*) *Way* v. *Hearn*, 13 C.B. N.S. 292; 32 L.J. C.P. 34.

(*u*) *Macdonald* v. *Longbottom*, 1 E. & E. 977, 987; 29 L.J. Q.B. 256.

(*x*) *Mumford* v. *Gething*, 7 C.B. N.S. 305; 29 L.J. C.P. 105.

(*y*) *Horsey* v. *Graham*, L.R. 5 C.P. 9; 39 L.J. C.P. 58.

(*z*) *Bank of New Zealand* v. *Simpson*, (1900) A.C. 182; 69 L.J. P.C. 22.

formance of the contract; but a plaintiff may not make use of a parol variation, unless there has been such a part performance of the parol portion of the agreement as would enable the court to decree a specific performance in the case of an original and independent agreement, or where the omission has occurred by fraud, or, in cases not within the Statute of Frauds, by clear mistake (*a*).

Annexation of agricultural and mercantile customs.—Customary incidents universally attaching to the subject-matter of the contract in the place where the contract was made are impliedly annexed to the written terms of the contract, unless the custom is expressly excluded (*b*). Parol evidence of custom, consequently, is always admissible to explain the real meaning of the parties (*c*), but not to prevail over and nullify the express provisions of the contract (*d*). The evidence of usage must, however, be distinct, in order to affect the meaning of the terms of the contract (*e*), and not be inconsistent therewith (*f*). The known usage of a particular trade, and the established course of every mercantile dealing, are considered to be tacitly annexed to the terms of every mercantile contract made in the ordinary course of business in which the usage prevails (*g*), if there be no words therein expressly controlling the ordinary operation of the usage; and parol evidence thereof may consequently be given (*h*). The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication all those general incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them (*i*). Whether the terms of the contract

(*a*) *Woollam* v. *Hearn*, 7 Ves. 211; 2 W. & T. L. Cas. 513 (ed. 7); *Laver* v. *Fielder*, 32 Beav. 1; 32 L.J. Ch. 365; *May* v. *Platt*, (1900) 1 Ch. 616; 69 L.J. Ch. 357.

(*b*) Many agricultural customs have been embodied in the Agricultural Holdings Act, 1908, (8 Edw. 7, c. 28); and for divers customs of different counties, see Dixon's Law of the Farm, pp. 710–747 (ed. 6); Woodfall's Landlord and Tenant, pp. 841, 852 (ed. 18).

(*c*) *Hutton* v. *Warren*, 1 M. & W. 466, 475, 476; 5 L.J. Ex. 234; *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L.C. 545 (ed. 11); *Cuthbert* v. *Cumming*, 24 L.J. Ex. 310; 11 Exch. 405.

(*d*) *Clarke* v. *Roystone*, 13 M. & W. 752; 14 L.J. Ex. 143; *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244; 1 L.J. Ex. 101; *Roxburghe* v. *Robertson*, 2 Bligh, 156; *Roberts* v. *Barker*, 1 C. & M. 808; 2 L.J. Ex. 268; *Phillipps* v. *Briard*, 1 H. & N. 21; 25 L.J. Ex. 233.

(*e*) *Bowes* v. *Shand*, 2 App. Cas. 455; 46 L.J. Q.B. 561.

(*f*) *Hayton* v. *Irwin*, 5 C.P.D. 130.

(*g*) *Allan* v. *Sundius*, 1 H. & C. 123; 31 L.J. Ex. 307.

(*h*) *Syers* v. *Jonas*, 2 Exch. 111; *Grant* v. *Maddox*, 15 M. & W. 737; 16 L.J. Ex. 227.

(*i*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Lucas* v. *Bristow*, E. B. & E. 907; 27 L.J. Q.B. 364; *Reg.* v. *Stoke-upon-Trent*, 13 L.J. M.C. 41; 5 Q.B. 303; *Brown* v. *Byrne*, 3 E. & B. 703, 715; 23 L.J. Q.B. 313; *Field* v. *Lelean*, 6 H. & N. 617; 30 L.J. Ex. 168; *Myers* v. *Sarl*, 30 L.J. Q.B. 9; 3 E. & E. 306; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49.

are such as to exclude evidence of the custom is a question for the judge and not for the jury (*k*). A local usage of a particular place, or of a particular class of persons, is not binding upon persons living at a distance, and who are proved to have been wholly unacquainted with such usage (*l*). And a custom in a particular market that a broker to buy is a principal to sell, is not binding upon a person ignorant of the existence of such custom, for it changes the intrinsic character of the contract (*m*). Neither is a rule that a broker can only recognise the person employing him, although he knows him to be only an agent (*n*). But, if a merchant residing in London employs an agent in Liverpool to make a contract there, the contract so made will be clothed with all the incidents of a Liverpool contract in respect of custom of trade (*o*). Where the written contract does not exclude the custom, oral evidence is not admissible for the purpose of showing that the parties did not intend it to apply (*p*). Oral evidence is admissible to show that, by the custom of a particular trade, persons describing themselves in the contract as "agents to merchants" are personally liable, if they do not disclose their principals within a reasonable time (*q*).

Customary meaning of particular words.—If, by the known usage of trade or by custom, a word has acquired, in respect of the subject-matter of the contract, a peculiar meaning different from the ordinary meaning, evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary sense. Thus, in a case arising on a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, the word "thousand" in a lease as applied to rabbits meant twelve hundred (*r*). So, where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf of Finland is considered by custom amongst merchants and in mercantile contracts to be within the Baltic, though the two seas are treated as distinct by geographers (*s*). And in a lease of a coal mine evidence was admitted to show that

(*k*) *Parker* v. *Ibbetson*, 4 C.B. N.S. 346; 27 L.J. C.P. 236.

(*l*) *Bartlett* v. *Pentland*, 10 B. & C. 760; 8 L.J. (O.S.) K.B. 264; *Kirchner* v. *Venus*, 12 Moore, P.C. 361, 399; *Sweeting* v. *Pearce*, 30 L.J. C.P. 109; 9 C.B. N.S. 534.

(*m*) *Robinson* v. *Mollett*, L.R. 7 H.L. 802; 44 L.J. C.P. 362.

(*n*) *Pearson* v. *Scott*, 9 Ch. D. 198; 47 L.J. Ch. 705, nom. *Pierson* v. *Scott*.

(*o*) *Graves* v. *Legg*, 2 H. & N. 210; 26 L.J. Ex. 316.

(*p*) *Fawkes* v. *Lamb*, 31 L.J. Q.B. 98; but see *Burges* v. *Wickham*, 33 L.J. Q.B. 17; 3 B. & S. 669.

(*q*) *Hutchinson* v *Tatham*, L.R. 8 C.P. 482; 42 L.J. C.P. 260; *Pike* v. *Ongley*, 18 Q.B.D. 708; 56 L.J. Q.B. 373.

(*r*) *Smith* v. *Wilson*, 3 B. & Ad. 728; 1 L.J. K.B. 194.

(*s*) *Uhde* v. *Walters*, 3 Campb. 16; *Birrell* v. *Dryer*, 9 App. Cas. 345.

the word "*level*" in mining districts had a meaning different from the ordinary meaning, and that the word was used by the parties to the contract in the sense in which it is employed by miners (*t*). But the custom and usage must be general and universal, and not the course of dealing of a particular firm or house of trade (*u*).

Terms of art—Trade acceptations.—The meaning of all words and terms of art and specifications of quantity, quality, weight, and measure, are regulated by local custom, unless the terms have been selected, and a definite meaning given to them, by the legislature (*x*). But, to vary the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible" (*y*). If peculiar expressions are used in a contract, which have in a particular place or trade a known meaning attached to them, it is for the jury to say what the meaning of those expressions is, but for the court to decide what is the meaning of the contract (*z*).

Oral evidence of conditional assent.—If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract (*a*). Where a party claims as the indorsee of a bill of exchange, it may be shown that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee for a particular purpose, and on the understanding that it should not operate as an indorsement until the condition was fulfilled (*b*). And, if an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with or alter the other, both may stand; and the oral bargain may be enforced as well as the contract in writing (*c*). When the contract is evidenced by letters and writings, it is for the court to

(*t*) *Clayton* v. *Gregson*, 5 Ad. & E. 302.

(*u*) *Gabay* v. *Lloyd*, 3 B. & C. 793, 797; 3 L.J. (O.S.) K.B. 116; *Sweeting* v. *Pearce*, 9 C.B. N.S. 534; 30 L.J. C.P. 109; *post*, p. 326; *Scott* v. *Irving*, 1 B. & Ad. 605; 9 L.J. (O.S.) K.B. 89; *post*, p. 1135.

(*x*) *Taylor* v. *Briggs*, 2 C. & P. 525; *Hutchison* v. *Bowker*, 5 M. & W. 535; 9 L.J. Ex. 24; *Spicer* v. *Cooper*, 1 Q.B. 424; 10 L.J. Q.B. 241.

(*y*) *Lewis* v. *Marshall*, 13 L.J. C.P. 193; 8 Sc. N.S. 477.

(*z*) *Hutchison* v. *Bowker*, *supra*; *Neilson* v. *Harford*, 8 M. & W. 806, 823; 11 L.J. Ex. 20; *Trueman* v. *Loder*, 11 Ad. & E. 589, 599; 9 L.J. Q.B. 165; *Sotilichos* v. *Kemp*, 18 L.J. Ex. 36; 3 Exch. 105.

(*a*) *Pym* v. *Campbell*, 6 E. & B. 370; 25 L.J. Q.B. 277; *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L.J. Ex. 241; *ante*, p. 68; *Lindley* v. *Lacey*, 34 L.J. C.P. 7; 17 C.B. N.S. 578; *Wallis* v. *Littell*, 11 C.B. N.S. 369; 31 L.J. C.P. 100; *Davis* v. *Jones*, 17 C.B. 625; 25 L.J. C.P. 91; *Pattle* v. *Hornibrook*, (1897) 1 Ch. 25; 66 L.J. Ch. 144.

(*b*) *Bell* v. *Ingestre* (*Lord*), 12 Q.B. 317; 19 L.J. Q.B. 71.

(*c*) *Lindley* v. *Lacey*, 34 L.J. C.P. 7; 17 C.B. N.S. 578; *White* v. *Parkin*, 12 East, 578; *Harris* v. *Rickett*, 4 H. & N. 1; 28 L.J. Ex. 197; *Green* v. *Saddington*, 7 E. & B. 503.

interpret them and determine whether they do or do not amount to a concluded contract; and, if the judge leaves it to a jury to say what is the effect and meaning of written correspondence, there is a misdirection (*d*).

Estoppel by deed.—The rule of law which stops a party from disputing what he has affirmed by deed (*ante*, p. 18) does not extend to strangers to the contract (*e*). A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited in such deed (*f*). When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the whole instrument (*g*). As between the parties themselves, any averment of a fact made by one of the parties in the nature of a representation or warranty to the other may be contradicted by that other (*h*). But the party who makes the averment is not permitted to dispute the fact recited (*i*). If a lease, however, recites that the lessor is possessed of real or personal property, the lessee who executes and accepts such lease is estopped, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed (*k*).

A "grant" of an estate which would amount in equity to a representation does not amount in law to a representation of a right to grant, that is, to an estoppel. There must be a strict recital to the effect that the party has the right or title in order by estoppel to bind him or persons claiming through him (*l*).

Estoppels in pais, meaning that a person is estopped before the country, arise in several ways. Thus, "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position," he is estopped and precluded from falsifying his own representation (*m*). Again, if, in the transaction which is itself in dis-

(*d*) *Cheveley* v. *Fuller*, 13 C.B. 122.
(*e*) *Rex* v. *Scammonden*, 3 T. R. 474.
(*f*) *Carpenter* v. *Buller*, 8 M. & W. 209; 10 L.J. Ex. 393; *Trinidad Asphalt Co.* v. *Coryat*, (1896) A.C. 587; 65 L.J. P.C. 100.
(*g*) *Stroughill* v. *Buck*, 14 Q.B. 781; 19 L.J. Q.B. 209; *Wiles* v. *Woodward*, 5 Ex. 557; 20 L.J. Ex. 261.
(*h*) *Hayne* v. *Maltby*, 3 Tr. 438, 441; Vin. Abr. Estoppel, M. 455.
(*i*) *Oldham* v. *Langmead*, cited 3 T.R. 439; *Humble* v. *Hunter*, 17 L.J. Q.B. 350; 12 Q.B. 310.
(*k*) *Beckett* v. *Bradley*, 8 Sc. N.R. 843; 14 L.J. C.P. 3.
(*l*) *General Finance Co.* v. *Liberator Building Society*, 10 Ch.D. 15.
(*m*) *Pickard* v. *Sears*, 6 Ad. & E. 469, 474; *M'Cance* v. *L. & N. W. Ry.*, 34 L.J. Ex. 39; 3 H. & C. 343; *Freeman* v. *Cooke*, 2 Exch. 654; 18 L.J. Ex. 114;

pute, one person has negligently led another into the belief of a certain state of facts, and such negligence has been the proximate and real cause of leading that other to act upon such belief, the former is estopped from showing that the state of facts referred to did not actually exist (*n*). Neglect or omission to do an act is equally within the rule, but in order to create an estoppel it must be shown that the party setting it up has been induced by such negligence or omission to alter his position (*o*). If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it, or that it is not a binding obligation (*p*). If on the evidence it appears that two persons upon the negotiation of a mercantile security have assumed by common consent a certain fact, such as that a particular person is the drawer of a bill, or if by express agreement between them a bill is drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered on the faith of the arrangement, the other cannot afterwards be permitted to say that the bill was not drawn or indorsed as it purports to be (*q*). But where the defendant left his blank acceptance in his table drawer, and the bill was stolen, and his name filled in as drawer of the bill, it was held he was not estopped (*r*). A voluntary payment of rent under a supposed legal obligation by a person who in fact is the owner of the land will not estop him from setting up his true title (*s*).

Mistaken or untrue averments in written contracts not under seal.—Although the express admissions of a party inserted in a contract are strong evidence against him, yet he is at liberty,

Johnson v. *Credit Lyonnais*, 3 C.P.D. 32, 40; 47 L.J. C.P. 241; *Carr* v. *L. & N. W. Ry.*, L.R. 10 C.P. 307, 316; 44 L.J. C.P. 109; *Citizen's Bank of Louisiana* v. *First National Bank of New Orleans*, L.R. 6 H.L. 352; 43 L.J. Ch. 269; *Williams* v. *Stern*, 5 Q.B.D. 409; 49 L.J. C.P. 663; *Coventry* v. *G. E. Ry.*, 11 Q.B.D. 776; 52 L.J. Q.B. 694; *Whitechurch* v. *Cavanagh*, (1902) A.C. 117; 71 L.J. K.B. 400; *Keith* v. *Gancia & Co.*, (1904) 1 Ch. 744; 73 L.J. Ch. 411.

(*n*) *Carr* v. *L. & N. W. Ry.*, *supra*; *Coventry* v. *G. E. Ry.*, *supra*; *Seton* v. *Lafone*, 19 Q.B.D. 68; 56 L.J. Q.B. 415.

(*o*) *Freeman* v. *Cooke*, *supra*; *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82; *Cooke* v. *Eshelby*, 12 App.Cas. 271; 56 L.J. Q.B. 505. See *Ogilvy* v. *West Australian Mortgage Corporation*, (1896) A. C. 257; 65 L.J. P.C. 46.

(*p*) *Straffon*, *Ex parte*, 22 L.J. Ch. 194, 202; 1 De G. M. & G. 576.

(*q*) *Ashpitel* v. *Bryan*, 32 L.J. Q.B. 91; 3 B. & S. 474. See as to fictitious indorsement, *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145, *post*, p. 1244.

(*r*) *Baxendale* v. *Bennett*, 3 Q.B.D. 525; 47 L.J. Q.B. 624. See *per* Lindley, L.J., *Cooper*, *In re*, 20 Ch.D. 611, 634; 51 L.J. Ch. 862.

(*s*) *Batten Pooll* v. *Kennedy*, (1907) 1 Ch. 256; 76 L.J. Ch. 162.

in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped by them, unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction (*t*); and this rule or principle of law is applicable to mistakes in respect of legal liability, as well as in respect of matter-of-fact (*u*). But a person is not estopped by a mere contract to do something which does not involve a representation of some fact (*x*). If a bill of exchange or promissory note purports on the face of it to be made for value received, it is competent to the parties to show that no value was received (*y*); and, if a receipt for the payment of money has been given, oral evidence is admissible to contradict such receipt, and rebut its legal operation as a discharge from liability (*z*). So, where a passenger who was injured by a railway accident accepted 400*l.*, and gave the company a receipt expressed to be in full discharge of his claims, it was held that the statement in the receipt could be rebutted by evidence that he did not receive the money in full satisfaction of all demands (*a*).

(*t*) *Heane* v. *Rogers*, 9 B. & C. 577, 586; 7 L.J. (O.S.) K.B. ~~283.~~ 285

(*u*) *Newton* v. *Liddiard*, 18 L.J. Q.B. 56; 12 Q.B. 925.

(*x*) *Farmeloe* v. *Bain*, 1 C.P.D. 445; 45 L.J. C.P. 264.

(*y*) *Foster* v. *Jolly*, 1 C.M. & R. 703, 708; 4 L.J. Ex. 65; *Ridout* v. *Bristow*, 1 C. & J. 231; 9 L.J. (O.S.) Ex. 48. See 45 & 46 Vict. c. 61, s. 30, *post*, p. 1257.

(*z*) *Lampon* v. *Corke*, 5 B. & Ald. 606, 611; *Skaife* v. *Jackson*, 3 B. & C. 421, 423; 3 L.J. (O.S.) K.B. 43; *Farrar* v. *Hutchinson*, 9 Ad. & E. 641, 643; 8 L.J. Q.B. 107; *Wallace* v. *Kelsall*, 7 M. & W. 264, 273, 274; 10 L.J. Ex. 12; *Graves* v. *Key*, 3 B. & Ad. 313; *Bowes* v. *Foster*, 2 H. & N. 779; 27 L.J. Ex. 262.

(*a*) *Lee* v. *Lancashire and Yorkshire Ry.*, L.R. 6 Ch. 527.

CHAPTER III.

OF THE AVOIDANCE OF CONTRACTS.

SECTION I.

VOID CONTRACTS.

Distinction between void and voidable contracts.—A contract which is void has no legal effect, and binds neither party—a contract which one of the parties may set aside under certain conditions is voidable only; but, unless set aside, is binding on both parties.

Immoral contracts.—Whenever a contract has been entered into for the performance of an immoral act, or an act which is contrary to the provisions of an Act of Parliament, or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract (*a*); and a deed will be set aside where the consideration is immoral (*b*). If the illegality of the contract appears upon the face of it, it is at once fatal to an action thereon; and, if it does not so appear, the fact of its existence may be established through the medium of oral testimony; but "illegality is never presumed: on the contrary, everything must be presumed to have been legally done till the contrary be proved" (*c*). Bonds, agreements (*d*), and guarantees to indemnify persons against the consequences of their illegal acts are absolutely void, whether the parties giving the bond or indemnity did or did not know of the illegality of the transaction (*e*). Such are contracts to indemnify a man against the consequences of publishing a libel (*f*); or to indemnify a sheriff or other ministerial officer of the law against the pecuniary consequences resulting to himself from his permitting a prisoner to go at large, or committing any

(*a*) *Holman* v. *Johnson*, 1 Cowp. 343; *Fivaz* v. *Nicholls*, 2 C.B. 501; 15 L.J. C.P. 125.

(*b*) *Willyams* v. *Bullmore*, 32 Beav. 574; 33 L.J. Ch. 461.

(*c*) *Bennett* v. *Clough*, 1 B. & Ald. 463.

(*d*) The giving of an agreement to indemnify bail is an indictable offence. See *Rex* v. *Porter*, (1910) 1 K.B. 369; 79 L.J. K.B. 241.

(*e*) *Duvergier* v. *Fellows*, 10 B. & C. 826; 8 L.J. (O.S.) K.B. 270.

(*f*) *Shackell* v. *Rosier*, 2 Bing. N.C. 634; 5 L.J. C.P. 193.

other breach of duty (*g*); or a promise to pay a man a sum of money "in consideration that he will beat another out of such a close" (*h*); or to save him harmless in consideration that he will imprison another (*i*); but an agreement to surrender a third party into the custody of the sheriff is not necessarily illegal (*k*). Where the defendant agreed that he would not expose the adultery of the plaintiff, if the plaintiff would not sue on a bond, it was held that the agreement was void (*l*). Where the defendant contracted to let rooms to the plaintiff, but afterwards, on discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of them, it was held that the purpose was illegal, and that the contract could not be enforced by law (*m*).

Contracts tending to promote fornication and prostitution are void as being *contra bonos mores*, such as bonds, covenants, promissory notes, or securities for the payment of money, given to a woman in order to induce her to commit fornication or to live in a state of concubinage or prostitution (*n*), or to secure a maintenance to a married woman in order that she may be induced to leave her husband and carry on an illicit intercourse with another man (*o*); but, if a man covenants to pay an annuity to a woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support or the support of her children, the contract is valid (*p*), even although he continues the cohabitation (*q*). The contract, however, must be made by deed, past cohabitation and seduction being an insufficient consideration for the support of a simple contract or promise (*r*). A contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrate to make an order of affiliation on the father, such order being, under the statute, for the

(*g*) *Featherston* v. *Hutchinson*, Cro. Eliz. 199; *Morris* v. *Chapman*, Jones, 24.

(*h*) *Allen* v. *Rescous*, 2 Lev. 174.

(*i*) *Fletcher* v. *Harcot*, Hut. 55.

(*k*) *Lewis* v. *Davison*, 4 M. & W. 657; 8 L.J. Ex. 78.

(*l*) *Brown* v. *Brine*, 1 Ex.D. 5; 45 L.J. Ex. 129.

(*m*) *Cowan* v. *Milbourn*, L.R. 2 Ex. 230; 36 L.J. Ex. 124.

(*n*) *Robinson* v. *Cox*, 9 Mod. 263; *Walker* v. *Perkins*, 3 Burr. 1568; 1 W. Bl. 517; *Friend* v. *Harrison*, 2 C. & P. 584.

(*o*) *Evans* v. *Carrington*, 30 L.J. Ch. 370; 2 De G. F. & J. 489.

(*p*) *Gibson* v. *Dickie*, 3 M. & S. 463; *Turner* v. *Vaughan*, 2 Wils. 339; *Nye* v. *Moseley*, 6 B. & C. 133; 4 L.J. (O.S.) K.B. 179; *Annandale* v. *Harris*, 2 P. Wms. 432; *Priest* v. *Parrot*, 2 Ves. senr. 160; *Knye* v. *Moore*, 2 S. & S. 260; 3 L.J. (O.S.) Ch. 136.

(*q*) *Vallance, In re*, 26 Ch.D. 353.

(*r*) *Beaumont* v. *Reeve*, 8 Q.B. 483; 15 L.J. Q.B. 141; *Matthews* v. *L—e*, 1 Madd. 558.

benefit of the child, and not of the mother exclusively (*s*). If a landlord knowingly permits a female lodger to carry on the trade of prostitution under his roof, the courts will give him no assistance for the recovery of his rent (*t*). One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral or illegal use, cannot recover upon the contract; and it is not necessary that he should expect to be paid out of the proceeds of the immoral or illegal act (*u*). Thus, where coachbuilders, knowing a woman to be a prostitute, supplied her with a brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men, it was held that they could not recover the price, although there was no evidence that they looked expressly to the proceeds of her prostitution for payment (*x*). But "a prostitute must have a lodging" as well as other people; and if she merely uses the lodgings to live in and plies her trade elsewhere, there is no answer to the landlord's claim for his rent (*y*). Where an action was brought for the charges of washing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing (*z*). A shopkeeper cannot recover the price of immoral or obscene prints and libels sold by him (*a*). A printer cannot bring an action against a publisher for the price agreed to be paid for printing an indecent, libellous, and immoral history setting forth the amours and intrigues of a prostitute (*b*).

Contracts against public policy.—A covenant by a father that he will abstain from seeing or exercising any control over his children is void as being contrary to the policy of the law (*c*),

(*s*) *Follit* v. *Koetzow*, 2 E. & E. 730; 29 L.J. M.C. 128.

(*t*) *Jennings* v. *Throgmorton*, R. & M. 251; *Smith* v. *White*, L.R. 1 Eq. 626; 35 L.J. Ch. 454.

(*u*) *Cannan* v. *Bryce*, 3 B. & Ald. 179; *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 7 L.J. Ex. 149.

(*x*) *Pearce* v. *Brooks*, L.R. 1 Ex. 213; 35 L.J. Ex. 134; *Upfill* v. *Wright*, (1911) 1 K.B. 506; 80 L.J. K.B. 254.

(*y*) *Crisp* v. *Churchill*, cited 1 B. & P. 340; *Appleton* v. *Campbell*, 3 Car. & P. 347; *Girardy* v. *Richardson*, 1 Esp. 13.

(*z*) *Lloyd* v. *Johnson*, 1 B. & P. 340.

(*a*) *Fores* v. *Johnes*, 4 Esp. 97.

(*b*) *Poplett* v. *Stockdale*, Ry. & M. 337; 2 C. & P. 198.

(*c*) *Vansittart* v. *Vansittart*, 4 K. & J. 62; 27 L.J. Ch. 222; 2 De G. & J. 249; 27 L.J. Ch. 289; *Hamilton* v. *Hector*, L.R. 6 Ch. 701; 40 L.J. Ch. 692. As to the mother of an illegitimate child, se *Barnardo* v. *McHugh*, (1891) A. C. 388; 61 L.J. Q.B. 721; *Humphrys* v. *Polak*, (1901) 2 K.B. 385; 70 L.J. K.B. 752; Addison on Torts, 870 (ed. 8).

unless the father has, by gross misconduct, manifested himself unfit to associate with them (*d*). But a bond given by the father of illegitimate children to the mother to secure her an annuity on condition of her giving up the care and custody of the children is legal and may be enforced (*e*). A promise of marriage made by a married man to a woman who at the time of the promise knew that he had a wife living is void as being against public policy (*f*). A promise by a client to his solicitor to make him a present beyond the scale of ordinary legal remuneration is void as being contrary to the public policy of the law (*g*); and so are all contracts between solicitors and clients for the purchase of property from the client (*h*); and all contracts prejudicial to the interests of the public, such as a contract tending to prevent free competition (*i*), to influence improperly the performance of public duties, or having for its object the purchase or acquisition by money of a dignity or title of honour in the gift of the Crown (*k*). Money lent to an elector as an inducement to him to give his vote cannot be recovered back; nor can any security given for its repayment be enforced. A contract with a member of the legislature to induce him to vote in a particular way, placing his private interest in opposition to his public duty, is void; but a member of the legislature may make terms for the sale of his lands, and for compensation for any injury he may sustain from the carrying out of an undertaking seeking parliamentary sanction (*l*). A contract to abandon rights under the Employers' Liability Act, 1880, is not void (*m*).

Contracts providing for the future separation of husband and wife are contrary to public policy, and therefore void (*n*). But a contract between the husband and a trustee on behalf of the wife, providing for the terms of a present separation, will be enforced (*o*).

Contracts in restraint of marriage are void, as being opposed

(*d*) *Swift* v. *Swift*, 34 L. J. Ch. 209, 394; 34 Beav. 266. As to agreements in separation deeds, see 36 & 37 Vict. c. 12, s. 2; Addison on Torts, 864 (ed. 8).

(*e*) *Plaskett's Estate, In re*, 30 L.J. Ch. 606.

(*f*) *Wilson* v. *Carnley*, (1908) 1 K.B. 729; 77 L.J. K.B. 594; approving *Spiers* v. *Hunt*, (1908) 1 K.B. 720; 77 L.J. K.B. 321.

(*g*) *O'Brien* v. *Lewis*, 4 Giff. 221; 32 L.J. Ch. 569; *Tyrrel* v. *Bk. of London*, 10 H.L.C. 26; 31 L.J. Ch. 396; *Pince* v. *Beattie*, 32 L.J. Ch. 734. As to validity of agreements between solicitors and their clients, see 33 & 34 Vict. c. 28, *post*, p. 894.

(*h*) *Post*, p. 131.

(*i*) *Hilton* v. *Eckersley*, 6 E. & B. 47, 64; 25 L.J. Q.B. 199.

(*k*) *Egerton* v. *Brownlow* (*Earl*), 4 H.L.C. 235; 23 L.J. Ch. 348.

(*l*) *Howden* (*Lord*) v. *Simpson*, 1 Rail. Cas. 347.

(*m*) *Griffiths* v. *Dudley* (*Earl*), 9 Q.B.D. 357; 51 L.J. Q.B. 543. As to contracting out of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), see ss. 3 and 15 of that Act.

(*n*) *Merryweather* v. *Jones*, 4 Giff. 509.

(*o*) *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374. As to deeds of separation, see *post*, p. 1324.

to public policy (*p*); but a restriction against marriage with one specified person is not illegal (*q*).

Maintenance.—Agreements to furnish money to be risked on the event of a lawsuit, or to aid and assist in the prosecution of lawsuits, in which the party making the agreement is in nowise interested, and with which he has no just or reasonable ground for interference, are void, as tending to keep alive strife and contention (*r*). The law of maintenance, observes Lord Abinger, "is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make" (*s*); and the principle there stated has been carried even further in recent years (*t*). But if the party has any interest in the thing in dispute, or has a fair and reasonable ground for thinking that he has rights in common with other parties, he may lawfully enter into an agreement with them for the prosecution or defence of those rights (*u*). A father may assist his son, a husband his wife, or a master his servant without being guilty of maintenance; but such a relationship as that of a cousin is not sufficient to make such an agreement lawful (*x*). A trader who has a pecuniary and commercial interest in the protection of customers to whom he has supplied goods may contract to indemnify them against actions brought against them by a rival trader, without being guilty of maintenance (*y*). Charitable motives are a good defence to the action, however indiscreet the charity may be (*z*). It is laid down in our old law books that, for avoiding maintenance, rights of action cannot be assigned or granted over by one man to another. Thus, "if a man owe me money on an obligation or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor" (*a*). But the

(*p*) *Post*, p. 1310.

(*q*) *Topham* v. *Portland* (*Duke*), 32 L.J. Ch. 81; 1 De G. J. & S. 517.

(*r*) 32 Hen. 8, c. 9; Plowd. 88; 2 Instit. 564; *Pierson* v. *Hughes*, Freem. 71, 81; *Earle* v. *Hopwood*, 30 L.J. C.P. 217; 9 C.B. N.S. 566; *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1; 52 L.J. Q.B. 454; *Harris* v. *Brisco*, 17 Q.B.D. 504; 55 L.J. Q.B. 423.

(*s*) *Findon* v. *Parker*, 11 M. & W. 675, 678; 12 L.J. Ex. 444, 447.

(*t*) See *per* Cozens-Hardy, M.R., in *British Cash, &c. Conveyors, Ltd.* v. *Lamson Store Service Co.*, (1908) 1 K.B. 1006; 77 L.J. K.B. 649; *Fitzroy* v. *Cave*, (1905) 2 K.B. 364; 74 L.J. K.B. 829.

(*u*) 4 Bl. Com. 134, 135; 2 Roll. Abr. 115; *Findon* v. *Parker*, 11 M. & W. 682; 12 L.J. Ex. 444; *Alabaster* v. *Harness*, (1895) 1 Q.B. 339; 64 L.J. Q.B. 76.

(*x*) *Hutley* v. *Hutley*, L.R. 8 Q.B. 112; 42 L.J. Q.B. 52.

(*y*) *British Cash, &c. Conveyors, Ltd.* v. *Lamson Store Service Co.*, (1908) 1 K. B. 1006; 77 L.J. K.B. 649.

(*z*) *Harris* v. *Brisco*, 17 Q.B.D. 504; 55 L.J. Q.B. 423; *Holden* v. *Thompson*, (1907) 2 K. B. 489; 76 L.J. K.B. 889.

(*a*) Vin. Abr. Assignment (B.) (D.); Bro. Abr. Chose in action; Co. Litt. 265 a.

ancient rule had been so explained away at common law, that it remained only as an objection to the form of the action; and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, protected the assignment of a *chose in action* as much as the law would that of a chose in possession (*b*). Rights of action, debts, and claims to money due on contracts, may therefore now be purchased without making the purchaser guilty of maintenance (*c*). But an agreement by which a third person (not being within the recognised exceptions, such as that of master and servant) undertakes to institute or prosecute or assist litigation in the name of a claimant, and to indemnify him wholly or partly against the costs of the litigation, if not technically maintenance, savours of maintenance, and will consequently be void (*d*).

Champerty.—When the party officiously and unwarrantably agreeing to furnish money, or to aid in the maintenance of the action or suit, is to share in the advantages thereof, he is said to be guilty of *champerty* (*campi partitio*), and the agreement is void (*e*). But if the interference does not amount to maintenance, there is no champerty, although the party tendering the assistance is to receive the money recovered in the action (*f*). An agreement by a solicitor not to charge his clients costs, in consideration of his being allowed to retain for his own use a share of the sums recovered by him for them, amounts to champerty and is illegal and void (*g*); but if the work is done, and the client receives the benefit of it, the solicitor will be entitled to his costs as between solicitor and client (*h*). An agreement (to be carried into effect in this country), which, if made in this country, would be void on the ground of champerty, is not the less void because made in a foreign country where such a contract would be legal (*h*). The purchase of an estate for the purpose of setting aside a previous agree-

(*b*) Co. Litt. 232 b. n. 1; *Tyson* v. *Jackson*, 30 Beav 384; *Hare* v. *L. & N. W. Ry.*, Johns. 722. See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

(*c*) See *Fitzroy* v. *Cave*, (1905) 2 K.B. 364; 74 L.J. K.B. 829.

(*d*) *Per* Cozens Hardy, L.J., in *Fitzroy* v. *Cave*, *supra*. See also *Wood* v. *Dowines*, 18 Ves. 120, 126; *Prosser* v. *Edmonds*, 1 Y. & C. 481, 496; *Harrington* v. *Long*, 2 Myl. & K. 590; *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1; 52 L.J. Q.B. 454; and *British Cash, &c. Conveyors, Ltd.* v. *Lamson Store Service Co.*, (1908) 1 K.B. 1006; 77 L.J. K.B. 649.

(*e*) *Stanley* v. *Jones*, 7 Bing. 369; 9 L.J. (O.S.) C.P. 51; *Reynell* v. *Sprye*, 21 L.J. Ch. 633; 1 De G. M. & G. 660; *Sprye* v. *Porter*, 7 E. & B. 58, 80; 26 L.J. Q.B. 64. See *James* v. *Kerr*, 40 Ch.D. 449; 58 L.J. Ch. 355.

(*f*) *Williams* v. *Protheroe*, 3 Y. & J. 129; 2 M. & P. 779.

(*g*) *Masters, In re*, 4 Dowl. P.C. 21; *Yeatman, Ex parte*, *ib.* 304; *Hilton* v. *Woods*, L.R. 4 Eq. 432; 36 L.J. Ch. 941; *Pince* v. *Beattie*, 32 L.J. Ch. 734; *Earle* v. *Hopwood*, 9 C.B. N.S. 566; 30 L.J. C.P. 217; 32 Hen. 8, c. 9. See also *Coondoo* v. *Mookerjee*, 2 App. Cas. 186.

(*h*) *Grell* v. *Lery*, 16 C.B. N.S. 73.

ment for payment only in the event of success (*p*), or one which of the nature of champerty, and will not be enforced (*i*).

A contract by a person to communicate information on the terms of getting a share of the property that may thereby be obtained by the person to whom the information is given is not void for champerty. But if the contract is that the person giving the information shall himself recover the property for the persons who are entitled to it, then, even although no hostile action may be necessary, it is against the policy of the law and the contract is void (*k*). The statutes against champerty were directed mainly against speculations in lawsuits, and were intended to repress the gambling propensity which formerly prevailed of buying up doubtful titles. It was never intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it (*l*).

Agreements between solicitors and their clients respecting payment for services are regulated by the Solicitors Act, 1870 (*m*). No action is to be brought upon such agreements, but they may be enforced by motion (*n*), and rule or order, or set aside (*o*). Nothing in the Act is to render valid an agreement for payment only in the event of success (*p*), or one which is void under the bankruptcy laws (*q*).

Contracts having a tendency, however slight, to obstruct or interfere with the administration of public justice are also void, as being contrary to the public policy of the law (*r*). All contracts prohibiting parties from bringing an action, and all agreements purporting to oust the courts of their jurisdiction altogether are void (*s*). But an agreement to refer existing or future differences to arbitration may be enforced (*t*), whether the difference is one of fact or of law (*u*); and agreements for determining only the amount to be recovered by arbitration are valid (*x*); and the determination by arbitration of the amount

(*i*) *De Hoghton* v. *Money*, L.R. 2 Ch. 164; *Hill* v. *Boyle*, L.R. 4 Eq. 260.

(*k*) *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L.J. Ch. 656.

(*l*) *Anderson* v. *Radcliffe*, E. B. & E. 817; 29 L.J. Q.B. 12; *Scott* v. *Miller*, 28 L.J. Ch. 584; Johns. 220, 328.

(*m*) 33 & 34 Vict. c. 28. See *post*, p. 894.

(*n*) *Ib.* s. 8.

(*o*) *Ib.* s. 9.

(*p*) *Ib.* s. 11. See Solicitors Act, 1870, *In re*; 1 Ch.D. 573; 45 L.J. Ch. 47.

(*q*) *Ib.* s. 12.

(*r*) *Egerton* v. *Brownlow* (*Earl*), 4 H.L.C. (I.) 163; 23 L.J. Ch. 386; *Lound* v. *Grimwade*, 39 Ch.D. 605; 57 L.J. Ch. 725; *Prince* v. *Haworth*, (1905) 2 K.B. 768; 75 L.J. K.B. 92.

(*s*) *Horton* v. *Sayer*, 4 H. & N. 643; 29 L.J. Ex. 28; *Lee* v. *Page*, 30 L.J. Ch. 857; *Edwards* v. *Aberayron Ins. Society*, 1 Q.B.D. 563; *Hope* v. *International Society*, 4 Ch.D. 327, 334; 46 L.J. Ch. 200. As to a statutory agreement to oust the jurisdiction, see *Crossfield* v. *Manchester Ship Canal Co.*, (1905) A.C. 421; 74 L.J. Ch. 637.

(*t*) 52 & 53 Vict. c 49; *Roper* v. *Lendon*, 1 E. & E. 825; 28 L.J. Q.B. 262.

(*u*) *Randegger* v. *Holmes*, L.R. 1 C.P. 679.

(*x*) *Horton* v. *Sayer*, *supra*; *Lee* v. *Page*, *supra*.

of damages to be recovered, or the time of payment, may lawfully be made a condition precedent to the right to maintain an action (*y*). It is difficult to reconcile two propositions so nearly in direct opposition as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between two parties, it shall be referred to arbitration; but the fair result of the authorities is that, if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition has been complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference will not oust the jurisdiction of the courts or deprive the party of his action (*z*). It is not contrary to public policy for the parties to agree that the question of fraud on the part of an architect whose certificate and valuation has been agreed to be binding as between them shall not be raised by either of them (*a*). All agreements to pay money to induce a party to suppress evidence, or to give evidence in favour of one side only, or not to appear as a witness in a civil suit or a criminal prosecution, are void (*b*), and will be set aside (*c*); and so are agreements to compound a felony, or to forego a prosecution for a public misdemeanour (*d*), or to hush up a charge of embezzlement (*e*), or to compromise a suit for divorce in consideration of money to be paid to the petitioner by the co-respondent (*f*), or to pay money in consideration that a party will use his private interest and influence with the crown to obtain the pardon of a criminal (*g*), or to pay money in consideration of the abandonment of a petition presented against the return of a member to the House of Commons on the ground

(*y*) *Scott* v. *Avery*, 5 H.L. Cas. 811; 25 L.J. Ex. 308; *Brown* v. *Overbury*, 11 Exch. 715; 25 L.J. Ex. 169; *Scott* v. *Liverpool Corporation*, 28 L.J. Ch. 230; *Tredwen* v. *Holman*, 1 H. & C. 72; 31 L.J. Ex. 398; *Braunstein* v. *Accidental Death Ins. Co.*, 1 B. & S. 782; 31 L.J. Q.B. 17; *Edwards* v. *Aberayron Ins. Society*, *supra*; *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; 45 L.J. Ex. 893; *Babbage* v. *Coulburn*, 9 Q.B.D. 235; 52 L.J. Q.B. 50; *Viney* v. *Bignold*, 20 Q.B.D. 172; 57 L.J. Q.B. 82; *Spurrier* v. *La Cloche*, (1902) A.C. 447; 71 L.J. P.C. 101.

(*z*) *Elliott* v. *Royal Exchange Assurance Co.*, L.R. 2 Ex. 237, 242; 36 L.J. Ex. 129.

(*a*) *Tullis* v. *Jackson*, (1892) 3 Ch. 441; 61 L.J. Ch. 655.

(*b*) *Collins* v. *Blantern*, 2 Wils. 347.

(*c*) *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717.

(*d*) *Keir* v. *Leeman*, 6 Q.B. 308; 13 L.J. Q.B. 359; 9 Q.B. 371; 15 L.J. Q.B. 360; *Windhill L. B.* v. *Vint*, 45 Ch. D. 351; 59 L.J. Ch. 608; *Edgcombe* v. *Rodd*, 5 East, 294. See *Flower* v. *Sadler*, 10 Q.B.D. 572.

(*e*) *Critchley*, *Ex parte*, 15 L.J. Q.B. 124; *Williams* v. *Bayley*, *supra*.

(*f*) *Gipps* v. *Hume*, 2 J. & H. 517; 31 L.J. Ch. 37.

(*g*) *Norman* v. *Cole*, 3 Esp. 253.

of bribery (*h*); and all agreements interfering with the proper administration of the bankruptcy laws, and the examination and discharge of bankrupts, or tending to deceive the trustees or officers of the court, or to induce them not to do their duty (*i*). And not only is the agreement itself void, but any bill of exchange, promissory note, or other security given in pursuance of any such agreement, is tainted with illegality and cannot be enforced, unless it is a negotiable security in the hands of a *bonâ fide* holder for value, without notice of the illegality (*k*). But an agreement to compound civil rights, or to forego or settle an action that has been commenced (*l*), or to compromise one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy (*m*), or to discharge a party from imprisonment under civil process, or his goods from a distress or execution (*n*), is valid and may be enforced. All contracts, bonds, indemnities, guarantees, and undertakings tending to induce sheriffs (*o*), under-sheriffs (*p*), gaolers (*q*), town-clerks (*r*), and public officers to violate or neglect their duty, or made to protect them from the consequences of their misconduct, are absolutely null and void. But an engagement or undertaking to indemnify a sheriff in the execution of a lawful or apparently lawful act, or in the exercise of the duties of his office, is valid and may be enforced, such as an indemnity bond to induce him to execute or not to execute a *fi. fa.* upon goods and chattels the ownership of which is disputed (*s*). An agreement between two or more to purchase shares in a company in order to induce persons, who might thereafter purchase shares in the company, to believe, contrary to the fact, that there was a *bonâ fide* market for its shares, is an indictable offence, and therefore an illegal transaction, and no action can be maintained in respect of such agreement or purchase of shares (*t*).

Contracts in contravention of the policy of an Act of Parlia-

(*h*) *Coppock* v. *Bower*, 4 M. & W. 367; 8 L.J. Ex. 9.

(*i*) *Nerot* v. *Wallace*, 3 T.R. 23; *Coles* v. *Strick*, 15 Q.B. 9; *Humphreys* v. *Welling*, 31 L.J. Ex. 33; 1 H. & C. 7.

(*k*) *Clubb* v. *Hutson*, 18 C.B. N.S. 414; *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717. See *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merioneth Bldg. Soc.*, (1892) 1 Ch. 173; 61 L.J. Ch. 138; and 45 & 46 Vict. c. 61, s. 27, *post*, p. 1257.

(*l*) *Harding* v. *Cooper*, 1 Stark. 467; *Drage* v. *Ibberson*, 2 Esp. 643.

(*m*) *Fisher* v. *Apollinaris Co.*, L.R. 10 Ch. 297; 44 L.J. Ch. 500; but see *per* Stirling, J., *Windhill L. B.* v. *Vint*, 45 Ch.D. 351; 59 L.J. Ch. 608.

(*n*) *Brett* v. *Close*, 16 East, 300; *Sugars* v. *Brinkworth*, 4 Campb. 46; *Pilkington* v. *Green*, 2 B. & P. 151.

(*o*) *Wright* v. *Verney* (*Lord*), 3 Dougl. 240.

(*p*) *Morris* v. *Chapman*, Sir T. Jones, 24.

(*q*) *Blithman* v. *Martin*, 2 Bulstr. 213.

(*r*) *Hughes* v. *Statham*, 4 B. & C. 187; 3 L.J. (O.S.) K.B. 179.

(*s*) Atkinson on Sheriffs, p. 152 (ed. 6).

(*t*) *Scott* v. *Brown*, (1892) 2 Q.B. 724; 61 L.J. Q.B. 738.

ment (*u*), *or of the Bankruptcy Acts*, are illegal and void, such as contracts and securities for the payment of money to a particular creditor to induce him to withdraw his opposition to a bankrupt's discharge (*x*), or to abandon proceedings in bankruptcy (*y*), or to secure to a particular creditor a superior claim or preference in respect of the future property of the bankrupt (*z*), or a greater share of the dividends of a bankrupt's estate (*a*), or some additional advantage which prevents the property being distributed under the bankruptcy laws (*b*), or to omit a debt from a bankrupt's schedule in order that the creditor may, after the bankruptcy, claim the amount from the bankrupt (*c*); and so also are all agreements tending to induce the officers of the court or trustees not to do their duty (*d*). Any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankruptcy law, is a fraud upon the creditors who are excluded or disappointed, or who may be delayed thereby, and is consequently void (*e*). A contract for the building of a ship provided that, in the event of bankruptcy of the builder, the purchaser might cause the ship to be completed by anyone else, and employ such materials of the builder's as were on his premises and fit for the purpose, and it was held that this contract was void as against the trustees in bankruptcy (*f*). A covenant or agreement to pay all the creditors their debts in full, in consideration that they will not proceed further under the bankruptcy, is of course perfectly legal; and so is a guarantee to a petitioning creditor securing to him a dividend of a certain amount on his debt, as an inducement to him to incur the expense and trouble of suing for an adjudication. But if the bankruptcy is a concerted bankruptcy, and there is anything

(*u*) *Macgregor* v. *Dover and Deal Ry.*, 18 Q.B. 618; 22 L.J. Q.B. 69.

(*x*) *Jackson* v. *Davison*, 4 B. & Ald. 695; *Rogers* v. *Kingston*, 2 Bing. 441; 3 L.J. (O.S.) C.P. 77; *Murray* v. *Reeves*, 8 B. & C. 425; 6 L.J. (O.S.) K.B. 348; *Hall* v. *Dyson*, 17 Q.B. 785; 21 L.J. Q.B. 224; *Hills* v. *Mitson*, 8 Exch. 758; 22 L.J. Ex. 273.

(*y*) *Davis* v. *Holding*, 1 M. & W. 164; 5 L.J. Ex. 102.

(*z*) *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Rose* v. *Main*, 1 Bing. N.C. 357; 4 L.J. C.P. 18.

(*a*) *Staines* v. *Wainwright*, 6 Bing. N.C. 179; 9 L.J. C.P. 107.

(*b*) *Mackay, Ex parte, Jearons, In re*, L.R. 8 Ch. 643; 42 L.J. Bank. 68; *Williams, Ex parte*, 7 Ch.D. 138; 47 L.J. Bank. 26.

(*c*) If the creditor is a party to the omission of the debt, he cannot afterwards recover the amount: *Tabram* v. *Freeman*, 2 C. & M. 451; 3 L.J. Ex. 135.

(*d*) *Nerot* v. *Wallace*, 3 T.R. 26; *M'Neill* v. *Cahill*, 2 Bligh, 229.

(*e*) *Saffery, Ex parte*, 4 Ch.D. 555; 46 L.J. Bank. 34.

(*f*) *Barter, Ex parte*, 26 Ch.D. 510; 53 L.J. Ch. 802. See also *Seath* v. *Moore*, 11 App.Cas. 350; 55 L.J. P.C. 54; *Reid* v. *Macbeth*, (1904) A.C. 223; 73 L.J. P.C. 57.

fraudulent in the proceeding, the contract will be illegal and void (*g*). By sect. 48 of the Bankruptcy Act, 1883 (*h*), every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor (*i*), or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy; but the section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. A secret agreement by a shareholder in a company which is being compulsorily wound up that he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal (*k*).

Contracts for the evasion of the licensing and excise Acts are void. The Customs Laws are now consolidated by 39 & 40 Vict. c. 36, amended by 41 & 42 Vict. c. 15, and other Acts (*l*). An agreement that articles of apprenticeship shall be antedated, to make it appear that an apprentice has been articled for the full term required by the statute, is void; and so is a bond given to secure payment of the premium in respect of such apprenticeship (*m*). Leases of premises to be used in contravention of the excise laws or licensing Acts, or of the provisions of a building Act, or of a public health or towns improvement Act, or of any local public Act of Parliament (*n*), are void, if the lessors knew that the premises were to be used for the forbidden purpose. Whenever a licence is required for the exercise of a trade on grounds of public policy, any agreement made with the view of enabling a party to trade without the licence is void (*o*).

Parish indemnities.—A security given to overseers to indemnify the parish against charges to which it may be subject by the birth of an illegitimate child therein has been held not to

(*g*) *Kaye* v. *Bolton*, 6 T.R. 134; *Fry* v. *Malcolm*, 5 Taunt. 117.

(*h*) 46 & 47 Vict. c. 52.

(*i*) As to meaning of term "creditor," see *Paine, In re*, (1897) 1 Q.B. 122; 66 L.J. Q.B. 71.

(*k*) *Elliott* v. *Richardson*, L.R. 5 C.P. 744; 39 L.J. C.P. 140.

(*l*) See *post*, p. 112, as to Excise.

(*m*) *Prole* v. *Wiggins*, 3 Bing. N.C. 230; 6 L.J. C.P. 2.

(*n*) *Gaslight and Coke Co.* v. *Turner*, 6 Bing. N.C. 324; 9 L.J. Ex. 336.

(*o*) *Ritchie* v. *Smith*, 6 C.B. 474; 18 L.J. C.P. 9.

be illegal (*p*): nor a covenant with a lessor of premises in a parish to indemnify the churchwardens and overseers of the poor of the parish, and the inhabitants thereof, from all charges resulting from the covenantor's taking apprentices or servants who should thereby gain a settlement within, or become chargeable to, the parish (*q*).

Sale of letters of recommendation and public offices of trust.—All contracts and agreements to pay money to ministers of state for an appointment to a public office of trust, or for the grant of favours from the crown (*r*), or for an appointment in the dockyard, the crown being kept in ignorance of the bargain, are absolutely void, as being contrary to public policy. But if the office is an acknowledged saleable office, and the transaction is carried on under public authority, and with the consent of the crown, and of the parties who have the office in their gift, as was formerly the case with sales of commissions in the army (*s*), the transaction is lawful, and the contract growing out of it may be enforced. Exchanges of public offices, and substitutions of one person in the place of another, are lawful, when they are made with the sanction of the public authorities and the parties who have the disposal of such offices; but secret agreements for exchanges of such offices are void (*t*).

Contracts in fraud of masters and employers.—All contracts and agreements to recommend parties for employment in offices of trust in consideration of the payment of money, or to pay money in consideration of such recommendation, entered into without the knowledge of the employer or person who has the office at his disposal, are a fraud upon the latter, and are void (*u*). If a party entrusted with the duty of selecting fit persons for certain offices obtains contracts or securities for the payment of money by the applicants after their appointment, without the knowledge of the employer, he is guilty of a gross abuse of the confidence reposed in him, and such agreements cannot stand. But, if the employer is apprised of the whole transaction, it cannot then be considered a fraud on him, although, if the office be a public office, the contract may be void on grounds of public policy (*post*, p. 91). An agreement to pay money in consideration of a recommendation to the appointment to the command of a vessel, entered into without

(*p*) *Cole* v. *Gower*, 6 East, 110.

(*q*) *Walsh* v. *Fussell*, 6 Bing. 163; 7 L.J. (O.S.) C.P. 261.

(*r*) *H*[illegible] v. *D*[illegible], 1 Bro. C.C. 124; *Morris* v. *M'Culloch*, Ambl. 435.

(*s*) As to the sale of commissions, see *post*, p. 91, note (*k*).

(*t*) *Parsons* v. *Thompson*, 1 H. Bl. 322.

(*u*) *Waldo* v. *Martin*, 4 B. & C. 319; 6 D. & R. 364.

the knowledge of the shipowners, is void (*x*); but, if the shipowners are cognizant of the agreement at the time they make the appointment, there is then no fraud in the matter (*y*). If a person is employed to puff a particular tradesman, he cannot bring an action against the latter for his commission, if the employment was kept secret from the customers, and they were led to suppose that the recommendation was founded upon the known character of the party recommended, and not upon a pecuniary consideration (*z*).

Fraud on creditors.—If a debtor induces his creditors to compound their claims and execute a deed of composition for their several debts by concealing from them the true state of his affairs, the deed will be void, and the creditors remitted to their original rights (*a*). Whenever creditors enter into a deed of composition with their debtor, whereby they agree to release the latter from his liabilities on payment of a certain rateable proportion of their several claims, any private underhand agreement for securing to any one of the creditors executing the deed any advantage not enjoyed by them all in common is fraudulent and void. Equality is the only principle that can be applied; and, if one creditor, unknown to the other creditors (*b*)—not unknown to one or two, but to the general body—enters into an arrangement by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, that arrangement cannot stand (*c*). But a payment in excess of the composition made afterwards under pressure and not in pursuance of a previous arrangement will not avoid the composition (*d*). And, although a promissory note so given has been dishonoured, and an action brought upon it and judgment recovered, yet a guarantee given for the amount of such judgment is tainted with the original fraud, and cannot be enforced, notwithstanding that the illegality might have been, but was not, pleaded to the action (*e*). If money is paid to one creditor, unknown to the other creditors, it may be recovered back (*f*). And, although

(*x*) *Blachford* v. *Preston*, 8 T.R. 89; *Card* v. *Hope*, 2 B. & C. 672; 2 L.J. (O.S.) K.B. 96.

(*y*) *Richardson* v. *Mellish*, 2 Bing. 229, 242; 3 L.J. (O.S.) C.P. 265.

(*z*) *Wyburd* v. *Stanton*, 4 Esp. 179.

(*a*) *Vine* v. *Mitchell*, 1 Moo. & R. 337; *Wenham* v. *Fowle*, 3 Dowl. P.C. 43.

(*b*) *Cockshott* v. *Bennett*, 2 T.R. 763.

(*c*) *Jackman* v. *Mitchell*, 13 Ves. 581; *Jackson* v. *Lomas*, 4 T.R. 166; *Wells* v. *Girling*, 4 Moore, 87; 1 B. & B. 447; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50; *Mare* v. *Warner*, 3 Giff. 100; *Mare* v. *Earle*, 3 Giff. 108; *McKewan* v. *Sanderson*, L.R. 15 Eq. 229.

(*d*) *Carey* v. *Barrett*, 4 C.P.D. 379.

(*e*) *Clay* v. *Ray*, 17 C.B. N.S. 188; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50.

(*f*) *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Lenzberg's Policy*, *In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

he is to receive no more money than the others, yet, if the composition is to be paid by instalments, and he secretly bargains for, and obtains, better security for the payment of his own instalments than is possessed by the other creditors, the security so obtained is void (*g*). And, if he has secretly received either goods or money to induce him to compound his claim and join in the execution of the composition deed, he will not be allowed to sue upon the deed for the instalments due to him, or upon any bond or bill of exchange given him to secure the payment of such instalments (*h*). A bargain by which a creditor, in consideration of his being a surety for the payment to the others of a composition, agreed with the debtor, without the knowledge of the other creditors, for the payment of his own debt in full, was set aside at the instance of the debtor (*i*). If the creditor keeps back a portion of the debts due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the debts omitted (*k*). If he makes a promise, upon the faith of which the composition proceeds, he will not be permitted to violate his engagement, as his doing so would amount to a fraud upon the other creditors (*l*).

All the creditors are presumed to compound their claims upon the debtor on the understanding that they are all to receive equal proportions of their several debts; and they all accept the same security for what they are individually to receive. They are, therefore, not fairly dealt by, if any of them bargains for, or receives, better terms than another (*m*). But a creditor who holds bills of exchange drawn by the debtor upon, and accepted by, third parties as a security for part of his debt, is entitled to avail himself of the benefit of such securities; and, if he claims the whole of his debt under the composition deed in the first instance, and then receives the amount due upon the bills, he is entitled to his composition upon the residue of his demand (*n*). The omission to state the amount of the debt in the deed will not avoid the contract as regards the creditor whose debt has been so omitted to be stated; but the amount of the debt may be proved by extrinsic testimony (*o*).

Contracts made illegal by statutes.—Everything in respect of

(*g*) *Leicester* v. *Rose*, 4 East, 381.

(*h*) *Knight* v. *Hunt*, 5 Bing. 432; 7 L.J. (O.S.) C.P. 165.

(*i*) *Wood* v. *Barker*, L.R. 1 Eq. 139; 35 L.J. Ch. 276.

(*k*) *Britten* v. *Hughes*, 5 Bing. 460; 7 L.J. (O.S.) C.P. 188.

(*l*) *Clark* v. *Upton*, 3 Man. & Ry. 89.

(*m*) *Lewis* v. *Jones*, 4 B. & C. 511; 3 L.J. (O.S.) K.B. 270; *Coleman* v. *Waller*, 3 Y. & J. 217.

(*n*) *Thomas* v. *Courtnay*, 1 B. & Ald. 5.

(*o*) *Harrhy* v. *Wall*, 1 B. & Ald. 103; *Reay* v. *White*, 1 C. & M. 748; 2 L.J. Ex. 229.

which a penalty is imposed by statute must be taken to be a thing forbidden; and a contract to do such thing is absolutely void (*p*). Where by a statute a penalty is imposed, solely or partly for the protection of the public, for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal; and therefore if a moneylender enters into any agreement to lend money without being registered as required by statute, the agreement cannot be enforced (*q*). Where the contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was an intention to break the law; and then it becomes important to ascertain whether the parties knew what the law was (*r*). Where a statute imposes a penalty upon corporate officers or others who are concerned or interested in the subject-matter of a contract to prevent them from entering into contracts, it is not necessary, in order to render such contracts void, that they should be declared to be void by the very words of the statute, but the whole statute must be looked at in order to see whether or not the legislature intended that such contracts should be void, or merely to inflict a penalty (*s*).

Illegal partnership.—By sect. 34 of the Partnership Act, 1890 (*t*), a partnership is dissolved by any event which makes it unlawful to carry it on. By sect. 7 of the Limited Partnerships Act, 1907 (*u*), the Act of 1890, subject to the provisions of the Act of 1907, applies to limited partnerships.

Illegal contract as to ground game.—By sect. 3 of the Ground Game Act, 1880 (*x*), every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier under that Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, is void. This section does not apply to prevent the occupier of moorlands and uninclosed lands (not

(*p*) *Cope* v. *Rowlands*, 2 M. & W. 149, 157; 6 L.J. Ex. 63; *Chambers* v. *Manchester and Milford Ry.*, 5 B. & S. 588; 33 L.J. Q.B. 268; *Cork & Youghal Ry., In re*, L.R. 4 Ch. 748; 39 L.J. Ch. 277; *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446; 55 L.J. Q.B. 143; *Portsea Island Building Soc.* v. *Barclay*, (1895) 2 Ch. 298; 64 L.J. Ch. 579.

(*q*) *Victorian Daylesford Syndicate* v. *Dott*, (1905) 2 Ch. 624; 74 L.J. Ch. 673 *Bonnard* v. *Dott*, (1906) 1 Ch. 740; 75 L.J. Ch. 446; *Sadler* v. *Whiteman*, (1910) 1 K.B. 868; 79 L.J. K.B. 786.

(*r*) *Waugh* v. *Morris*, L.R. 8 Q.B. 202, 208; 42 L.J. Q.B. 57.

(*s*) *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446; 55 L.J. M.C. 143.

(*t*) 53 & 54 Vict. c. 39, s. 34.

(*u*) 7 Edw. 7, c. 24, s. 7.

(*x*) 43 & 44 Vict. c. 47, s. 3.

being arable lands) and the owner of such lands or other persons having a right to take and kill game thereon from making and enforcing agreements for the joint exercise, or the exercise for their joint benefit of the right to kill and take ground game between Sept. 1 and Dec. 10, both inclusive in any or every year (*y*). Section 3 of the Act of 1880 is only directed to preventing landlords and tenants from combining to defeat the objects of the Act; it does not, therefore, prevent the tenant of a farm, over which he has the sole right of killing ground game, otherwise than in pursuance of the statute, from entering into a valid agreement with a third person to let such right to him (*z*). A reservation in a lease of land of the exclusive right of sporting to the lessor is not wholly void as being in contravention of the section, but only so far as it purports to divest the right of the occupier to kill and take ground game (*a*). An agreement purporting to bind the landlord of a farm, in the event of the tenant in occupation leaving the ground game unshot, to compensate the tenant for damage done by such game to his crops, is void under the section, both as being an agreement purporting to divest or alienate the right of the occupier as declared by the Act, and as giving to the occupier an advantage in consideration of his forbearing to exercise such right (*b*).

Illegal contract as to compensation under the Agricultural Holdings Act.—Subject to certain provisions of the Agricultural Holdings Act, 1908 (*c*), any contract (whether under seal or not) by a tenant of a holding depriving himself of his right to claim compensation under the Act is void, so far as it deprives him of that right (*d*).

Illegal contract to pay tithe rent-charge.—An agreement by a tenant to pay by way of further rent so much as is paid by the landlord for tithe rent-charge on the premises is, by s. 1 of the Tithe Act, 1891 (*e*), void (*f*); but an agreement to pay as part of the rent a sum assessed as compensation to the landlord for having to pay tithe rent-charge is good (*g*).

Illegal contract as to stamp duty.—By sect. 117 of the Stamp

(*y*) 6 Edw. 7, c. 21, s. 3. The words "ground game" mean hares and rabbits: 43 & 44 Vict. c. 47, s. 8.

(*z*) *Morgan* v. *Jackson*, (1895) 1 Q.B. 885; 64 L.J. Q.B. 462.

(*a*) *Stanton* v. *Brown*, (1900) 1 Q.B. 671; 69 L.J. Q.B. 301.

(*b*) *Sherrard* v. *Gascoigne*, (1900) 2 Q.B. 279; 69 L.J. Q.B. 720.

(*c*) 8 Edw. 7, c. 28, ss. 1–4.

(*d*) *Ib.*, s. 5. Contracts between the owner and occupier of land for the payment of tithe rent-charge by the occupier are void: 54 Vict. c. 8, s. 1.

(*e*) 54 & 55 Vict. c. 8, s. 1.

(*f*) *Ludlow* (*Baron*) v. *Pike*, (1904) 1 K.B. 531; 73 L.J. K.B. 274; *Davies* v. *Fitton*, 2 Dr. & W. 225.

(*g*) See *Davies* v. *Fitton*, *supra*; *Colbron* v. *Travers*, 12 C.B. N.S. 181; 31 L.J. C.P. 257.

Act, 1891 (*h*), every condition of sale, framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any instrument or indemnifying against such liability, absence or insufficiency, is void. Sect. 78, sub-sect. 1 of the Finance (1909—10) Act, 1910, imposes a penalty on any person who, effecting as broker or agent a sale or purchase of any stock or marketable security of the value of 5*l.* or upwards, fails to execute and transmit a contract note to his principal; sub-sect. 2 also imposes a penalty on every person who makes or executes any contract note chargeable with duty and not being duly stamped; and, by sub-sect. 3, no broker, agent, or other person has any legal claim to any charge for brokerage, commission, or agency with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards, if he fails to comply with the provisions of sect. 78 (*i*).

Illegal sale of offices.—By 5 & 6 Edw. 6, c. 16, ss. 2, 3, and 49 Geo. 3, c. 126, all contracts for money or profit, relating to appointments, touching the administration of justice, or the collection of the revenue, or to any office in the gift of the crown, and any commission, civil, naval, or military, and any place or employment in any public department or office of Government are void (*k*). All assignments, trusts, and money bargains, therefore, respecting cadetships, places, and public offices are illegal and void (*l*). The offices of sub-distributor of stamps and collector of taxes are within the statute, both of them being connected with the receipt of the revenue (*m*); but the office of clerk to assessed tax commissioners, or of clerk to commissioners of sewers, was held not to be an office within the Act (*n*), nor the office of clerk to the deputy registrar in the Prerogative Court of Canterbury (*o*), nor the fellowship of a college (*p*). A fellow may assign and mortgage the income of his fellowship, although the assignment may be a violation of his duty to his college, and a clerk to the deputy registrar may likewise charge

(*h*) 54 & 55 Vict. c. 39, s. 117.

(*i*) 10 Edw. 7, c. 8, s. 78, and sched. 6, repealing 54 & 55 Vict. c. 39, s. 53, and the heading "Contract Note" in sched. 1 of that Act.

(*k*) The sale of commissions is illegal; see 34 & 35 Vict. c. 86 (preamble).

(*l*) *Graeme* v. *Wroughton*, 24 L.J. Ex. 265; 11 Exch. 146; *Eyre* v. *Forbes*, 12 C.B. N.S. 191; *Lee* v. *Coleshill*, Cro. Eliz. 529; *Stackpole* v. *Earle*, 2 Wils. 133; *Garforth* v. *Fearon*, 1 H. Bl. 328; *Palmer* v. *Bate*, 2 B. & B. 673; *Parker* v. *Brown*, Cro. Jac. 612; *Reg.* v. *Charretie*, 13 Q.B. 447; 18 L.J. M.C. 151.

(*m*) *Hopkins* v. *Prescott*, 16 L.J. C.P. 259; 4 C.B. 578.

(*n*) *Sterry* v. *Clifton*, 9 C.B. 110; 19 L.J. C.P. 237.

(*o*) *Austin* v. *Gwinnell*, 3 Y. & J. 136.

(*p*) *Feistel* v. *King's College, Cambridge*, 16 L.J. Ch. 339; 10 Beav. 491.

or alien the income and profits of his office. The appointment of a deputy to fulfil the duties of a public office at a fixed salary, the deputy paying over the fees of the office to the principal, is legal, where the business of the office can be lawfully transacted by the deputy; but, if the deputy takes the fees of the office, and pays a fixed sum annually to the principal for the post, the deputation of the office and the contract to pay the money are void (*q*). A clergyman having the cure of souls is not a public officer, and may assign his salary (*r*).

Illegal sale of or charge on pensions.—The pension of a retired officer, whether naval, military, or civil, unless made inalienable by statute, is alienable (*s*). By sect. 141 of the Army Act, 1881 (*t*), every assignment of, and charge on, and every agreement to assign or charge, any pension payable to any officer of any of his Majesty's forces, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto or as may be authorised by any Act for the time being in force, is void (*u*). The word "officer" includes retired officer (*x*), so that the section includes pensions payable to them (*y*). The pension of a retired officer in the Indian army, granted for past services, has been held not to be assignable (*z*). A distinction has been drawn between half-pay and a retiring pension, it having been held that the former is inalienable even at common law (*a*), whereas the latter has been held to be alienable, unless alienation is prohibited by statute (*a*), as, for instance, by the Army Act, 1881. Money paid to a retired military officer for commutation of his pension does not retain its character as pension (*b*). An assignment of a pension granted by the late East India Company was held valid (*c*); and so was an assignment of a pension payable to a former officer of the East India Company out of the revenue of India (*d*). The pension of a

(*q*) *Godolphin* v. *Tudor*, 2 Salk. 468; *Gulliford* v. *De Cardonell*, *ib.* 466; 1 Bro. P.C. 135; *Greville* v. *Attkins*, 9 B. & C. 462; 4 M. & R. 372.

(*r*) *Mirams*, *In re*, (1891) 1 Q.B 594; 60 L.J. Q.B. 397. See, however, as to beneficed clergymen, simoniacal contracts, *post*, p. 93.

(*s*) *Per* Lindley, L.J., *Lucas* v. *Harris*, 18 Q.B.D. 127, at p. 135; 56 L.J. Q.B. 15; see also *Wells* v. *Foster*, 8 M. & W. 149; 10 L.J. Ex. 216; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Dent* v. *Dent*, L.R. 1 P. & D. 366; 36 L.J. P. & M. 61.

(*t*) 44 & 45 Vict. c. 58, s. 141.

(*u*) As to retired officer in his Majesty's forces, see *Crowe* v. *Price* Q.B.D. 428; 58 L.J. Q.B. 215.

(*x*) 44 & 45 Vict. c. 58, s. 190 (4).

(*y*) *Per* Lindley, L.J., *Lucas* v. *Harris*, *supra*.

(*z*) *Birch* v. *Birch*, 8 P. D. 163; 52 L.J. P. 88; *Lucas* v. *Harris*, *supra*.

(*a*) *Flarty* v. *Odlum*, 3 T.R. 681; *Lidderdale* v. *Montrose* (*Duke*), 4 T.R. 248; *Wells* v. *Foster*, *supra*.

(*b*) *Crowe* v. *Price*, 22 Q.B.D. 428; 58 L.J. Q.B. 215.

(*c*) *Heald* v. *Hay*, 3 Giff. 467; 31 L.J. Ch. 311.

(*d*) *Carew* v. *Cooper*, 4 Giff. 619; 33 L.J. Ch. 289.

county court judge (*e*) or of a civil servant (*f*) is assignable. By the Naval Pensions Act, 1865 (*g*), any assignment, sale, or contract by an officer, seaman or marine (*h*), entitled to any naval pension is void; and the provisions of this Act as amended by any subsequent Act (*i*) have been extended to the Royal Naval Volunteer Reserve by the Naval Forces Act, 1903 (*k*).

Simoniacal contracts.—By 31 Eliz. c. 6, s. 5, if any person, body politic or corporate, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for any promise or contract for money, &c., presents or collates to any benefice with cure of souls, prebend, or any ecclesiastical living or dignity, the presentation, collation, gift and bestowing and every admission, institution, investiture and induction thereupon made, is utterly void. A penalty is imposed upon the parties to such a transaction, and upon every person who receives money or reward, or accepts a promise thereof, to admit or induct any person into any benefice or ecclesiastical dignity. Penalties are also imposed upon persons who resign or exchange benefices with cure of souls for money, reward, or benefit. And by 13 Anne, c. 11 (*l*), if any person, for money, reward, &c., or by reason of any promise of money, &c., directly or indirectly procures or accepts the next avoidance or presentation to any benefice, &c., and is presented thereupon, such presentation is void, and the agreement deemed to be a simoniacal contract (*m*). By 3 & 4 Vict. c. 113, s. 42 (*n*), spiritual persons are not to sell or assign their patronage.

The statutes against simony do not prohibit the sale of an advowson or the right of presentation to a living or benefice which is filled at the time of the sale; but the object of them is to restrain a patron who possesses the right of presenting at a vacancy from being influenced in the choice of his presentee by a bribe or benefit to himself. An agreement, however, for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor, but not being a party to the contract, was held not to be simoniacal (*o*). If an advowson is sold or transferred during a vacancy of the benefice, the

(*e*) *Willcock* v. *Terrell*, 3 Ex. D. 323.

(*f*) *Sansom* v. *Sansom*, 4 P.D. 69; 48 L.J. P. 25.

(*g*) 28 & 29 Vict. c. 73, s. 4.

(*h*) These terms are defined by 28 & 29 Vict. c. 73, s. 2.

(*i*) As for instance by 47 & 48 Vict. c. 44.

(*k*) 3 Edw. 7, c. 6, s. 3.

(*l*) 12 Anne, st. 2, c. 12 (Ruffhead).

(*m*) See 32 & 33 Vict. c. 94, ss. 12 and 13, as to contracts under the provisions of the Church Buildings Acts and New Parishes Acts relative to rights of presentation.

(*n*) 3 & 4 Vict. c. 113, s. 42. This Act is explained by 9 & 10 Vict. c. 88.

(*o*) *Sweet* v. *Meredith*, 3 Giff. 610; 32 L.J. Ch. 147.

presentation upon that vacancy does not pass by the grant; it is a fruit fallen or *chose in action* vested in the patron, which cannot legally be sold or transferred by him (*p*); and, if it is provided in any part of the contract that the right of presentation which has then accrued shall be exercised by the late patron in favour of a nominee of the purchaser or of any particular individual, the whole contract is simoniacal and void. If the incumbent of a living is sick and dying, and the next presentation is purchased with intent to present a particular person as soon as the expected vacancy occurs, the purchase is simoniacal and void; but not if it is made without the privity of, and without a view to the nomination of, the clerk afterwards appointed (*q*). The patron of a vacant donative benefice, who was a curate, granted the advowson by deed poll to a trustee to present any nominee of the patron's, and he then nominated himself, and the trustee by deed poll granted him the office of rector; it was held that the contract was not simoniacal (*r*). Where a presentation to a living was made upon an agreement that the incoming incumbent should pay to the patron a sum of money for repairs previously executed at the rectory, it was held that such agreement was simoniacal and the presentation void under the Statute of Elizabeth (*s*). An agreement upon an exchange of livings that neither party should pay for dilapidations was held not to be simoniacal, and not contrary to the policy of the Ecclesiastical Dilapidations Act (*t*).

Resigning and charging benefices.—A bond given by an incumbent for the resignation of his benefice on notice or request generally, or in favour of a particular person named in the bond, as soon as the latter should become qualified for admission or induction to such benefice, has been held void, as "coming as near simony as possible" (*u*). In 1828, however, bonds of this description were conditionally legalised by statute (*x*). By sect. 1 of 13 Eliz. c. 20 (*y*), all charging of benefices with any pension or profit to be taken out of the same, other than rents to be reserved upon leases as therein mentioned, is utterly void. Under this statute it has been held that a demise of the glebe by the incumbent of a benefice,

(*p*) *Leak* v. *Babington*, Cro. Eliz. 811.

(*q*) *Sheldon* v. *Brett*, Winch. 63; *Fox* v. *Chester* (*Bishop*), 6 Bing. 1; 1 Dow & Cl. 416; 3 Bli. N.S. 123.

(*r*) *Lowe* v. *Chester* (*Bishop*), 10 Q.B.D. 407.

(*s*) *Mosse* v. *Killick*, 50 L.J. C.P. 300.

(*t*) *Wright* v. *Davies*, 1 C.P.D. 638; 46 L.J. C.P. 41; 34 & 35 Vict. c. 43.

(*u*) *Fletcher* v. *Sondes* (*Lord*), 3 Bing. 501. On the subject of resignation deeds, see *Reichell* v. *Oxford* (*Bishop*), 14 App.Cas. 259; 59 L.J. Ch. 66.

(*x*) 9 Geo. 4, c. 94.

(*y*) Repealed by 43 Geo. 3, c. 84, and revived by 57 Geo. 3, c. 99.

to secure an annuity, is void (*z*); also an agreement by a clergyman to appropriate the future profits of his living to the payment of his debts, reserving thereout a competent stipend to a curate to serve the church (*a*); also a warrant of attorney which appears on the face of it to be an authority for the sequestration of a living and the appropriation of the profits in discharge of a debt due from the incumbent (*b*). But a warrant of attorney to enter up judgment against the incumbent, given with a defeasance in the usual form, and not charging the benefice in express terms, is not void (*c*), although it may refer on the face of it to a void deed charging the benefice, and may appear to be given as a collateral security for the same debt (*d*). A mortgage of pew rents made by the vicar of a district church is void under the Act of Elizabeth (*e*).

Contracts in general restraint of industry and trade, preventing parties from gaining a livelihood in any particular vocation, were at one time absolutely void, as being contrary to public policy (*f*). But it has now been held that a covenant in restraint of trade, which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy unless some specific ground for so holding it void can be clearly established (*g*). The question (*h*) in each case would therefore seem to be whether the restraint imposed is reasonable in reference to the interests of the parties concerned (*i*). If an agreement restraining a person from carrying on business is injurious to the public interests of the country, such an agreement is invalid to the extent to which it is injurious, but not further, if it is so framed that it can be divided (*k*). If it cannot be divided and is wider than is reasonable and necessary for the protection of the party in-

(*z*) *Shaw* v. *Pritchard*, 10 B. & C. 241; 8 L.J. (O.S.) K.B. 133.

(*a*) *Alchin* v. *Hopkins*, 1 Bing. N.C. 99; 3 L.J. C.P. 272.

(*b*) *Newland* v. *Watkin*, 9 Bing. 113; 1 L.J. C.P. 177; *Saltmarshe* v. *Hewett*, 1 Ad. & E. 812; 3 L.J. K.B. 188.

(*c*) *Moore* v. *Ramsden*, 7 Ad. & E. 907; 7 L.J. Q.B. 54.

(*d*) *Colebrook* v. *Layton*, 4 B. & Ad. 578; 2 L.J. K.B. 95; *Bendry* v. *Price*, 7 Dowl. P.C. 753; *Bishop* v. *Hatch*, *ib.* 763.

(*e*) *Arrowsmith*, *Ex parte*, 8 Ch. D. 96; 47 L.J. Bank. 46.

(*f*) *Thompson* v. *Harvey*, 1 Show. 2; *Davies* v. *Davies*, 36 Ch. D. 359; 56 L.J. Ch. 962; *Gunmakers' Co.* v. *Fell*, Willes, 389; *Tailors of Lichfield's case*, 11 Co. 53 a; *Hinde* v. *Gray*, 1 Man. & G. 195; 9 L.J. C.P. 253; 2 Hen. 5, fol. 5, pl. 26; *Claygate* v. *Batchelor*, Owen, 143; *Ward* v. *Byrne*, 5 M. & W. 548; 9 L.J. Ex. 14; *Allsopp* v. *Wheatcroft*, L.R. 15 Eq. 59; 42 L.J. Ch. 12.

(*g*) *Underwood* v. *Barker*, (1899) 1 Ch. 300; 68 L.J. Ch. 201.

(*h*) This question is one of law for the determination of the court, *per* Cozens-Hardy, L.J. in *Dowden and Pook, Ltd.* v. *Pook*, *infra*; and see *United Shoe Manufacturing Co.* v. *Brunet*, (1909) A. C. 330; 78 L.J. P.C. 101.

(*i*) *Nordenfelt* v. *Maxim Nordenfelt Co.*, (1894) A.C. 535; 63 L.J. Ch. 908; *Dowden and Pook, Ltd.* v. *Pook*, (1904) 1 K.B. 45; 73 L.J. K.B. 38.

(*k*) *Baines* v. *Geary*, 35 Ch.D. 154; 56 L.J. Ch. 935; *Nordenfelt's case*, (1893) 1 Ch. 630; 62 L.J. Ch. 273.

terested, it is void (*l*). The onus of proving that the restraint is unnecessary and unreasonable where it is only in partial restraint of trade—*e.g.*, for a limited period—rests on the person who has knowingly entered into such an agreement (*m*). There is no case in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was unlimited (*n*). An unlimited restraint will be valid if from the circumstances it appears to be reasonable and not contrary to the public interest. But a covenant in restraint of trade which extended to every part of the world and was wider than was necessary for the protection of the particular business, namely, that of a cider merchant, has been held unreasonable and therefore void (*o*).

It seems that the distinction between the legal considerations which would invalidate general and partial restraints on trading may now be considered as abolished (*p*). An agreement made by a trader with a purchaser of his commodities not to sell them below certain fixed prices is valid and not against public policy (*q*). Contracts whereby certain master manufacturers mutually bind themselves to close their works at the will of a majority (*r*), or not to employ any workman who has left the service of another master manufacturer without the consent of his employer (*s*), are contracts in restraint of trade, and therefore void. And so are contracts by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority (*t*).

Trade Unions.—By sect. 3 of the Trade Union Act, 1871 (*u*), the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render

(*l*) *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L.J. Ch. 409.

(*m*) *Haynes* v. *Doman*, (1899) 2 Ch. 13; 68 L.J. Ch. 419.

(*n*) *Per* Lindley, M.R., *Haynes* v. *Doman*, *supra*.

(*o*) *Dowden and Pook, Ltd.* v. *Pook*, (1904) 1 K.B. 45; 73 L.J. K.B. 38.

(*p*) *Rousillon* v. *Rousillon*, 14 Ch.D. 351; 49 L.J. Ch. 338; *Davies* v. *Davies*, 36 Ch.D. 359; 56 L.J. Ch. 962; *Mills* v. *Dunham*, (1891) 1 Ch. 576; 60 L.J. Ch. 362; *Badische Anilin Fabrik* v. *Schott*, (1892) 3 Ch. 447; 61 L.J. Ch. 698; *Nordenfelt* v. *Maxim Nordenfelt Co.*, (1894) A.C. 535; 63 L.J. Ch. 908.

(*q*) *Elliman* v. *Carrington*, (1901) 2 Ch. 275; 70 L.J. Ch. 577.

(*r*) *Hilton* v. *Eckersley*, 6 E. & B. 47; 25 L.J. Q.B. 199.

(*s*) *Mineral Water Bottle Trade Protection Society* v. *Booth*, 36 Ch.D. 465.

(*t*) *Hornby* v. *Close*, L.R. 2 Q.B. 153; 36 L.J. M.C. 43.

(*u*) 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22. The Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4, which was passed to get rid of the decision in *Taff Vale Ry.* v. *Amalgamated Railway Servants' Society*, (1901) A.C. 426; 70 L.J. K.B. 905, prohibits actions of tort against trade unions, but nothing in that section is to affect the liability of trade union trustees to be sued in the events provided by sect. 9 of the Act of 1871, except in respect of any tortious act committed by or on behalf of a trade union in contemplation or in furtherance of a trade dispute.

void or voidable any agreement or trust. But by sect. 4, nothing in that Act is to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of—1st, any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed; 2nd, any agreement for the payment by any person of any subscription or penalty to a trade union; 3rd, any agreement for the application of the funds of a trade union, to provide benefits to members, or to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union, or to discharge any fine imposed upon any person by sentence of a court of justice; 4th, any agreement made between one trade union and another; 5th, any bond to secure the performance of any of the above-mentioned agreements. But nothing in that section is to be deemed to constitute any of the above-mentioned agreements unlawful. An action brought to enforce an agreement between members of a trade union "to provide benefits to members" was held not maintainable (*x*), but an injunction to restrain members from acting contrary to such an agreement was allowed (*y*). It has been held that an action may be brought by a member to restrain the union from dealing with its funds in a manner contrary to its rules (*z*). Where the general objects of a society are legal, the fact that some of its rules are illegal and in restraint of trade does not prevent a member from recovering a sum of money payable to him under a rule which is not illegal (*a*).

Contracts restraining the exercise of a trade or profession in particular localities are valid, when there is a reasonable ground for the restriction, as in the case of the sale of the goodwill of a trade carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business on the same spot in opposition to the purchaser (*b*); or the

(*x*) *Rigby* v. *Connol*, 14 Ch.D. 482; 49 L.J. Ch. 328; *Chamberlain's Wharf* v. *Smith*, (1900) 2 Ch. 605; 69 L.J. Ch. 783. In *Steele* v. *S. Wales Miners' Fed.*, (1907) 1 K.B. 361; 76 L.J. K.B. 333, some doubt has been thrown by Phillimore, J., on the validity of the latter case.

(*y*) *Wolfe* v. *Matthews*, 21 Ch.D. 194; 51 L.J. Ch. 833.

(*z*) *Yorkshire Miners' Assoc.* v. *Howden*, (1905) A.C. 256; 74 L.J. K.B. 511.

(*a*) *Swaine* v. *Wilson*, 24 Q.B.D. 252; 59 L.J. Q.B. 76; *Strick* v. *Swansea Tinplate Co.*, 36 Ch.D. 558; 57 L.J. M.C. 438. As to whether an action will lie against a trade union to enforce payment of benefit to members, see *Burke* v. *Amalgamated Society of Dyers*, (1906) 2 K.B. 583; 75 L.J. K.B. 533; *Old* v. *Robson*, 59 L.J. M.C. 41.

(*b*) *Prugnell* v. *Gosse*, Aleyn, 67; *Broad* v. *Jollyffe*, Cro. Jac. 596; *Jollie*

taking or continuing in his engagement (*c*) of an apprentice or servant, clerk or traveller, upon the terms that he shall not, during or after the termination of his engagement, solicit custom from the master's customers (*d*), or set up the same trade, craft, or profession in opposition to his employer in his immediate neighbourhood, or in the district over which the master's business extends (*e*); or the formation or dissolution of a partnership, or the retirement of one of the members of a firm, upon the terms, and subject to an agreement, that he will not at any time be a competitor with the remaining partners, or any new partners or assignees, in the district where the business is carried on (*f*). So rules made for the *bonâ fide* purpose of protecting the funds of a society whose general objects are legal from claims which may fairly be avoided, are not illegal because they are incidentally to some extent in restraint of trade, if they are only reasonable and necessary for the purpose for which they were made (*g*). Where the contract is reasonable, the courts will prevent any infringement of it, although a pecuniary penalty in the case of a breach may have been stipulated for in the agreement (*h*). A trader "may sell a secret of business, and restrain himself generally from using that secret" (*i*); and railway companies and other parties engaged in trade may lawfully agree that one company shall not compete or interfere with the other upon a particular line of railway (*k*). An agreement made by several persons to parcel out the stevedoring business of a particular port amongst themselves, and so to prevent competition amongst themselves, and keep up prices, was held to be good (*l*); and so was a combination between shipowners to keep up freights and exclude rival shipowners by underbidding them and carrying at lower rates

& Broad's case, 2 Rolle R. 201; *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Archer* v. *Marsh*, 6 Ad. & E. 959; 6 L.J. K.B. 244; *Jones v. Lees*, 1 H. & N. 189; 25 L.J. Ex. 241.

(*c*) *Gravely* v. *Barnard*, L.R. 18 Eq. 518; 43 L.J. Ch. 659.

(*d*) *Rannie* v. *Irvine*, 7 Man. & G. 969; 14 L.J. C.P. 10; *Huntocke* v. *Blacklowe*, 2 Wms. Saund. 156; *Homer* v. *Ashford*, 11 Moore, 101; 4 L.J. (O.S.) C.P. 62; *Hartley* v. *Cummings*, 17 L.J. C.P. 84; 5 C.B. 247; *Dubowsky* v. *Goldstein*, (1896) 1 Q.B. 478; 65 L.J. Q.B. 397.

(*e*) *Chesman* v. *Nainby*, 2 Ld. Raym. 1456; 2 Str. 739; *Nicholls* v. *Stretton*, 7 Beav. 42; 10 Q.B. 346; *Baines* v. *Geary*, 35 Ch.D. 154; 56 L.J. Ch. 935; *Sainter* v. *Ferguson*, 7 C.B. 716; 18 L.J. C.P. 217; *Denby* v. *Henderson*, 11 Exch. 194; 24 L.J. Ex. 324; *Benwell* v. *Inns*, 26 L.J. Ch. 663; 24 Beav. 307.

(*f*) *Gale* v. *Reed*, 8 East, 80; *Leighton* v. *Wales*, 3 M. & W. 545; 7 L.J. Ex. 145.

(*g*) *Swaine* v. *Wilson*, 24 Q.B.D. 252; 59 L.J. Q.B. 76.

(*h*) *Fox* v. *Scard*, 33 Beav. 327; *Howard* v. *Woodward*, 34 L.J. Ch. 47; *National Prov. Bank of England* v. *Marshall*, 40 Ch.D. 112; 58 L.J. Ch. 229; but see *Carnes* v. *Nesbitt*, 7 H. & N. 778; 31 L.J. Ex. 273.

(*i*) V.-C. Leach, *Byson* v. *Whitehead*, 1 Sim. & S. 77; *Leather Cloth Co.* v. *Lorsont*, L.R. 9 Eq. 345; 39 L.J. Ch. 86.

(*k*) *Shrews. & Birm. Ry.* v. *L. & N. W. Ry.*, 21 L.J. Q.B. 89; 17 Q.B. 652.

(*l*) *Collins* v. *Locke*, 4 App.Cas. 674; 48 L.J. P.C. 68.

than they could afford to do (*m*). But the restraint must be confined within reasonable limits; for, where it is larger and wider than is necessary for the protection of the party with whom the contract is made, it is illegal, and the contract is void (*n*). It has been held that the limit of a provincial town, and ten or twenty miles round it, is not too large for such a profession as a surgeon, apothecary, and man-midwife (*o*); five miles from Northampton Square, in the county of Middlesex, in the case of a milkman and cowkeeper (*p*); one mile in the case of a fruiterer (*q*); and that the wide ambit of the metropolis is not too large for such a profession as that of a dentist; nor even "London and 150 miles from thence," for the profession of a solicitor (*r*), or a canvassing publisher (*s*); nor Birmingham and 200 miles from thence, in the case of a horsehair manufacturer (*t*); nor "within a hundred miles of the General Post Office at Cardiff" in the case of the business of selling malt liquors (*u*). But a restraint extending over so large a district seems to be at variance with the ancient policy of the common law in respect of "restraint of trade," and to overrule some earlier decisions holding that a restraint extending over so wide an area is void, on the ground that the employer shuts out the assistant from a larger field of exertion than can by possibility be beneficially occupied by himself (*x*). "Six hundred miles from any particular spot in this kingdom is out of all reason, and absolutely void" (*y*). In one case it has been held that the reasonableness of the restriction, and its consequent validity, depend upon the extent and not the populousness of the district. In another, that both the superficial area and the amount of the population are to be taken into consideration (*z*). When the restraint is limited in point of space, the limit is to be measured by a straight line drawn upon the horizontal plane from point to point (*a*). If the restraint is reason-

(*m*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1892) A.C. 25; 61 L.J. Q.B. 295.

(*n*) *Hitchcock* v. *Coker*, 6 Ad. & E. 454; 6 L.J. Ex. 266; *Dowden & Pook, Ltd.* v. *Pook*, (1904) 1 K.B. 45; 73 L.J. K.B. 38; *Leetham* v. *Johnstone-White*, (1907) 1 Ch. 322; 76 L.J. Ch. 304.

(*o*) *Davis* v. *Mason*, 5 T.R. 118; *Atkyns* v *Kinnier*, 4 Exch. 776; 19 L.J. Ex. 132; *Carnes* v. *Nesbitt*, *ante*, p. 98.

(*p*) *Proctor* v. *Sargent*, 2 Man. & G. 20; 10 L.J. C.P. 34.

(*q*) *Pemberton* v. *Vaughan*, 16 L.J. Q.B. 161; 10 Q.B. 87.

(*r*) *Bunn* v. *Guy*, 4 East, 190.

(*s*) *Tallis* v. *Tallis*, 22 L.J. Q.B. 185; 1 E. & B. 391; *Horner* v. *Graves*, 7 Bing. 735; 9 L.J. (O.S.) C.P. 192.

(*t*) *Harms* v. *Parsons*, 32 Beav. 328; 32 L.J. Ch. 247.

(*u*) *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; 62 L.J. Ch. 219.

(*x*) *Mallan* v. *May*, 11 M. & W. 668; 14 L.J. Ex. 48.

(*y*) *Price* v. *Green*, 16 M. & W. 346; 16 L.J. Ex. 108.

(*z*) As to the divisibility of such covenants, see *post*, p. 120.

(*a*) *Lake* v. *Butler*, 5 E. & B. 92; 24 L.J. Q.B. 273; *Duignan* v. *Walker*, 28 L.J. Ch. 867; Johns. 446; *Mouflet* v. *Cole*, L.R. 8 Ex. 32; 42 L.J. Ex. 8. As to measurement "by the usual streets or ways of approach," see *Atkyns* v. *Kinnier*, 4 Exch. 776; 19 L.J. Ex. 132.

able as to space, the circumstance that it is indefinite in point of time will not affect its validity (*b*).

The question whether a contract in restraint of trade is reasonable is one of law for the judge, and not merely one of fact for the jury; all the surrounding circumstances ought to be taken into consideration (*c*), and are admissible in evidence (*d*). The date for considering the reasonableness of the contract is the date when the contract was entered into (*e*). If the restraint is imposed by a written contract, which does not really set out the whole consideration, parol evidence is admissible, as in the case of other simple contracts, to show that the real contract was partly oral and partly in writing (*f*). Where it appears that the consideration is a good and valid consideration, such as is essential to support any contract not under seal, the court will not enquire into its adequacy (*g*).

If one man binds himself to serve another for a particular period, and not to carry on the business of his employers within ten miles of their place of business, the restriction will be confined to the period of service (*h*), unless the entire services of the servant are by the contract to be devoted to the employer, and the restriction is manifestly intended to come into operation when he leaves the service and is his own master (*i*). A covenant negative in its terms, prohibiting a servant during the term of his employment from being concerned in any business other than that of his employer is not enforceable by injunction, at any rate where the prohibition is not restricted to a competing business (*k*). A person who has covenanted not to trade within certain reasonable limits is bound by his covenant, although the covenantee may have ceased both by himself and by his agents, licensees, or assigns to carry on the trade (*l*). He is responsible if he serves customers within the prohibited limits, although he has no residence, shop, or place of business within them (*m*). Where the defendant became an assistant to two surgeons and entered into a bond not at any time to carry on the profession of a surgeon in the particular

(*b*) *Catt* v. *Tourle*, L.R. 4 Ch. 654 ; 38 L.J. Ch. 665.

(*c*) *Dowden & Pook, Ltd.* v. *Pook*, (1904) 1 K.B. 45 ; 73 L.J. K.B. 38.

(*d*) *Dowden & Pook, Ltd.* v. *Pook*, *supra*.

(*e*) *Per* Cozens Hardy, L.J., *Dowden & Pook, Ltd.* v. *Pook*, *supra*.

(*f*) *Cooper* v. *Southgate*, 63 L.J. Q.B. 670; *Hitchcock* v. *Coker*, 6 Ad. & E. 438 ; 6 L.J. Ex. 266.

(*g*) *Hitchcock* v. *Coker*, *supra*.

(*h*) *King* v. *Hansell*, 5 H. & N. 106.

(*i*) *Mumford* v. *Gething*, 29 L.J. C.P. 105 ; 7 C.B. N.S. 305.

(*k*) *Ehrmann* v. *Bartholomew*, (1898) 1 Ch. 671 ; 67 L.J. Ch. 319 ; and see *Robinson & Co.* v. *Heuer*, (1898) 2 Ch. 451 ; 67 L.J. Ch. 644.

(*l*) *Elves* v. *Crofts*, 10 C.B. 241 ; 19 L.J. C.P. 389.

(*m*) *Turner* v. *Evans*, 2 E. & B. 512 ; 22 L.J. Q.B. 412 ; *Brampton* v. *Beddoes*, 13 C.B. N.S. 538 ; *Edmundson* v. *Render*, (1905) 2 Ch. 320; 74 L.J. Ch. 585.

town or within ten miles of it, and the partnership between the two surgeons was afterwards dissolved and one of them engaged the defendant as his assistant, it was held that the other surgeon could obtain an injunction to restrain the defendant from acting as such (*n*). Where a business is sold with a covenant by the vendor not to carry on or be concerned or interested in a similar business, no rule can be precisely laid down as to what is or is not comprehended in such words as "interested or concerned in"; but to determine that question the facts of the particular case and the business meaning of the words must be looked at (*o*). Thus the mere fact of the vendor being a creditor of the business sold by him has been held not to make him concerned or interested therein (*p*); nor where a similar business was carried on by the vendor's wife with her separate estate (*q*). The word "interest" has been treated as meaning a pecuniary or proprietary interest (*r*). Where there was a covenant not to be concerned in carrying on, either directly or indirectly, or to sell any goods in any way connected with, a trade, it was held to be broken by selling goods as a journeyman in the employment of another carrying on that trade (*s*). A covenant by a solicitor not to practise within a radius of so many miles from a place was held to be broken by writing as a solicitor and sending to addresses within the radius, letters, for instance, demanding payment from or giving advice to the addressee, for in such case the demand is made or the advice given where the letter is received, although it is posted outside the radius (*t*). There is not any implied covenant or promise on the part of a vendor or assignor of the good-will of a business not to set up the same trade in opposition to the purchaser in the neighbourhood of the spot where the business is carried on; and the courts will not grant an injunction to prevent the vendor from so doing (*u*); but the vendor is not entitled to canvass the customers of the old firm either to deal with him or not to deal with the purchaser, and he may be restrained by injunction from so doing (*x*). This latter rule also applies in the case of customers who, although remaining customers of

(*n*) *Palmer* v. *Mallet*, 36 Ch.D. 411; 57 L.J. Ch. 226.

(*o*) *Cory & Son* v. *Harrison*, (1906) A.C. 274; 75 L.J. Ch. 714.

(*p*) *Cory & Son* v. *Harrison*, *supra*.

(*q*) *Smith* v. *Hancock*, (1894) 2 Ch. 377; 63 L.J. Ch. 477.

(*r*) *Per* Swinfen Eady, J., *Gophir Diamond Co.* v. *Wood*, (1902) 1 Ch. 950; 71 L.J. Ch. 550.

(*s*) *Jones* v. *Heavens*, 4 Ch.D. 636.

(*t*) *Edmundson* v. *Render*, (1905) 2 Ch. 320; 74 L.J. Ch. 585.

(*u*) *Cruttwell* v. *Lye*, 17 Ves. 346; *Walker* v. *Mottram*, 19 Ch.D. 355; 51 L.J. Ch. 189.

(*x*) *Trego* v. *Hunt*, (1896) A.C. 7; 65 L.J. Ch. 1; overruling *Pearson* v. *Pearson*, 27 Ch.D. 145; 54 L.J. Ch. 32; and discussing all the cases on the subject, *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; 69 L.J. Ch. 527.

the business sold, have also of their own accord become customers of a new competing business established by the vendor, or in which he is interested(*y*). The same principle is applicable where a person has been taken into partnership on the terms that on the expiration of the partnership the good-will shall belong solely to the other partner (*z*). It seems, however, that an injunction will not be granted to restrain the vendor or assignor from dealing with the old customers if they come to him without solicitation (*a*). An employer carrying on more than one business, who engages an employee for one business, cannot by covenant restrain the employee after leaving his service from competing with him in any other than the business in which the employee has been actually employed (*b*). When the business of a firm has been carried on under an adopted name, a person who sells the good-will of the business cannot set up the same business under the same name and style, although he cannot be prevented from using his own name(*c*). An agreement between several persons carrying on a particular trade in various parts of England, not to interfere with each other in different towns and districts, or become competitors, or undersell one another, in particular localities, is not contrary to public policy, and is, consequently, valid (*d*). And, lastly, it must be observed, that the exercise of the trade or profession in the prohibited district must be shown to have been made in opposition to and against the will of the covenantee (*e*). A covenant by a retiring partner to retire, "so far as the law allows, from the business, and not to trade, act, or deal in any way," so as to affect the continuing partners, was held to be too vague to be enforced by the court; it was further held that the latter part of the covenant was personal to the continuing partners and could not be sued upon by their assignees (*f*).

Contracts creating monopolies, also, are void, as being contrary to public policy (*g*). Contracts between brewers and publicans, restraining the publican from buying beer from any other brewer than the one named in the contract, may be thought

(*y*) *Curl Brothers* v. *Webster*, (1904) 1 Ch. 685; 73 L.J. Ch. 540.

(*z*) *Trego* v. *Hunt*, *ante*, p. 101.

(*a*) *Leggott* v. *Barrett*, 15 Ch.D. 306; 51 L.J. Ch. 90.

(*b*) *Per* Farwell, L.J., *Leetham* v. *Johnstone-White*, (1907) 1 Ch. 322; 76 L.J. Ch. 304.

(*c*) *Churton* v. *Douglas*, 28 L.J. Ch. 841; Johns. 174.

(*d*) *Wickens* v. *Evans*, 3 Y. & J. 330; *Collins* v. *Locke*, 4 App.Cas. 674; 48 L.J. P.C. 68, *ante*, p. 98.

(*e*) *Rawlinson* v. *Clarke*, 14 M. & W. 191.

(*f*) *Davies* v. *Davies*, 36 Ch.D. 359; 56 L.J. Ch. 962.

(*g*) 21 Jac. 1, c. 3; *East Ind. Co.* v. *Sandys*, Skin. 169: *Darcy* v. *Allen*, Moore, 671; *The case of Monopolies*, 11 Co. 86 b; Com. Dig. Trade, D. 4. As to a Royal charter granting an exclusive licence which was held void both by the Statute of Monopolies, 1623, and by the Common Law, cf. *Simpson* v. *Att.-Gen.*, (1904) A.C. 476; 74 L.J. Ch. 1.

to be contrary to the common law, as creating a monopoly; but, although these contracts have been censured, they have never been held to be invalid. Before, however, the brewer can recover damages for a breach of the contract by the publican, he must show clearly that the beer supplied by him was good marketable beer, wholesome, and fit to drink, and that the price was reasonable (*h*). A grant from the crown of the sole use, for a reasonable period, of any art invented or first brought into the realm by the grantee, is not void as being contrary to the policy of the common law (*i*).

Contracts with foreign enemies.—All contracts for trading purposes made between British subjects and the subjects of a sovereign who is at war with this country are void, and cannot be enforced in our courts of law on the return of peace (*k*), unless the contracts have been made pursuant to a licence to trade granted by the crown (*l*). The effect of a licence authorising an alien enemy to trade with this country is to legalise the commerce comprehended in the licence, and all usual contracts entered into for carrying on such licensed trade; the alien licensee consequently may sue and be sued in respect of such contracts, just the same as if he were a natural-born subject (*m*). A contract between two subjects of a neutral state to export contraband of war to a belligerent is lawful, and may be enforced in the courts of the neutral state (*n*).

Gaming contracts and wagers.—By sect. 18 of the Gaming Act, 1845 (*o*), all contracts or agreements, whether by parole or in writing, by way of gaming or wagering are null and void; and no suit is to be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event on which any wager has been made (*p*); but the prohibition of

(*h*) *Holcombe* v. *Hewson*, 2 Camp. 391; *Jones* v. *Edney*, 3 *ib.* 285; *Thornton* v. *Sherratt*, 8 Taunt. 530; *Luker* v. *Dennis*, 7 Ch. D. 227; 47 L.J. Ch. 174; *Courage* v. *Carpenter*, (1910) 1 Ch. 262; 79 L.J. Ch. 184.

(*i*) *The case of Monopolies*, 11 Co. 86 b; Com. Dig. Trade, D. 4; 21 Jac. 1, c. 3, s. 6; *Duvergier* v. *Fellows*, 10 B. & C. 829; 8 L.J. (O.S.) K.B. 270.

(*k*) *Potts* v. *Bell*, 8 T.R. 548; *Ogden* v. *Peele*, 8 D. & R. 1; *Bell* v. *Reid*, 1 M. & S. 731; *Furtado* v. *Rodgers*, 3 B. & P. 191; *Esposito* v. *Bowden*, 7 E. & B. 763; 27 L.J. Q.B. 17.

(*l*) *Flindt* v. *Scott*, 15 East, 525; 5 Taunt. 674; *Lemcke* v. *Vaughan*, 8 Moore, 646; 2 L.J. (O.S.) C.P. 44. As to insurance against seizure which took place immediately before commencement of a war, see *Janson* v. *Driefontein Consolidated Mines*, (1902) A.C. 484; 71 L.J. K.B. 857. As to seizure after outbreak of war, see *Nigel Gold-Mining Co.* v. *Hoade*, (1901) 2 K.B. 849; 70 L.J. K.B. 1006.

(*m*) *Usparicha* v. *Noble*, 13 East, 340; *Fenton* v. *Pearson*, 15 East, 426; *Morgan* v. *Oswald*, 3 Taunt. 568.

(*n*) *Chavasse, Ex parte, Grazebrook, In re*, 34 L.J. Bk. 17; *The Helen*, 35 L.J. Adm. 2; L.R. 1 Adm. 1.

(*o*) 8 & 9 Vict. c. 109, s. 18.

(*p*) See *Universal Stock Exchange* v. *Strachan* (No. 1), (1896) A.C. 166; 65 L.J. Q.B. 429; *Same* v. *Same* (No. 2),

gaming or wagering contracts therein contained is not to be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise (*q*). Where two persons entered into partnership for the purpose of betting on horse races, and the business resulted in a loss, which was paid by one party, who claimed contribution from the other in respect of it, it was held that the money he had paid had been paid in respect of contracts which were null and void under the section (*r*). By the Gaming Act, 1892 (*s*), any promise, express or implied, to pay any person any sum of money paid (*t*) by him under or in respect of any contract or agreement rendered null and void by the Act of 1845, or to pay any sum by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation to or connection with it, is null and void, and no action will lie to recover any such sum. The Act does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any sums received by the agent on account of such bets (*u*); nor does it apply to a deposit of money with a stakeholder, so as to prevent the depositor from maintaining an action against the stakeholder for the recovery of a deposit which he has demanded back from the stakeholder before it was paid over by him (*x*). An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is an agreement by way of wagering, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, and is therefore null and void (*y*). Where there was an agreement to walk a match for 200*l.* a side and the money was deposited with a stakeholder, it was held to be a wager within the Act of 1845, but that although the winner, as such, could not sue the loser or stakeholder, yet the loser as depositor might recover back his

(1895) 2 Q.B. 697; 65 L.J. Q.B. 178; *Duncan & Co., In re*, (1905) 1 Ch. 307; 74 L.J. Ch. 188.

(*q*) So long as there is a subscription which is not a wager the second part of the section does not apply to it: *per* Lord Cairns in *Diggle* v. *Higgs*, 2 Ex.D. at p. 426: 46 L.J. Ex. 721.

(*r*) *Saffery* v. *Mayer*, (1901) 1 K.B. 11; 70 L.J. K.B. 145.

(*s*) 55 & 56 Vict. c. 9, s. 1. This Act abrogates the decision in *Read* v. *Anderson*, 13 Q.B.D. 779; 53 L.J. Q.B. 532; see *Tatam* v. *Reeve*, (1892) 1 Q.B. 44; 62 L.J. Q.B. 30, *post*, p. 107.

(*t*) The words "any sum of money paid" are not confined to money actually paid, but apply equally to money to be paid: *Levy* v. *Warburton*, 70 L.J. K.B. 708.

(*u*) *De Mattos* v. *Benjamin*, 63 L.J. Q.B. 248.

(*x*) *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538; following *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398.

(*y*) *Coombes* v. *Dibble*, L.R. 1 Ex. 248; 35 L.J. Ex. 167.

share (*z*). An action will not lie to recover money lent to a successful combatant in a prize-fight to be deposited as his share of the stake (*a*). So also where it was agreed between the plaintiff and the defendant that the plaintiff should have 2*l*. on a horse at 25 to 1, and the horse won, and the plaintiff claimed 50*l*. from the defendant, this was held to be within the Act of 1845 (*b*). But where the defendant had given a cheque to the plaintiff in respect of such winnings, it was held that the plaintiff could recover on the cheque because it had been given in respect of money received by the defendant for which he had agreed to account (*c*). Where two persons agree that one shall engage to ride a horse so many miles in so many hours, this is not within the proviso to the Act of 1845 (*d*). A colourable contract for the purchase and sale of railway shares or of goods, where neither party intends to deliver or accept the shares or the goods, but merely to pay differences according to the rise or fall of the market, is gaming and wagering; and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity (*e*). But there is no ground for contending that a contract for the sale of shares or of goods, to be delivered at a future day, is a gaming or wagering contract merely because the vendor neither has the shares or goods in his possession nor has entered into any contract to buy them, nor has any expectation of becoming possessed of them by the time appointed for transferring or delivering them otherwise than by purchasing them in the market (*f*). A bond given to persons to whom the obligor had lost bets on horse races which he was unable to pay, in order to prevent them from taking the steps which under the conventional code established among betting men they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss, is valid (*g*). But while a person cannot sue for the recovery of money won by him by betting, nor on a bond, bill, note, or cheque given to pay the money lost, yet he can sue upon a new contract not tainted

(*z*) *Diggle* v. *Higgs*, 2 Ex.D. 422; 46 L.J. Ex. 721; *Trimble* v. *Hill*, 5 App. Cas. 342; 49 L.J. P.C. 49.

(*a*) *Carney* v. *Plimmer*, (1897) 1 Q.B. 634; 66 L.J. Q.B. 415.

(*b*) *Higginson* v. *Simpson*, 2 C.P.D. 76; 46 L.J. C.P. 192.

(*c*) *Beeston* v. *Beeston*, 1 Ex.D. 13; 45 L.J. Ex. 230.

(*d*) *Batson* v. *Newman*, 1 C.P.D. 571.

(*e*) *Grizewood* v. *Blane*, 11 C.B. 538; *Rourke* v. *Short*, 25 L.J. Q.B. 196.

(*f*) *Hibblewhite* v. *M'Morine*, 5 M. & W. 466; 8 L.J. Ex. 271; *Phillips, Ex parte*, 6 Jur. N.S. 1273; 30 L.J. Bk. 1; as to the meaning of the words "time bargain," see *Thacker* v. *Hardy*, 4 Q.B.D. 685; 48 L.J. Q.B. 289; and of "wagering contract," *Richards* v. *Starck*, (1911) 1 K.B. 296; 80 L.J. K.B. 213.

(*g*) *Bubb* v. *Yelverton*, L.R. 9 Eq. 471; 39 L.J. Ch. 428, followed in *Browne, In re, Martingell, Ex parte*, (1904) 2 K.B. 133; 73 L.J. K.B. 446.

with illegality, and made for good consideration, if he can prove such a contract (*h*); as, for instance, a promise to hold over at the request of the drawer a cheque given in payment of betting losses, or an agreement not to mention, and in fact not mentioning, that the cheque had been held over when the publication of the fact would have resulted in ruin to the drawer of the cheque(*i*). Where a broker was employed to speculate upon the Stock Exchange upon the terms that only the "differences" in prices were to be paid to the employer, it was held that the broker could sue for indemnity against the liabilities incurred by him in buying and selling on behalf of his principal and for his commission (*k*); for although gaming and wagering contracts cannot be enforced, yet they are not illegal so as to taint legal contracts entered into in furtherance of gaming. But where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase does not prevent them from being contracts by way of gaming, and therefore void. In such transactions securities deposited by one party with the other to secure the payment of "differences" do not come within sect. 18 of the Act of 1845, and are recoverable by action (*l*). Where the vendors of a medical preparation advertised that they would pay a reward to any person contracting a specified disease after having used their preparation, it was held that the advertisement was not an offer to contract by way of wagering within the Act of 1845 (*m*).

Oral evidence may be given, and the parties themselves be examined, to show that a contract purporting on the face of it to be a contract of sale was a mere gaming contract, void *ab initio*, although the contract is in writing or under seal (*n*). It would seem that the statutes against gaming do not prevent a person who has employed another upon commission to make bets for him from recovering from such person the winnings which he has received on his behalf (*o*); nor do they prevent

(*h*) *Hyams* v. *Stuart King*, (1908) 2 K.B. 696; 77 L.J. K.B. 794, *per* Gorell Barnes, P.

(*i*) *Hyams* v. *Stuart King*, *supra*.

(*k*) *Thacker* v. *Hardy*, 4 Q.B.D. 685; 48 L.J. Q.B. 289; *Forget* v. *Ostigny*, (1895) A.C. 318; 64 L.J. P.C. 62.

(*l*) *Universal Stock Exchange* v. *Strachan* (No. 1), (1896) A.C. 166; 65 L.J. Q.B. 429; *Gieve*, *In re*, *Trustee*, *Ex parte*, (1899) 1 Q.B. 794; 68 L.J. Q.B. 509; *Cronmire*, *In re*, *Waud*, *Ex parte*, (1898) 2 Q.B. 383; 67 L.J. Q.B. 620; *Duncan & Co.*, *In re*, (1905) 1 Ch. 307; 74 L.J. Ch. 188.

(*m*) *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256; 62 L.J. Q.B. 257.

(*n*) *Collins* v. *Blantern*, 1 Smith's L. Cas. 369 (ed. 11); *Enderby* v. *Gilpin*, 5 Moore, 588.

(*o*) *Bridger* v. *Savage*, 15 Q.B.D. 363;

a person who has deposited money in the hands of a stakeholder to abide an event from repudiating the contract, and recovering back his deposit, before the event has happened (*p*); but they do prevent a third party from suing for the recovery of money paid at the request of the defendant to the winner of a bet; and it is immaterial whether the plaintiff knew that the money he had paid was in respect of a bet (*q*). Where a person employs an agent to bet on commission, and the agent fails to make the bets, his principal cannot maintain any action for damages for the breach of contract (*r*); nor can the agent, where he has failed to pay lost bets made on behalf of his principal, sue the latter to recover such unpaid losses or to indemnify him against his liability to pay them (*s*).

Lotteries.—Various statutes have from time to time been passed for the suppression of lotteries (*t*), and contracts with respect to them have been declared to be illegal (*u*).

Betting-house keepers.—By sect. 1 of the Betting Act, 1853 (*x*), betting-houses are prohibited; and by sect. 5 money or valuables received as a deposit on any bet may be recovered back, with full costs of suit (*y*). But nothing contained in the Act is to extend (sect. 6) to any person receiving or holding money or valuables by way of stakes or deposit to be paid to the winner of any lawful race, sport, or game, or to the owner of any horse engaged in any race (*z*).

Lawful games.—Playing at lawful games, such as horse-races, steeple-chases, and foot-races, or the game of dominoes, does not amount to gaming unless bets are made, and money lost and won; but, if the amount of a bet is deposited in the hands of a stakeholder, to be awarded to the winner of the bet, the money cannot be recovered by the winner (*a*); for all

54 L.J. Q.B. 464; see 55 & 56 Vict. c. 9, s. 1, *ante*, p. 104, and *per* Wright, J., in *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398.

(*p*) *O'Sullivan* v. *Thomas*, *supra*; *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538.

(*q*) *Tatam* v. *Reeve*, (1892) 1 Q.B. 44; 62 L.J. Q.B. 30.

(*r*) *Cohen* v. *Kittell*, 22 Q.B.D. 680; 58 L.J. Q.B. 241.

(*s*) *Levy* v. *Warburton*, 70 L.J. K.B. 708.

(*t*) 10 Will. 3, c. 23; 9 Anne, c. 6, s. 56 (Ruffhead); 9 Geo. 1, c. 19; 12 Geo. 2, c. 28; 42 Geo. 3, c. 119.

(*u*) As to what may be a lottery, see *Sykes* v. *Beadon*, 11 Ch.D. 170, 190; 48 L.J. Ch. 186; and *Macnee* v. *Persian Corporation*, 44 Ch.D. 306; 59 L.J. Ch. 695; as to missing words competitions, see *Barclay* v. *Pearson*, (1893) 2 Ch. 154; 62 L.J. Ch. 636; as to coupon competitions, see *Stoddart* v. *Sagar*, (1895) 2 Q.B. 474; 64 L.J. M.C. 234; as to a sale of goods with an added right to a prize, see *Taylor* v. *Smetten*, 11 Q.B.D. 207; 52 L.J. M.C. 101; and as to gratuitous distribution of numbered discs, see *Willis* v. *Young*, (1907) 1 K.B. 448; 76 L.J. K.B. 390.

(*x*) 16 & 17 Vict. c. 119, s. 1.

(*y*) *Doggett* v. *Catterns*, 19 C.B. N.S. 765; 34 L.J. C.P. 159.

(*z*) As to money in the hands of a stakeholder, see *post*, p. 123.

(*a*) *Varney* v. *Hickman*, 5 C.B. 271; 17 L.J. C.P. 102; *Moon* v. *Durden*, 2 Exch. 22. See *ante*, pp. 104, 105.

bets, though made upon a lawful game, are invalidated by the Gaming Act, 1845 (*b*).

Notes, bills, and mortgages given to secure money won at, or lent for, play, are not absolutely void, but are deemed and taken to have been made for an illegal consideration only (*c*); so that they are void only as between the original parties (*d*) and those persons who take them without consideration, or with notice of the illegality of the consideration, or after they have become overdue (*e*). A person to whom a cheque, payable in England, has been given in a foreign country for money lent for gaming in the foreign country, cannot, even assuming the consideration therefor to have been valid in that country, maintain an action upon the cheque in England, for such a case must be determined by the law of England under which he is precluded by the Gaming Acts from bringing the action (*f*).

Money knowingly lent for gaming, or to be employed by the borrower in playing at cards, or dice, or any game of chance or skill in a common gaming-house, or in playing at the games of hazard, the ace of hearts, pharaoh, or basset, cannot be recovered from the borrower, as the lender is himself a party to the violation of the statutes prohibiting such games. But money lent to play at whist, or cribbage, or any game not prohibited by Act of Parliament, may be sued for and recovered from the borrower, provided the loan is not part and parcel of a wagering or gaming contract (*g*). If, however, a licensed publican lends money to a guest to enable the latter to play at a game prohibited by law, or to lay bets or wagers on games of chance, the money so lent cannot be recovered (*h*).

Sale by illegal weights and measures.—By the Weights and Measures Act, 1878 (*i*), and amending Acts (*k*), provision is made for the establishment throughout the United Kingdom of uniform weights and measures; penalties are imposed for using unjust weights and measures (*l*); and any contract, bargain,

(*b*) 8 & 9 Vict. c. 109, s. 18; *Parsons* v. *Alexander*, 24 L.J. Q.B. 277; see *post*, p. 122; and *post*, Implied Contracts, p. 446.

(*c*) 9 Anne, c. 14, s. 1, amended by 5 & 6 Will. 4, c. 41, s. 1.

(*d*) *Cooke* v. *Stratford*, 13 M. & W. 379; 14 L.J. Ex. 66.

(*e*) *Edmunds* v. *Groves*, 2 M. & W. 642; 6 L.J. Ex. 203; *Hay* v. *Ayling*, 16 Q.B. 431; 20 L.J. Q.B. 171; see 45 & 46 Vict. c. 61, s. 27, *post*, p. 1257.

(*f*) *Moulis* v. *Owen*, (1907) 1 K.B. 746; 76 L.J. K.B. 396.

(*g*) *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 7 L.J. Ex. 149.

(*h*) *Foot* v. *Baker*, 6 Sc. N.R. 309; 5 Man. & G. 335.

(*i*) 41 & 42 Vict. c. 49.

(*k*) See 52 & 53 Vict. c. 21; 55 & 56 Vict. c. 18; 60 & 61 Vict. c. 46; 4 Edw. 7, c. 28.

(*l*) 41 & 42 Vict. c. 49, s. 19. The Acts do not apply to weights and measures belonging to the Crown: *Reg.* v. *Kent (Justices)*, 24 Q.B.D. 181; 59 L.J. M.C. 51. As to what amounts to weight or measure used for trade, see *Harris* v. *London County Council*, (1895) 1 Q.B. 240; 64 L.J. M.C. 81; *Crick* v. *Theobald*, 64 L.J. M.C. 216.

sale or dealing made by any such unjust weights or measures is declared void (*m*). It is, moreover, enacted by s. 19 of the Act of 1878 (*n*) that every trade contract for any work, goods, wares, merchandise, or other thing, to be done, sold, delivered, carried, or agreed for, by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by the Act or to some multiple or aliquot part thereof, and if not so made or had shall be void. By sect. 1 of the Weights and Measures (Metric System) Act, 1897 (*o*), nothing in sect. 19 of the Act of 1878 shall make void any contract, bargain, sale, or dealing by reason only of its being made or had according to weights or measures of the metric system. Sect. 21 of the Act of 1878 (*p*) had previously provided that a contract or dealing was not to be invalid or open to objection because the weights or measures expressed or referred to therein are measures of the metric system, or because decimal subdivisions of imperial weights and measures, whether metric or otherwise, are used therein. Where a contract was made for the sale of iron by what is called "long weight," a well-known term used in the north to designate the long hundred of 120 lbs. as distinguished from the southern hundred of 112 lbs., it was held that the contract was valid, as "the ton long weight" was a multiple of the standard pound (*q*). And where, on a sale by hobbet, it appeared that the hobbet was a local term designating a given number of pounds weight, it was held that this was a sale by the pound weight, the hobbet being a known multiple of a pound (*r*). These statutes do not avoid contracts made in England for the sale of goods to be measured or weighed abroad (*s*).

Coinage.—By sect. 6 of the Coinage Act, 1870 (*t*), every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of that Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state.

(*m*) 41 & 42 Vict. c. 49, s. 25; 52 & 53 Vict. c. 21, s. 3.
(*n*) 41 & 42 Vict. c. 49, s. 19.
(*o*) 60 & 61 Vict. c. 46, s. 1.
(*p*) 41 & 42 Vict. c. 49, s. 21.
(*q*) *Giles* v. *Jones*, 11 Exch. 393; 24 L.J. Ex. 259.
(*r*) *Hughes* v. *Humphreys*, 3 E. & B. 958; 23 L.J. Q.B. 356.
(*s*) *Rosseter* v. *Cahlmann*, 8 Exch. 361; 22 L.J. Ex. 128.
(*t*) 33 & 34 Vict. c. 10, s. 6.

Illegal sale of coals.—By the Weights and Measures Act, 1889, s. 20 (*u*), all coal is to be sold by weight only, except where by the written consent of the purchaser it is sold by boat load or by waggons or tubs delivered from the colliery into the works of the purchaser; and a penalty is imposed on all persons who sell coal otherwise. Power is also given to any local authority by sect. 28 to make by-laws with respect to the sale of coal, and by sect. 30 to make local exceptions under certain conditions. If any of the requirements of the former statutes were not complied with, the vendor was unable to sue for the price (*x*).

Illegal sale of game.—Sects. 17, 25 and 27 of the Game Act, 1831 (*y*), regulate the sale of game by game-keepers and persons who have taken out game certificates, and a penalty is imposed upon all persons who sell game without a licence to deal in game, or without having a game certificate, and upon all unlicensed persons who buy game from unlicensed dealers (*z*).

Illegal sale of spirituous liquors.—By sect. 12 of the Sale of Spirits Act, 1750 (*a*), no person is entitled to sue for the price of spirituous liquors, unless the debt has been *bonâ fide* contracted for at one time to the amount of 20*s.* or upwards, nor is any particular item or article in any account or demand for distilled spirituous liquors to be allowed and maintained, where liquors delivered at one time and mentioned in such article or item do not amount to 20*s.* at the least (*b*). But by the Sale of Spirits Act, 1862 (*c*), the Act of 1750, so far as it relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart, is repealed. Spirits mixed with water are spirituous liquors within the meaning of the Act (*d*). If payments are made on account of a tavern bill containing items for spirits, together with other general items, and the tavern-keeper appropriates the payments in satisfaction and discharge of his claim for the spirits, his right of

(*u*) 52 & 53 Vict. c. 21, s. 20.

(*x*) *Little* v. *Poole*, 9 B. & C. 200; 7 L.J. (O.S) K.B. 158; *Cundell* v. *Dawson*, 17 L.J. C.P. 311; 4 C.B. 376; *Tyson* v. *Thomas*, M'Clel. & Y. 119.

(*y*) 1 & 2 Will. 4, c. 32; and see 23 & 24 Vict. c. 90; 43 & 44 Vict. c. 47, s. 4.

(*z*) The powers of justices out of sessions as to the licensing of dealers in game when arising within a county district are now transferred to the district council of the district, 56 & 57 Vict. c. 73, s. 27.

(*a*) 24 Geo. 2, c. 40, s. 12.

(*b*) *Burnyeat* v. *Hutchinson*, 5 B. & Ald. 241; *Hughes* v. *Done*, 1 Q.B. 302; 10 L.J. Q.B. 65; *Lansdale* v. *Clarke*, 1 Exch. 78; 16 L.J. Ex. 246.

(*c*) 25 & 26 Vict. c. 38.

(*d*) *Scott* v. *Gillmore*, 3 Taunt. 226; see further as to what are spirits and spirituous liquors, *Att.-Gen.* v. *Bailey*, 1 Exch. 281; 17 L.J. Ex. 9; *Bailey* v. *Harris*, 18 L.J. Q.B. 115; 12 Q.B. 905.

action for the rest of his demand is not affected by the statute (*e*). By sect. 182 of the County Courts Act, 1888 (*f*), no action is to be brought or be maintainable in any county or other court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider or perry which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, in, or towards the obtaining of any such ale, &c. The sale of spirits is also regulated by the Spirits Act, 1880 (*g*); and its sale, directly or indirectly, during the voyage in any emigrant ship to any steerage passenger is prohibited by sect. 326 of the Merchant Shipping Act, 1894 (*h*).

Illegal sale of poison and adulterated food.—The sale of arsenic is regulated by the Arsenic Act, 1851 (*i*), and that of other poisons by the Pharmacy Act, 1868 (*k*), and the Pharmacy Act, 1869 (*l*). The selling of poisoned grain, meal, or seed is prohibited by the Poisoned Grain Prohibition Act, 1863 (*m*); and the sale of adulterated food and drugs, by the Sale of Food and Drugs Acts, 1875 to 1907 (*n*).

Illegal sale of explosive substances.—The sale of explosive substances is regulated by 38 & 39 Vict. c. 17; see also 39 & 40 Vict. c. 36, and 42 & 43 Vict. c. 21. As to petroleum, see 34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67; 56 & 57 Vict. c. 73, s. 27.

Chain-cables and anchors.—By the Merchant Shipping Act, 1894 (*o*), the rights of marine-store dealers to buy and sell chain-cables and anchors (*p*) are dealt with. And by the Anchors and Chain Cables Act, 1899 (*q*), it is made unlawful for any makers of, or dealers in, anchors or chain-cables to sell or contract to sell any chain-cable or anchor exceeding in weight 168 pounds, for use on any British ship unless it has been previously proved in accordance with the Act. Every contract for the sale of such a chain-cable or anchor is, in the

(*e*) *Philpott* v. *Jones*, 2 Ad. & E. 41; 4 L.J. K.B. 65; *Owens* v. *Denton*, 1 C. M. & R. 712; 4 L.J. K.B. 68.

(*f*) 51 & 52 Vict. c 43, s. 182.

(*g*) 43 & 44 Vict. c. 24, ss. 146—149.

(*h*) 57 & 58 Vict. c. 60, s. 326.

(*i*) 14 & 15 Vict. c. 13.

(*k*) 31 & 32 Vict. c. 121. See *Berry* v. *Henderson*, L.R. 9 Q.B. 296; 39 L.J. M.C. 77; *Pharmaceutical Soc.* v. *London & Prov. Supply Ass.*, 5 App. Cas. 857; 49 L.J. Q.B. 736; *Templeman* v. *Trafford*, 8 Q.B.D. 397; 51 L.J. M.C. 4; *Pharmaceutical Soc.* v. *Piper*, (1893) 1 Q.B. 683; 62 L.J. Q.B. 305; *Pharmaceutical Soc.* v. *Delve*, (1894) 1 Q.B. 71; 63 L.J. Q.B. 360; *Pharmaceutical Soc.* v. *Armson*, (1894) 2 Q.B. 720; 64 L.J. Q.B. 32; *Pharmaceutical Soc.* v. *White*, (1901) 1 K.B. 601; 70 L.J. K.B. 386.

(*l*) 32 & 33 Vict. c. 117.

(*m*) 26 & 27 Vict. c. 113.

(*n*) 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 50 & 51 Vict. c. 29; 62 & 63 Vict. c. 51; 7 Edw. 7, c. 21. As to horse flesh, see 52 & 53 Vict. c. 11. See *Parsons* v. *Birmingham Dairy Co.*, 9 Q.B.D. 172; 51 L.J. M.C. 111.

(*o*) 57 & 58 Vict. c. 60, ss. 538—543.

(*p*) For definition of chain-cables and anchors, see 62 & 63 Vict. c. 23, s. 19.

(*q*) 62 & 63 Vict. c. 23, s. 1.

absence of an express stipulation to the contrary, to be deemed to imply a warranty that it has been so proved, and the burden of proof, in case of dispute, lies on the seller (*r*).

Smuggling.—If goods are sold abroad for the purpose of being smuggled into this country, and the vendor knowingly packs the goods in a particular way to aid and assist the act of smuggling, or in any way shares or participates in the illegal transaction, he will not be permitted to sue upon the contract in any of our courts of justice (*s*). If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the smuggling, our courts of law will not refuse to assist him to recover the price (*t*). Although a foreigner is not bound to take notice of the revenue laws of this country, yet, if he makes himself a direct party to the act of breaking them, he cannot here recover the fruits of his illegal act (*u*).

Illegal sale of exciseable articles.—Many Acts of Parliament, passed for the mere purpose of raising a revenue, require persons dealing in certain classes of goods to take out a licence or permit, and impose a penalty upon them in case of their neglect so to do. The omission to take out a licence required for mere revenue purposes does not render contracts of sale, entered into by such dealers in the way of their trade, unlawful, unless such contracts are expressly forbidden, but only exposes them to the penalty imposed by the statute (*x*). But, when the licence is required for the protection of the public and the prevention of improper persons from acting in a particular capacity, and is not confined to revenue purposes, the imposition of the penalty amounts to a positive prohibition of the contract (*y*). In order to legalise the sale of wines, beer, and spirituous liquors, two licences are necessary, one from the excise, the other from the magistrates in sessions. The licence granted by the magistrates has no reference whatever to revenue purposes; it is required solely for the protection and preservation of public morals, and the prevention of crimes and offences which are subversive of good order and the public safety. Every person, therefore, who sells wines, spirits, &c.,

(*r*) 62 & 63 Vict. c. 23, s. 2.

(*s*) *Biggs* v. *Lawrence*, 3 T.R. 454; *Clugas* v. *Penaluna*, 4 *ib.* 466; *Lightfoot* v. *Tenant*, 1 B. & P. 556.

(*t*) *Holman* v. *Johnson*, 1 Cowp. 341; *Pellecat* v. *Angell*, 2 C. M. & R. 311; 4 L.J. Ex. 326.

(*u*) *Waymell* v. *Reed*, 5 T.R. 600.

(*x*) *Johnson* v. *Hudson*, 11 East, 180; *Smith* v. *Mawhood*, 14 M. & W. 463; 15 L.J. Ex. 149; *Brown* v. *Duncan*, 10 B. & C. 93; 8 L.J. (O.S.) K.B. 60; *Wetherell* v. *Jones*, 3 B. & Ad. 221; 1 L.J. K.B. 39.

(*y*) *Cope* v. *Rowlands*, 2 M. & W. 157; 6 L.J. Ex. 68. See *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446; 55 L.J. Q.B. 143.

without being duly licensed so to do, has no remedy for the recovery of the price thereof (*z*). A brewer who sells beer to be consumed in a public-house is not bound to ascertain whether the party who orders the beer is duly licensed before he supplies the article (*a*). Mere knowledge, moreover, on the part of the vendor, that the buyer will make an illegal use of goods sold to him, is not sufficient to deprive the vendor of his right to payment of the price. It is necessary that the vendor should be a sharer in the illegal transaction, and should render some aid beyond that of merely selling the goods (*b*).

Sunday sales and trading.—By sect. 1 of the Sunday Observance Act, 1677 (*c*), commonly called the Lord's Day Act, it is enacted that no tradesman, artificer, workman, or labourer, shall exercise the worldly labour, business, or work of his ordinary calling upon the Lord's day (works of necessity and charity only excepted); and a penalty is imposed upon all persons of the age of fourteen years or upwards who offend against the statute. No action, consequently, can be brought for the price of goods sold on Sunday in the ordinary course of trade or business of the vendor (*d*), unless the sale is within the exception of the Act, which permits (sect. 3) food to be dressed or sold in inns, cook-shops (*e*), and victualling-houses, to persons who cannot be otherwise provided for, and milk to be carried about and sold at stated hours; or unless the sale is of bread, the baking and sale of which on Sundays are sanctioned under certain restrictions (*f*). If the sale or other contract was not made in the exercise of the trade or ordinary calling of the party against whom it is sought to be enforced, it is not invalidated by the statute (*g*). The sale of a horse, for example, by a person who is not a horse-dealer, is not within the statute; and, if a sale is merely proposed on a Sunday, and carried into effect on a subsequent week-day, it is not illegal. But, if the contract of sale is concluded on the Sunday, it will be void, although it may not be fulfilled by the delivery of the goods until a subsequent week-day (*h*). If the goods are actually delivered to the purchaser under the void contract, the latter will

(*z*) *Ritchie* v. *Smith*, 6 C.B. 474; 18 L.J. C.P. 9.

(*a*) *Brooker* v. *Wood*, 5 B. & Ad. 1052; 3 L.J. K.B. 96.

(*b*) *Hodgson* v. *Temple*, 5 Taunt. 181; 1 Marsh. 5.

(*c*) 29 Car. 2, c. 7.

(*d*) *Fennell* v. *Ridler*, 5 B. & C. 406; 4 L.J. (O.S.) K.B. 207.

(*e*) *Bullen* v. *Ward*, 74 L.J. K.B. 916.

(*f*) *Rex* v. *Cox*, 2 Burr. 787; *Rex* v. *Younger*, 5 T.R. 449. As to prosecutions for the sale of bread on Sundays, see 34 & 35 Vict. c. 87; *Thorpe* v. *Priestnall*, (1897) 1 Q.B. 159; 66 L.J. Q.B. 248; *Rex* v. *Mead*, (1902) 2 K.B. 212; 71 L.J. K.B. 871.

(*g*) *Drury* v. *Defontaine*, 1 Taunt. 131.

(*h*) *Bloxsome* v. *Williams*, 2 L.J. (O.S.) K.B. 224; 3 B. & C. 233, 234; *Smith* v. *Sparrow*, 12 Moore, 266; 5 L.J. (O.S.) C.P. 80.

have no right to detain them against the owner, unless it can be considered that both parties are *in pari delicto*. If the owner, subsequently to the void sale, demands on a week-day either the goods or the price, and the intended purchaser then promises to pay for them, a new and valid contract of purchase and sale arises between the parties which may be enforced by action. But the law will not imply a promise to pay the price from the mere fact of the detention or use of the goods (*i*). The hiring by a farmer of a labourer or servant is not an exercise of the farmer's ordinary calling, and, consequently, is not within the letter or spirit of the Act (*k*). Neither is a contract by a farmer for the covering of a mare with a stallion (*l*); nor an agreement by a solicitor to become personally responsible for the payment of the debt of a client (*m*). Farmers, attorneys, and surgeons, moreover, do not range under the classes of persons (tradesmen, artificers, workmen, and labourers) mentioned in the statute. A coach-proprietor, or the driver of a hackney-coach, is not a workman or labourer within the meaning of the statute; and a contract, therefore, for the hire of his coach or carriage, or a place therein, is not illegal, although made on a Sunday (*n*).

Contracts for prohibited services.—Printers are required by statute to affix their names and places of abode or business to all papers printed by them for reward (*o*); and, if a printer neglects to comply with the requisitions of the statute, he cannot maintain an action for his labour, or for the materials provided for the printing (*p*). By a later statute (*q*) all persons who print any paper or books whatsoever must print their names and usual places of abode or business on such paper or books. But, as the name is required to be printed on the first or last leaf of every book, the omission might be rectified by the tender of the requisite printed leaf to the author or publisher at any time before actual publication. As soon as a printer discovers that he is printing libellous matter he ought to stop, and may then recover for what he has done; but, if he goes on with his printing, he makes himself a party to the unlawful transaction, and cannot recover his charges (*r*).

(*i*) *Williams* v. *Paul*, 6 Bing. 653; 8 L.J. (O.S.) C.P. 280; *Simpson* v. *Nicholls*, 3 M. & W. 240; 7 L.J. Ex. 117.

(*k*) *Rex* v. *Whitnash*, 7 B. & C. 602; 6 L.J. (O.S.) M.C. 26; *Reg.* v. *Silvester*, 33 L.J. M.C. 79; *S.C. R.* v. *Cleworth*, 4 B. & S. 927.

(*l*) *Searle* v. *Morgan*, 4 M. & W. 270; 7 L.J. Ex. 324.

(*m*) *Peate* v. *Dicken*, 1 C. M. & R. 422; 4 L.J. Ex. 28.

(*n*) *Sandiman* v. *Breach*, 7 B. & C. 96; 5 L.J. (O.S.) K.B. 298.

(*o*) See 39 Geo. 3, c. 79, s. 29, set out in Sched. 2 of 32 & 33 Vict. c. 24.

(*p*) *Bensley* v. *Bignold*, 5 B. & Ald. 340; *Marchant* v. *Evans*, 2 Moore, 14.

(*q*) See 2 & 3 Vict. c. 12, s. 2, set out in Sched. 2 of 32 & 33 Vict. c. 24.

(*r*) *Clay* v. *Yates*, 1 H. & N. 73; 25

Unauthorised medical practitioners.—By sect. 32 of the Medical Act, 1858 (*s*), it is enacted that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice or attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under that statute. This section is not repealed by the Medical Act, 1886 (*t*), although sect. 31 is repealed (*t*). It is not confined to cases in which the patient is sued; and an unregistered practitioner cannot sue a registered practitioner for medicine supplied to, or attendance upon, the patients of the latter at his request (*u*). But every person registered under the Act may sue for his reasonable charges, unless he is a fellow of a college of physicians which has passed a bye-law prohibiting their fellows from recovering at law their fees or charges (*x*), in which case the bye-law may be pleaded in bar of any legal proceeding for their recovery (*y*). This Act, however, does not repeal sect. 21 of the Apothecaries Act, 1815 (*z*); and, consequently, a medical practitioner who is registered as a member of the College of Surgeons only, and who has no other qualification, cannot recover for attendance and medicines supplied in other than surgical cases (*a*). Proof of the registration of the plaintiff at the time of the trial is insufficient; and it is necessary to show that he was registered at the time the services were rendered (*b*). If a chemist attends patients, and applies and administers medicines, he practises as an apothecary, subjects himself to a penalty for so doing, and is disabled from suing for his charges. When an action has been brought to recover the amount of a chemist's bill, and it is contended that the items are properly within the scope of an apothecary's profession, the proper question to be submitted to the jury is, whether the plaintiff acted as a chemist or as an apothecary, and not whether he has charged as a chemist or as an apothecary (*c*). It was held that a qualified practitioner could not recover for the services of his brother (not qualified), not performed under his advice and direction (*d*).

L.J. Ex. 237; as to the registration of printing presses, see *Day* v. *Hemming*, 9 W.R. 703. As to registration of newspapers, see 44 & 45 Vict. c. 60, amended by 51 & 52 Vict. c. 64, and 57 & 58 Vict. c. 56, Sched. 1.

(*s*) 21 & 22 Vict. c. 90, s. 32.

(*t*) 49 & 50 Vict. c. 48, Sched. Pt. II.

(*u*) *Alvarez de la Rosa* v. *Prieto*, 16 C.B. N.S. 578; 33 L.J. C.P. 262.

(*x*) *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L.J. Ex. 182.

(*y*) 49 & 50 Vict. c. 48, s. 6.

(*z*) 55 Geo. 3, c. 194.

(*a*) *Leman* v. *Fletcher*, L.R. 8 Q.B. 319; 42 L.J. Q.B. 214.

(*b*) *Leman* v. *Houseley*, L.R. 10 Q.B. 66; 44 L.J. Q.B. 22.

(*c*) *Richmond* v. *Coles*, 1 Dowl. N.S. 560; 11 L.J. Q.B. 155.

(*d*) *Howarth* v. *Brearley*, 19 Q.B.D. 303; 56 L.J. Q.B. 543. See also *Davies*

Unstamped contract notes.—By sect. 78 of the Finance Act, 1910 (*e*), any person effecting any sale or purchase of any stock or marketable security of the value of 5*l.* or upwards, as a broker or agent, has forthwith to make and execute a contract note and transmit the same to his principal, and in default will incur a fine of 20*l.* (sub-sect. 1); and any person making or executing any contract note chargeable with duty and not duly stamped will also incur a like fine (sub-sect. 2). No broker, agent, or other person is to have any legal claim to any charge for brokerage (*f*), commission or agency, with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards if he fails to comply with the provisions of sect. 78 (sub-sect. 3).

Unauthorised sea insurance transactions.—By the Stamp Act, 1891 (*f*), s. 97 (2), every broker, agent, or other person negotiating or transacting any sea insurance (*g*), contrary to the true intent and meaning of that Act, or writing any policy of insurance upon material not duly stamped, has no legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge is to be deemed to be paid without consideration, and is to remain the property of his employer.

Uncertificated solicitors.—By sect. 26 of the Solicitors Act, 1843 (*h*), no person who as a solicitor prosecutes, defends, or carries on any proceeding in any court without having previously obtained a duly stamped certificate is capable of maintaining any action or suit for the recovery of any fee, or reward, or disbursement in respect of any business done by him as a solicitor whilst he is without such certificate (*i*). But the debt is still subsisting, although he can take no steps to enforce its payment (*k*); and, though uncertificated and unable to sue for his fees, he may do acts in his capacity of solicitor which will be valid, and will bind his client (*l*). By sect. 12 of the Solicitors Act, 1874 (*m*), no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any

v. *Makuna*, 29 Ch.D. 596; 54 L.J. Ch. 1148. An agreement to carry on an illegal business as an unqualified practitioner will not be enforced.

(*e*) 10 Edw. 7, c. 8.

(*f*) 54 & 55 Vict. c. 39.

(*g*) See Finance Act, 1901 (1 Edw. 7, c. 7), s. 11, as to the validity of continuation clauses (as defined by that Act) in policies of sea insurance.

(*h*) 6 & 7 Vict. c. 73.

(*i*) *Brunswick (Duke)* v. *Crowl*, 4 Exch. 492; 19 L.J. Ex. 112.

(*k*) *Jones, In re*, L.R. 9 Eq. 63; 39 L.J. Ch. 83; *Fullalove* v. *Parker*, 31 L.J. C.P. 239, 240; 12 C.B. N.S. 246.

(*l*) *Holdgate* v. *Slight*, 21 L.J. Q.B. 75; *Sparling* v. *Brereton*, L.R. 2 Eq. 64; 35 L.J. Ch. 461.

(*m*) 37 & 38 Vict. c. 68, s. 12. The provisions of this section are extended to surrogates and other persons not being qualified practitioners by 40 & 41 Vict. c. 62, s. 2.

person who acts as a solicitor without being duly qualified so to act, are recoverable in any action, suit, or matter, by any person or persons whomsoever (*n*).

Contracts by rural district councillors.—The provisions of the Highway Act, 1863 (*o*)—which prohibited any waywarden from, directly or indirectly, in his own name or in the name of any other person, contracting for the repair of any road, or for any other work to be executed under the provisions of the Highway Act, 1862 (*p*), within the parish for which he was elected waywarden, or within any other parish in the same district—are no longer operative since every rural district council has, under the Local Government Act, 1894 (*q*), become the successor of any highway board, *i.e.*, the highway authority. Sect. 20 of the Highway Act, 1864 (*r*), however—which provides that any waywarden may contract for the supply or cartage of materials within the parish for which he is waywarden, with the licence of two justices assembled at petty sessions, to be granted on such application as is therein provided—seems still to be effective to some extent in the case of a rural district council, inasmuch as sect. 46 (2) of the Local Government Act, 1894 (*s*), expressly provides that a person is not to be disqualified for being elected, or being a member or chairman of a parish or district council because he is interested in any contract with the council for the supply from land of which he is the owner or occupier of stone, gravel, or other materials for making or repairing highways or bridges, or in the transport of materials for the repair of roads or bridges in his own immediate neighbourhood.

Illegality of contracts for payment of work otherwise than in current coin.—The truck system.—By sect. 1 of the Truck Act, 1831 (*t*), in all contracts for the hiring of any artificer (*u*) in the iron or steel manufactures, or in the working of mines of coal, iron, limestone, or salt-rock, or the getting of stone, slate, or clay, or in the preparing of salt, bricks, tiles, or quarries, or in the manufacturing of nails, chains, rivets, &c., spades, shovels, &c., or any articles of hardware, of iron or steel, or plated articles of cutlery, or goods or wares made of brass,

(*n*) See *Fowler* v. *Monmouthshire Canal Co.*, 4 Q.B.D. 334; 48 L.J. Q.B. 457.

(*o*) 26 & 27 Vict. c. 61, ss. 1, 2. This Act expired when the last Highway Board ceased to exist on March 31, 1899.

(*p*) 25 & 26 Vict. c. 61.

(*q*) 56 & 57 Vict. c. 73, s. 25 (1).

(*r*) 27 & 28 Vict. c. 101.

(*s*) 56 & 57 Vict. c. 73, s. 45 (2) (a).

(*t*) 1 & 2 Will. 4, c. 37.

(*u*) As to the meaning and extent of the term, see *Riley* v. *Warden*, 2 Exch. 59; 12 L.J. Ex. 120; *Sharman* v. *Sanders*, 22 L.J. C.P. 86; 13 C.B. 166; *Weaver* v. *Floyd*, 21 L.J. Q.B. 151; 16 Jur. 289; *Bowers* v. *Lovekin*, 6 E. & B. 584; 25 L.J. Q.B. 371; *Ingram* v. *Barnes*, 7 E. & B. 115, 132; 26 L.J. Q.B. 82; *Sleeman* v. *Barrett*, 33 L.J. Ex. 153; 2 H. & C. 934; *Moorhouse* v. *Lee*, 4 F. & F. 355. See also 50 & 51 Vict. c. 46, s. 2.

tin, or other metal, or of any japanned goods or wares, or in the spinning, throwing, twisting, &c., weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen or worsted yarn, stuff, &c., cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in the glass, porcelain, china, or earthenware manufacture, or in the making or preparing of bone, thread, silk, or cotton-lace, &c., the wages of such artificer are to be made payable in the current coin of the realm only; and, if in any such contract the whole or any part of such wages is made payable in any other manner, such contract is illegal, null, and void (*x*). Also by sect. 2 if in any contract between any artificer in any of the trades enumerated and his employer any provision is made "respecting the place where, or the manner in which, or the person with whom, the whole or any part of the wages" of such artificer is to be expended, such contract is illegal and void. By sect. 3 the entire amount of the wages earned by or payable to any artificer is to be actually paid to him in the current coin of the realm, and not otherwise. All such artificers are empowered by sect. 4 to sue for and recover any wages that have not been paid them in the current coin of the realm. Payment may, however, be made (sect. 8) in bank notes, if such artificers consent thereto. The provisions of the principal Act are extended, by the Truck Act, 1887 (*y*), to all workmen, as defined in the Employers and Workmen Act, 1875 (*z*), and in some cases include persons working at their own homes and selling their work to shopkeepers, dealers or traders (*a*).

One of the evils intended to be remedied by the Truck Act, 1831, was "the giving by masters to their workmen in exchange for their labour, wholly or in part, things of uncertain value, instead of money, the value of which is certain" (*b*); and therefore it has been held that payment in damaged cloth is not payment in coin (*c*). If the employer set up a shop, and make use of any compulsion to induce his workmen to lay out their wages at this shop, the wages thus received and compulsorily expended at the employer's shop are not, it seems, valid payment of wages, but are within the mischief intended to be provided against by the Truck Acts (*d*). It is illegal for

(*x*) *Ashersmith* v. *Drury*, 28 L.J. M.C. 5; 1 E. & E. 46.

(*y*) 50 & 51 Vict. c. 46, s. 2.

(*z*) 38 & 39 Vict. c. 90, s. 10. As to persons coming within the definition of "workman," see Addison on Torts (ed. 8), 782.

(*a*) 50 & 51 Vict. c. 46, s. 10.

(*b*) *Per* Keating, J., in *Archer* v. *James*, 2 B. & S. at p. 76; 31 L.J. Q.B. at p. 159.

(*c*) *Smith* v. *Walton*, 3 C.P.D. 109; 47 L.J. M.C. 45.

(*d*) *Olding* v. *Smith*, 16 Jur. 497. See

an employer to impose upon a workman as a condition of his employment any terms as to spending any part of his wages at any particular shop, &c. (*e*). The deduction by an employer from the wages of a workman of damages awarded by a court of competent jurisdiction to be paid to the employer for breach of contract is a violation of the Truck Act, 1831, s. 3 (*f*), which requires payment of the entire amount of wages in coin (*g*). But a payment made by an employer at the instance of the person employed is not within the Act; and therefore where an employé agreed to become a member of a sick club, and the employer weekly deducted from his wages the payment to the club, and handed it over to the club treasurer with the assent of the employé, it was held that he could not recover the amount thus deducted, although he had derived no benefit from the club (*h*).

By sect. 23 of the Truck Act, 1831 (*i*), the employer may contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation if a miner, and may demise to the artificer a tenement at any rent reserved, and may contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing (*k*), and signed by the artificer. The amount to be deducted in respect of each head of deduction need not be specified in the contract (*l*). The employer may deduct 6*d*. a week for medicine to be paid by the miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as may require them (*m*); but, in order to be valid, the contract for the supply of materials must be an absolute contract of sale, and not a mere contract of hiring by the artificer (*n*). By sect. 1 of the Hosiery Manufacture (Wages) Act, 1874 (*o*), wages in that manufacture are to be paid without any deductions whatever, save and except for bad or disputed workmanship; by sect. 2 all contracts to stop wages and for frame rents and charges are illegal; and by sect. 5 no action, suit, or set-off between

50 & 51 Vict. c. 46, s. 5, as to an order for goods as a deduction from wages being illegal.

(*e*) 50 & 51 Vict. c. 46, s. 6.

(*f*) 1 & 2 Will. 4, c. 37, s. 3.

(*g*) *Williams* v. *North's Navigation Collieries*, (1906) A.C. 136; 75 L.J. K.B. 334.

(*h*) *Hewlett* v. *Allen*, (1894) A.C. 383; 63 L.J. Q.B. 608.

(*i*) 1 & 2 Will. 4, c. 37, s. 23.

(*k*) *Pillar* v. *Llynvi Coal Co.*, L.R. 4 C.P. 752; 38 L.J. Q.B. 294; *Cooper, Ex parte, Morris, In re*, 26 Ch.D. 693. See *Lamb* v. *G. N. Ry.*, (1891) 2 Q.B. 281; 60 L.J. Q.B. 489.

(*l*) *Cutts* v. *Ward*, L.R. 2 Q.B. 357; 36 L.J. Q.B. 161.

(*m*) *Cutts* v. *Ward*, *supra*.

(*n*) *Cutts* v. *Ward*, *supra*.

(*o*) 37 & 38 Vict. c. 48, ss. 1, 2, 5.

employer and artificer is to be allowed for any deduction or stoppage of wages nor for any contract declared by the Act to be illegal. By the Truck Act, 1887 (*p*), it is not illegal to contract with a servant in husbandry to give him food, drink, not being intoxicating, a cottage, or other allowances or privileges in addition to his money wages as a remuneration for his services. The Truck Act, 1896 (*q*), prohibits any contract being made by an employer with a workman for any deduction from wages contracted to be paid, or for any payment to the employer by a workman in respect of fines except under certain very strictly limited conditions (sect. 1), or in respect of damaged goods (sect. 2), or of materials (sect. 3); and if an employer enters into any such contract or makes or receives any such prohibited deductions or payments he is liable to the penalties imposed by the principal Act (*r*) (sect. 4).

A fine imposed for breach of a rule that all workers shall observe good order is one in respect of "an act or omission" likely to cause damage to the employer within the meaning of sect. 1, sub-sect. 1, of the Act (*s*). The provisions of sect. 2 of the Act do not apply to a "clipper" in the lace manufacturing trade, who is not a "workman" within the meaning of the Employers' Liability Act, 1875 (*t*).

Divisible contracts, part being good and part bad.—If there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails. The invalidity of the one will not necessarily induce the destruction of the other (*u*). If a deed of conveyance contains limitations and grants of land and tenements to uses, some of which are charitable uses within the 9 Geo. 2, c. 36, the deed will be void so far as it relates to the charitable uses, but valid so far as it passes the other lands to the other uses (*x*). If a settlement contains provisions for the case of a future separation between the husband and wife, those provisions are void; but the rest of the settlement may be valid (*y*). Where a rector granted a yearly rent-charge, payable out of his benefice, and covenanted to pay the rent-charge, and the grant was avoided by the 13 Eliz. c. 30,

(*p*) 50 & 51 Vict. c. 46.

(*q*) 59 & 60 Vict. c. 44.

(*r*) 1 & 2 Will. 4, c. 37, s. 9.

(*s*) *Squire* v. *Bayer*, (1901) 2 K.B. 299; 70 L.J. K.B. 705.

(*t*) *Squire* v. *Midland Lace Co.*, (1905) 2 K.B. 448; 74 L.J. K.B. 614.

(*u*) *Collins* v. *Blantern*, 2 Wils. 341; *Chester (Bishop)* v. *Freeland*, Ley, 79; 1 Vin. Abr. 332.

(*x*) *Doe* v. *Pitcher*, 6 Taunt. 369; *Howe* v. *Synge*, 15 East, 440.

(*y*) *Merryweather* v. *Jones*, 4 Giff. 509; *Hamilton* v. *Hector*, L.R. 13 Eq. 511.

it was held that the rector was nevertheless liable upon his covenant to pay annually to the plaintiff the amount intended to have been charged upon the benefice (*z*). A covenant to pay rent and taxes has been held not to be avoided by including property tax (*a*). Where a corporation had by a deed which was *ultra vires* borrowed money for a purpose to which the borough fund was inapplicable, though the substance of the deed was held bad, yet the covenant for repayment of the money was held capable of being enforced (*b*). Where, on a contract for the sale of a perfumer's business, the vendor covenanted not to carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same, it was held that the covenant was good so far as it related to the cities of London and Westminster, though it was void as to the 600 miles (*c*). But the court will not carve out of the covenant such a distance as will be reasonable (*d*). The covenant must be capable of being construed divisibly (*e*). And where there are separate and independent covenants in the same deed, the illegality of one of the covenants does not invalidate the others (*f*). Where there are two considerations, the one good and the other bad, and general damages have been recovered, they will be deemed to have been given in respect of the good consideration alone (*g*).

Indivisible contracts.—If there is one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. Thus, where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void (*h*). And, if a contract or promise be founded upon a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of part vitiates the whole (*i*). Where a bill of exchange was given to secure payment of a debt, part of which consisted of money lawfully advanced, and the rest of money due upon an illegal sale, it

(*z*) *Mouys* v. *Leake*, cited *Kerrison* v. *Cole*, 8 East, 231.

(*a*) *Gaskell* v. *King*, 11 East, 165.

(*b*) *Payne* v. *Brecon Corporation*, 3 H. & N. 572 ; 27 L.J. Ex. 495.

(*c*) *Price* v. *Green*, 16 M. & W. 346 ; 16 L.J. Ex. 108. "London" means the city of London, and not the metropolis generally : *Mallan* v. *May*, 13 M. & W. 517 ; 14 L.J. Ex. 48.

(*d*) *Baker* v. *Hedgecock*, 39 Ch.D. 520 ; 57 L.J. Ch. 889.

(*e*) *Price* v. *Green*, *supra* ; *Nicholls* v. *Stretton*, 10 Q.B. 346 ; 7 Beav. 42 ; *Baines* v. *Geary*, 35 Ch.D. 154 ; 56 L.J. Ch. 935 ; *Perls* v. *Saalfeld*, (1892) 2 Ch. 149 ; 61 L.J. Ch. 409 ; *Rogers* v. *Maddocks*, (1892) 3 Ch. 346 ; 62 L.J. Ch. 219.

(*f*) *Wigg* v. *Shuttleworth*, 13 East, 87.

(*g*) Ley, 79 ; *Best* v. *Jolly*, 1 Sid. 38.

(*h*) *Hopkins* v. *Prescott*, 16 L.J. C.P. 263 ; 4 C.B. 578.

(*i*) *Featherston* v. *Hutchinson*, Cro. Eliz. 199 ; *Lound* v. *Grimwade*, 39 Ch.D. 605 ; 57 L.J. Ch. 725 ; and see *United Shoe Manufacturing Co.* v. *Brunet*, (1909) A.C. 330 ; 78 L.J. P.C. 101.

was held that the good part of the consideration for the bill could not be separated from the rest, and that the whole was void (*k*). Every secret bargain in fraud of creditors is void when it is made, and cannot be enforced even against a fraudulent party; and, when a part is fraudulent, the bargain, being entire, is altogether fraudulent and void. The creditor, therefore, can enforce no part of it; and it is no matter that part of the agreement is by deed and part by parol (*l*). If, upon a contract for the hiring and service of a housekeeper at certain agreed wages, it appears to have been part of the contract that the housekeeper should cohabit with her master, the whole will be void, and the wages irrecoverable (*m*). Where a verbal agreement was made to pay the debt of a third party (which is void by the Statute of Frauds, unless it is authenticated by writing), and to pay certain expenses connected therewith, it was held that the agreement was indivisible, and the whole invalid (*n*). Upon a contract for the sale of tobacco, it was agreed that counterfeit money should be taken in payment, and, the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it, and brought an action for the price of the tobacco; but, per Buller, J., "It cannot be said that the sale is good and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. . . . The parties are *in pari delicto*, and *potior est conditio defendentis*" (*o*).

Void foreign contracts.—As a general rule, a contract will not be enforced, unless it is valid by the law both of the country in which it was made and of that in which it is sought to be enforced (*p*); nor a contract made in a foreign country which has been obtained by coercion, either physical or moral, although it may be valid by the law of that country (*q*).

Effect of avoidance.—A person who has authorised the application of his money to an illegal purpose may revoke the authority and recover back the money at any time before it has been paid over (*r*); and, so long as an illegal contract remains unperformed, money deposited by one of the parties in further-

(*k*) *Scott* v. *Gillmore*, 3 Taunt. 226; *Thomas* v. *Williams*, 10 B. & C. 671; 8 L.J. (O.S.) K.B. 314; *Fergusson* v. *Norman*, 6 Sc. 810; 8 L.J. C.P. 3; *Willyams* v. *Bullmore*, 32 Beav. 574; 33 L.J. Ch. 461.

(*l*) *Higgins* v. *Pitt*, 4 Exch. 324.

(*m*) *Rex* v. *Northwingfield*, 1 B. & Ad. 912.

(*n*) *Lexington* v. *Clarke*, 2 Ventr. 223; *Chater* v. *Beckett*, 7 T.R. 201.

(*o*) *Alexander* v. *Owen*, 1 T.R. 227.

(*p*) *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417.

(*q*) *Kaufman* v. *Gerson*, (1904) 1 K.B. 591; 73 L.J. K.B. 320; *Rousillon* v. *Rousillon*, 14 Ch.D. 351; 49 L.J. Ch. 338.

(*r*) *Bone* v. *Ekless*, 29 L.J. Ex. 438; 5 H. & N. 925.

ance of the fulfilment of the contract may be recovered back(*s*), but not when the parties have carried out their unlawful intention, in any material part (*t*), and both are *in pari delicto* (*u*). Money lost at play (*x*), or paid for the purpose of procuring a pardon (*y*), or for insurance in the nature of a wager (*z*), or for supplying wine, &c., for a debauch at a brothel (*a*), or for compounding a felony, or purchasing false evidence, or inducing a party not to appear and give evidence at a trial, or indemnifying bail with a like object, cannot be recovered from the person to whom it has been paid (*b*). If indentures of apprenticeship are void by reason of the amount of the premium paid with the apprentice not being truly or correctly stated pursuant to the requirements of the Stamp Acts, the money actually given with the apprentice cannot be recovered back on the ground of a failure of consideration, as both parties are *in pari delicto* (*c*). When, however, the parties are not *in pari delicto*, the more innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other under the illegal contract, although the unlawful act may have been fully accomplished. And it has been held that a debtor paying money to one creditor as the price of procuring a fraud on his other creditors before the creditors enter into a composition can recover back the money, the parties not being *in pari delicto* (*d*).

Money in hands of depositaries and stakeholders.—The Gaming Acts of 1845 and 1892 (*e*) were intended to prevent the recovery of the stake by the party who assumed to have won the wager, and not to prevent either of the parties depositing the money with a stakeholder from withdrawing his assent to the contract before the determination of the wager, and thus of his own free will preventing the result which the Acts were passed to prevent (*f*). So long as the money has not been actually paid over by the stakeholder or depositary to the winner,

(*s*) *Walker* v. *Chapman*, cited 2 Doug. 471, a.

(*t*) *Kearley* v. *Thomson*, 24 Q.B.D. 742 ; 59 L.J. Q.B. 288.

(*u*) *Palyart* v. *Leckie*, 6 M. & S. 293 ; *Wilson* v. *Ray*, 10 Ad. & E. 88 ; 8 L.J. Q.B. 224.

(*x*) *Thistlewood* v. *Cracroft*, 1 M. & S. 500 ; *Webb* v. *Bishop*, Bull. N.P. 132.

(*y*) *Norman* v. *Cole*, 3 Esp. 253.

(*z*) *Edgar* v. *Fowler*, 3 East, 225.

(*a*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309 ; 38 L.J. Q.B. 225.

(*b*) *Wilson* v. *Strugnell*, 7 Q.B.D. 548 ; 50 L.J. Q.B. 145 ; *Herman* v. *Jeuchner*, 15 Q.B.D. 561 ; 54 L.J. Q.B. 340 ; *Consolidated Exploration Co.* v. *Musgrave*, (1900) 1 Ch. 37 ; 69 L.J. Ch. 11. As to liability of a person to be indicted for entering into an agreement to indemnify bail, see *Rex* v. *Porter*, (1910) 1 K.B. 369 ; 79 L.J. K.B. 241.

(*c*) *Stokes* v. *Twitchen*, 2 Moore, 538.

(*d*) *Atkinson* v. *Denby*, 31 L.J. Ex. 362 ; 7 H. & N. 934 ; *Lenzberg's Policy*, *In re*, 7 Ch.D. 650 ; 47 L.J. Ch. 178.

(*e*) 8 & 9 Vict. c. 109 ; 55 Vict. c. 9.

(*f*) *Varney* v. *Hickman*, 5 C.B. 271 ; 17 L.J. C.P. 102 ; *ante*, p. 107 ; *Martin* v. *Hewson*, 24 L.J. Ex. 174 ; 10 Exch. 737.

it may be recovered back by the depositor (*g*), but not afterwards (*h*), unless previous notice has been given not to pay over the money (*i*). Where, however, a billiard player, who was an undischarged bankrupt, played and won a match for 100*l*. a side, the money being deposited with a stakeholder, it was held that in the absence of any claim by the unsuccessful player, the whole sum must be paid by the stakeholder to the bankrupt's trustee. The stakeholder had interpleaded, but the court expressed doubt whether he ought to have been allowed to do so, saying that persons who enter into wagering contracts ought not to have the assistance of the court to recover their winnings (*k*). Money deposited as "cover" against loss on gaming transactions, which has never been required or appropriated for that purpose, can be recovered back from the depositary (*l*).

SECTION II.

VOIDABLE CONTRACTS.

Avoidance of contracts on ground of fraud and unfair dealing.—If one man obtains another's money by reason of a promise to do some particular thing, and refuses to do it, but keeps the money, it is a fraud; and it is at the election of the party injured either to affirm the contract by bringing an action for the non-performance of it, or to disaffirm it, *ab initio*, by reason of the fraud, and bring an action for the money (*m*). If a person obtains goods under a contract of sale with the fraudulent intention of never paying for them, the contract is voidable as far as the vendor is concerned, and the goods may be recovered by the latter (*n*), provided he makes his election before the goods have been resold and transferred to a *bonâ fide* purchaser (*o*); but, if the vendor does not think fit to avail himself of the fraud, he may treat the contract as a subsisting con-

(*g*) *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398; *Cotton* v. *Thurland*, 5 T.R. 405; *Marryat* v. *Broderick*, 2 M. & W. 369; 6 L.J. Ex. 113; *Hampden* v. *Walsh*, 1 Q.B.D. 189; 45 L.J. Q.B. 238; *Diggle* v. *Higgs*, 2 Ex.D. 422; 46 L.J. Ex. 721; *Trimble* v. *Hill*, 5 App.Cas. 342; 49 L.J. P.C. 49.

(*h*) *Howson* v. *Hancock*, 8 T.R. 575.

(*i*) *Hastelow* v. *Jackson*, 8 B. & C. 221; 6 L.J. (O.S.) K.B. 318; *Bone* v. *Ekless*, 5 H. & N. 925; 29 L.J. Ex. 438.

(*k*) *Shoolbred* v. *Roberts*, (1900) 2 Q.B. 497; 69 L.J. Q.B. 800.

(*l*) *Cronmire, In re*, (1898) 2 Q.B. 383; 67 L.J. Q.B. 620.

(*m*) Mansfield, C.J., *Moses* v. *Macferlan*, 2 Burr. 1011.

(*n*) *Load* v. *Green*, 15 M. & W. 216; 15 L.J. Ex. 113. See *Eastgate, In re, Ward, Ex parte*, (1905) 1 K.B. 465; 74 L.J. K.B. 324; *Tilley* v. *Bowman*, (1910) 1 K.B. 745; 79 L.J. K.B. 547.

(*o*) *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 167. See *Babcock* v. *Lawson*, 5 Q.B.D. 284; 49 L.J. Q.B. 208.

tract, and sue for the price. Where a workman has agreed to do a certain job for a certain sum, upon the faith of a false and fraudulent representation by the employer, the workman may treat the special agreement as a nullity, and sue for the recovery of a fair and reasonable remuneration (*p*). But, if the workman has exercised, or ought to have exercised, his own judgment in the matter, and ought not to have depended upon the representation of the employer, he will not be permitted to avoid the contract on the ground of fraud (*q*). If a man is drawn into drink, in order that he may be thrown off his guard, and an unfair bargain be imposed upon him, the contract cannot be enforced (*r*). Where a fraudulent misrepresentation "*dans locum contractui*," or giving occasion to the contract, has been made by one who is no party to the contract, there the contract cannot be avoided; but the person who made the representation will be compelled to make good his assertion as far as this may be possible. But, where the false representation has been made by a person who is a party to the agreement, then the contract may be avoided by the party who has been deceived (*s*). But a contract cannot be avoided by reason of a representation concerning some matter altogether collateral to the contract. Where, therefore, an agreement was entered into for the letting of apartments on the strength of a representation by the hirer that he wanted them for a perfumer's business, and, as soon as the agreement was executed, and he had obtained possession, he used the premises as a common bawdy house, it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser (*t*). Where, however, a defendant, holding under a lease which was not assignable without the consent of the landlord, was desirous of selling his lease, and the plaintiff, in order to obtain an assignment of the lease to a friend, represented the latter to be a responsible person, and upon the faith of this representation obtained from the defendant an agreement to assign the lease to such friend, and also the landlord's written consent to the assignment, and the representation was false to the knowledge of the plaintiff at the time he made it, and therefore fraudulent, it was held that the representation went to

(*p*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199.

(*q*) *Baily* v. *Merrell*, 3 Bulstr. 94.

(*r*) *Johnson* v. *Medlicott*, 3 P. Wms. 130, *in notis*; *Pitt* v. *Smith*, 3 Campb. 33.

(*s*) *Pulsford* v. *Richards*, 17 Beav. 95; 22 L.J. Ch. 559; *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 188; Ld. Wensleydale, *Smith* v. *Kay*, 30 L.J. Ch. 45, 61; 7 H.L.C. 775.

(*t*) *Ferret* v. *Hill*, 15 C.B. 225; 23 L.J. C.P. 186.

the very essence of the contract, and entitled the defendant to rescind the agreement (*u*).

False representations.—In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But, when there has only been an innocent misrepresentation, it is no ground for a rescission, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration (*x*); or perhaps where it is a material inducement for entering into the contract (*y*). A representation is made fraudulently, when it is made knowingly, or without belief in its truth, or recklessly without caring whether it be true or false (*z*). Where there has been a fraudulent misrepresentation, or a wilful concealment of fact, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry (*a*). If a person makes a representation calculated to induce another to assume a particular liability, and the circumstances are afterwards, before liability assumed, materially altered, it is the duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances; and the person to whom the representation has been made will not be bound in equity by any contract entered into on the faith thereof, unless such a communication has been made (*b*). But, in the case of a sale, the maxim *caveat emptor* applies; and the vendor is not bound to inform the purchaser that he is labouring under a mistake in no way induced by the act of the vendor (*c*).

Fraudulent concealment.—Suppression of the truth, as much as misrepresentation of a material fact, will vitiate any contract the validity of which depends upon the truth and accuracy

(*u*) *Canham* v. *Barry*, 24 L.J. C.P. 100; 15 C.B. 603.

(*x*) *Kennedy* v. *Panama, &c. Royal Mail Co.*, 36 L.J. Q.B. 260; L.R. 2 Q.B. 580; *Mackay* v. *Dick*, 6 App.Cas. 251, 265, *per* Ld. Blackburn; *Seddon* v. *N. E. Salt Co.*, (1905) 1 Ch. 326; 74 L.J. Ch. 199.

(*y*) *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 188; *Fane* v. *Fane*, L.R. 20 Eq. 698; Pollock on Contracts, 520, 540.

(*z*) *Behn* v. *Burness*, 3 B. & S. 751; 32 L.J. Q.B. 204; *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64; 39 L.J. Ch. 849; *Derry* v. *Peek*, 14 App. Cas. 337; 58 L.J. Ch. 864; *Glasier* v. *Rolls*, 42 Ch.D. 436; 58 L.J. Ch. 325.

(*a*) *Venezuela Co.* v. *Kisch*, L.R. 2 H.L. 99; 36 L.J. Ch. 849; *Redgrave* v. *Hurd*, 20 Ch.D. 1; 51 L.J. Ch. 113. As to ambiguous statements, see *Smith* v. *Chadwick*, 9 App.Cas. 187; 51 L.J. Ch. 597.

(*b*) *Traill* v. *Baring*, 33 L.J. Ch. 521; 4 Giff. 485.

(*c*) *Smith* v. *Hughes*, L.R. 6 Q.B. 597; 40 L.J. Q.B. 221; but see *post*, p. 133. As to sale of goods, see 56 & 57 Vict. c. 71, s. 14, *post*, p. 565.

of the representation on which it was made (*d*). A seller who stands in a fiduciary relation to the purchaser is more strictly bound to disclose all facts within his knowledge (*e*).

Fraud by means of agents.—If a principal, desirous of selling or letting property, knows of a latent defect, and expressly authorises his agent to state that it does not exist, or to make any statement of similar import, or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he is dealing; in either of these cases the representation of the agent will be the representation of the principal, and, coupled with the principal's knowledge of its falsehood, will be a fraud. There is no implied undertaking on the part of the lessor of realty that it is fit for the purpose for which it is let, or that it is in any particular condition at the time of the demise; and it has accordingly been held that, although a principal who employs an agent to let a house knows that the house is encumbered with a nuisance of so serious a nature as to render it an unfit place of residence for any family of respectability, yet he is not guilty of any fraud in the eye of the law by neglecting to make known the existence of the nuisance to the agent, and through him to the parties who contract for the hiring of the house (*f*).

Fraudulent misrepresentations by directors of companies.—The same rules as to false representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No mis-statement or concealment of any material circumstances can be permitted in a prospectus issued to invite persons to become shareholders in a projected company (*g*). The public are in such a case entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess (*h*). But there must be a misrepresentation of some matter of fact, and not merely an incorrect statement of a matter of law (*i*). Mere exagge-

(*d*) *Prideaux* v. *Lonsdale*, 4 Giff. 159; 32 L.J. Ch. 317; *Evans* v. *Edmonds*, 22 L.J. C.P. 211, 214; 13 C.B. 777.

(*e*) *Coaks* v. *Boswell*, 11 App. Cas. 232; 55 L.J. Ch. 761.

(*f*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297; see *post*, p. 672. As to liability of principal for acts of his agent, see Addison on Torts, 843 (ed. 8).

(*g*) With regard to specific requirements as to particulars of prospectus, see 8 Edw. 7, c. 69, s. 81. See also Addison on Torts, pp. 832—835 (ed. 8).

(*h*) *Venezuela Ry.* v. *Kisch*, L.R. 2 H.L. 99; 36 L.J. Ch. 849; *Ogilvie* v. *Currie*, 37 L.J. Ch. 541.

(*i*) *Rashdall* v. *Ford*, L.R. 2 Eq. 750; 35 L.J. Ch. 769; *Beattie* v. *Ebury* (*Lord*), L.R. 7 H.L. 102; 44 L.J. Ch. 30; see *Eaglesfield* v. *Londonderry* (*Marquis*), 4 Ch.D. 693; *West London Commercial*

rated views of the advantages of the company, not containing any material mis-statement of fact, are not sufficient to avoid the contract (*k*). In an action based on sect. 38 of the Companies Act, 1867—now sect. 81 (1) (k) of the Companies (Consolidation Act), 1908(*l*)—against a director, promoter or officer of a company for non-disclosure of a contract in a prospectus, the plaintiff must prove that if he had known of the contract he would not have taken shares; that he has suffered damage from such non-disclosure; and that the defendant knew of the existence of the undisclosed contract. The defendant may also be protected by a waiver clause which is honest and above suspicion (*m*). Directors will not be liable for non-disclosure of contracts in a prospectus for which they would otherwise have been liable if they show that it was issued without their authority. In such a case they cannot be made liable on the ground that they afterwards ratified and adopted the prospectus or even derived some advantage from it (*n*). Where an applicant for shares agrees to be bound by the articles and memorandum of association, he must be taken to have notice of their contents, but not of documents referred to in them and misrepresented by the prospectus (*o*). Where a person believes that he has been misled by representations which are false or deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay (*p*); but it is not necessary for him expressly to repudiate the contract (*q*). But the contract between a shareholder who has been deceived by a fraudulent prospectus and the company is voidable only, and not void, and can only be avoided subject to the rights of creditors where there is a winding-up order(*r*), or a voluntary winding-up(*s*).

But, where persons have been induced by fraud to take shares in a company, and have, within a reasonable time after discovery of the fraud, repudiated the shares, and have taken proceedings

Bank v. *Kitson*, 13 Q.B.D. 360; 53 L.J. Q.B. 345.

(*k*) *Denton* v. *Macneil*, L.R. 2 Eq. 352.

(*l*) 8 Edw. 7, c. 69.

(*m*) *Calthorpe* v. *Trechmann*; *Macleay* v. *Tait*, (1906) A.C. 24; 75 L.J. Ch. 90; *Nash* v. *Calthorpe*, (1905) 2 Ch. 237; 74 L.J. Ch. 493; *Brookes* v. *Hansen*, (1906) 2 Ch. 129; 75 L.J. Ch. 450; *Shepheard* v. *Bray*, (1906) 2 Ch. 235; 75 L.J. Ch. 633; *Broome* v. *Speak*, (1903) 1 Ch. 586; 72 L.J. Ch. 251; *Wimbledon Olympia, Ltd., In re*, (1910) 1 Ch. 630; 79 L.J. Ch. 481.

(*n*) *Hoole* v. *Speak*, (1904) 2 Ch. 732; 73 L.J. Ch. 719.

(*o*) *Kisch* v. *Venezuela Ry.*, 34 L.J. Ch. 545.

(*p*) *Venezuela Ry.* v. *Kisch*, L.R. 2 H.L. 99; 36 L.J. Ch. 849; *Ashley's case*, L.R. 9 Eq. 263; 39 L.J. Ch. 354; *M'Neil's case*, L.R. 10 Eq. 503; 39 L.J. Ch. 822.

(*q*) *Aarons Reefs* v. *Twiss*, (1896) A.C. 273; 65 L.J. P.C. 54.

(*r*) *Oakes* v. *Turquand*, 36 L.J. Ch. 949; L.R. 2 H.L. 325; *Kent* v. *Freehold Land Co.*, L.R. 3 Ch. 493; 37 L.J. Ch. 653; *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317.

(*s*) *Stone* v. *City Bank*, 3 C.P.D. 282; 47 L.J. C.P. 681; *Scottish Petroleum Co., In re*, 23 Ch.D. 413.

to have their names removed from the list of shareholders, they are entitled to have their names removed, although a decree for that purpose may not have actually been obtained at the date of the winding-up order (*t*).

The general rule of law that a person purchasing goods in consequence of a fraudulent representation may retain the goods, and still have his action for damages, does not apply to shares in a joint stock company; for a shareholder, becoming a partner, can bring no action for damages while he remains in the company. His only remedy is *restitutio in integrum*, and rescission of the contract; and, if that is impossible by the winding-up of the company, or for any other reason, his action for damages cannot be maintained (*u*). A completed contract for the sale of shares in the business of a company will not, in the absence of fraud, be set aside on the ground of misrepresentation (*x*).

Fraudulent misreading of a deed.—If a man who cannot read executes a deed which is falsely read, or the sense declared different from the truth, the deed will not bind him (*y*). "It is at the peril of the party to whom the writing is made that the true effect and purport of the writing be declared if it be required; but, if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning" (*z*).

So, where the plaintiff was induced to sign a receipt for compensation for injuries in a railway collision by false representations, it was held that the document did not operate as a valid release (*a*).

The effect of fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded (*b*); and the contract continues valid until the party defrauded has determined his election by avoiding it (*c*). A party, however, who alleges fraud cannot avoid one part of the contract and affirm the other unless the parts are so sever-

(*t*) *Pawle's case*, L.R. 4 Ch. 497; 38 L.J. Ch. 412; *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64; 39 L.J. Ch. 849.

(*u*) *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317; *Addlestone Linoleum Co., In re*, 37 Ch.D. 191; 57 L.J. Ch. 249.

(*x*) *Seddon* v. *North Eastern Salt Co.*, (1905) 1 Ch. 326; 74 L.J. Ch. 199.

(*y*) 2 Rolle's Abr. 28, Faits, S.; *Simons* v. *G. W. Ry.*, 2 C.B. N.S. 620; 26 L.J. C.P. 25; Com. Dig. Fait (B. 2); *Hirschfield* v. *L. B. & S. C. Ry.*, 2 Q.B.D. 1; 46 L.J. Q.B. 94; *Carlisle, &c. Banking Co.* v. *Bragg*, (1911) 1 K.B. 489.

(*z*) *Thoroughgood's case*, 2 Co. 9, a, b; *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224; *Howatson* v. *Webb*, (1908) 1 Ch. 1; 77 L.J. Ch. 32. See 45 & 46 Vict. c. 61, s. 27, *post*, p. 1257.

(*a*) *Hirschfield* v. *L. B. & S. C. Ry.*, 2 Q.B.D. 1; 46 L.J. Q.B. 94; *Edwards* v. *Brown*, 1 C. & J. 312.

(*b*) *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64; 39 L.J. Ch. 849.

(*c*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 34; 41 L.J. Ex. 17; *Gordon* v. *Street*, (1899) 2 Q.B. 641; 69 L.J. Q.B. 45.

able as to form independent contracts (*d*). In the case of a sale or purchase obtained by fraud, the property in the thing sold passes by the contract until the contract is avoided, so that an innocent party buying from a fraudulent purchaser may acquire an indisputable title to the subject-matter of the contract, though the contract is voidable as between the original parties. All mesne dispositions of the property to persons not cognizant of the fraud are valid (*e*).

Determination of power of avoidance.—A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for, if, after the discovery of the fraud, he treats the contract as a subsisting contract, or, if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected (*f*), he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit (*g*). And, whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his election may be manifested by acts as well as by words, and when once made is final, and cannot be retracted (*h*). Moreover, lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and, when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But the mere fact that one who is a party to the fraud has commenced an action before the rescission, is not such a change of position as will preclude the defrauded party from exercising his election to rescind; nor is it necessary that there should be a declaration of his intention to rescind prior to the plea (*i*). The discovery of a new incident in the fraud, which only strengthens the evidence of the original fraud, cannot revive a right of repudiation which has once been waived (*k*).

. The right of repudiation of a contract on the ground of fraud does not prevail where a man has by his own act put it out of his power to place the parties in the same position as they were

(*d*) *United Shoe Manufacturing Co.* v. *Brunet*, (1909) A.C. 330; 78 L.J. P.C. 101.

(*e*) *White* v. *Garden*, 10 C.B. 927; 20 L.J. C.P. 166; *Stevenson* v. *Newnham*, 13 C.B. 302; 22 L.J. C.P. 110; *Ward, Ex parte*, 20 Ch.D. 356; 51 L.J. Ch. 752.

(*f*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 35; 41 L.J. Ex. 17; *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197, 204; 42 L.J. Ex. 115.

(*g*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199; *Read* v. *Hutchinson*, 3 Campb. 352.

(*h*) *Ward* v. *Day*, 33 L.J. Q.B. 13; 5 B. & S. 359.

(*i*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 35; 41 L.J. Ex. 17; *Scarf* v. *Jardine*, 7 App.Cas. 345; 51 L.J. Q.B. 613.

(*k*) *Campbell* v. *Fleming*, 1 Ad. & E. 40; 3 L.J. K.B. 136; *Law* v. *Law*, (1905) 1 Ch. 140; 74 L.J. Ch. 169.

in at the time the contract was made. A purchaser who has obtained possession of property under a contract of sale cannot rescind the contract on the ground of fraud, and bring an action for the recovery of the purchase-money, unless he can restore the subject-matter of the sale to the vendor (*l*). And, if a voidable contract has been acted upon by a party who might have avoided it, and who has refrained from doing so in the hope that it may turn out to his advantage, such party cannot then, after abiding the event, or dealing with the subject-matter of the contract, elect to annul the transaction (*m*). But where a person purchased a business which by its own inherent vice became worthless, he was held entitled to a rescission of the contract and re-payment (*n*). A person who has applied for shares in a company which have been duly allotted to him, seeking to have his name removed from the register of shareholders, on the ground of a substantial variance between the prospectus upon the faith of which the shares were applied for and the memorandum of association, must show that he used due diligence in ascertaining the contents of the memorandum, and that he repudiated the shares at the earliest practicable moment. If the memorandum and articles of association are in existence at the time when he applies for the shares, and if he agrees to take his shares on the footing of the memorandum and articles of association, he must be held bound to look at them before he applies for shares. If they are not in existence at the time, then at the very latest when he receives his allotment of shares he ought to satisfy himself that there is nothing in them to which he desires to make any objection (*o*).

Constructive fraud.—"Trustees, agents, commissioners, and assignees of bankrupts, solicitors to commissions of bankruptcy, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of the state of his property," are incapable of entering into any contract for the purchase of such property for themselves, except under certain restrictions and limitations (*p*); and a purchase

(*l*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 337; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; 36 L.J. Ex. 147; *Clarke* v. *Dickson*, E. B. & E. 155; 27 L.J. Q.B. 223; *Mixer, Ex parte*, 4 De G. & J. 575; 28 L.J. Ch. 879; *Sheffield Nickel Co.* v. *Unwin*, 2 Q.B.D. 214; 46 L.J. Q.B. 299; *Urquhart* v. *Macpherson*, 3 App.Cas. 831; *Tennent* v. *City of Glasgow Bank*, 4 App.Cas. 615; see *post*, Contract of Sale, 474.

(*m*) *Ormes* v. *Beadel*, 30 L.J. Ch. 4; *Campbell* v. *Fleming*, 1 Ad. & E. 40; 3 L.J. K.B. 136.

(*n*) *Adam* v. *Newbiggin*, 13 App.Cas. 308; 57 L.J. Ch. 1066.

(*o*) *Peel's case*, L.R. 2 Ch. 674; 36 L.J. Ch. 757.

(*p*) *York Buildings Co.* v. *Mackenzie*, 8 Bro. P.C. 93; *Tate* v. *Williamson*, L.R. 2 Ch. 55; *Luff* v. *Lord*, 34 Beav. 220; *Summers* v. *Griffiths*, 35 Beav. 27;

made under such circumstances will be set aside even after it has been completed, and a reconveyance will be directed (*q*). A trustee or an agent for sale cannot, under ordinary circumstances, become himself the purchaser of the property confided to him to sell (*r*). A solicitor cannot buy an estate of his client, unless he deals with him "at arm's length" through the intervention of another solicitor, from whom no necessary information is withheld, and who properly discharges his duty (*s*); or unless he shows to demonstration that no industry on his part could have got a better bargain (*t*); nor can an arbitrator purchase from the parties to the reference, nor a guardian from his ward, nor a trustee from his *cestui que trust*, unless the surrounding circumstances prove beyond all doubt that the transaction was perfectly fair and advantageous for the client, *cestui que trust*, or other parties affected by it (*u*). And, although a solicitor or agent can show that he is entitled to purchase, yet, if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, such purchase cannot stand (*x*). An agent for sale, who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest, and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiring (*y*). If the agent does purchase, the agency is dissolved; he comes forth as a principal, and can claim no commission or remuneration as agent (*z*).

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, and if it renders it impossible for him to have the full benefit of the contract, entitles him, if he applies in time, to have it set aside (*a*). It is immaterial whether the mind of the agent was

Bevan v. *Webb*, (1905) 1 Ch. 620; 74 L.J. Ch. 300.

(*q*) *Clark* v. *Malpas*, 31 Beav. 80; 31 L.J. Ch. 696; *Gresley* v. *Mousley*, 31 L.J. Ch. 537; 3 De G. F. & J. 433; *Douglas* v. *Culverwell*, 31 L.J. Ch. 543; 3 Giff. 251; *Clanricarde* v. *Henning*, 30 L.J. Ch. 865; 30 Beav. 175; *Hannah* v. *Hodgson*, 30 L.J. Ch. 738; 30 Beav. 19.

(*r*) *Crowe* v. *Ballard*, 3 Bro. Ch.C. 119; *Lacey*, *Ex parte*, 6 Ves. 626; see *Hickley* v. *Hickley*, 2 Ch.D. 190; 45 L.J. Ch. 401.

(*s*) *Gibbs* v. *Daniel*, 4 Giff. 1; *Tomson* v. *Judge*, 3 Drew. 306; 24 L.J. Ch. 785; *Simpson* v. *Lamb*, 7 E. & B. 84; 26 L.J. Q.B. 121; *Davis* v. *Freethy*, 24 Q.B.D. 519; 59 L.J. Q.B. 318; *Wright* v. *Carter*, (1903) 1 Ch. 27; 72 L.J. Ch. 138.

(*t*) *Cutts* v. *Salmon*, 21 L.J. Ch. 750; 4 De G. & S. 125; *Champion* v. *Rigby*, 1 Russ. & Myl. 539; *Casborne* v. *Barsham*, 2 Beav. 76; *Hatch* v. *Hatch*, 9 Ves. 296; *Wright* v. *Proud*, 13 Ves. 138; *Gibson* v. *Jeyes*, 6 Ves. 266; *Gibbs* v. *Daniel*, *supra*.

(*u*) *Cane* v. *Allen* (*Lord*), 2 Dow. 289; *Dawson* v. *Massey*, 1 Ball. & B. 219; *Hardwicke* (*Lord*) v. *Vernon*, 4 Ves. 411; 14 Ves. 504.

(*x*) *Lewis* v. *Hillman*, 3 H.L.C. 607, 630.

(*y*) *Dunne* v. *English*, L.R. 18 Eq. 524.

(*z*) *Salomons* v. *Pender*, 34 L.J. Ex. 95; 3 H. & C. 639.

(*a*) *Panama and South Pacific Telegraph Co.* v. *India Rubber Co.*, L.R. 10 Ch. 515.

biassed by such dealing or not (*b*). So also trustees lending themselves to a fraud by their *cestui que trusi* and receiving money from the defrauded party cannot escape the liability which attaches alike to them and to their *cestui que trust*, and must refund money paid to them in consideration of their fraud (*c*). Whenever there exists such a confidence as enables one person to exert influence over another, the court will not allow any transactions between the parties to stand, unless there has been the fullest communication of every particular known to the one who seeks to establish a contract (*d*).

Duress.—Any agreement made under improper pressure is voidable. Thus, where B. discounted bills to which he had forged his father's signature, and the holders of the forgeries, working on the fears of the father for his son's safety, but without holding out any direct threat, or making any distinct promise not to prosecute, obtained from the father equitable security for the amount of the bills, it was held that the security was void (*e*). If a man pays money or gives securities to redeem his goods from the custody of the law, that is not a case of duress; nor can he recover back his money or defend himself from proceedings taken to enforce the securities which he has paid or given under legal compulsion (*f*). If a person, having been constrained by duress to make a contract, afterwards voluntarily acts upon it, he thereby affirms its validity and loses the right of avoiding it (*g*). The court has set aside a guarantee given by a wife to her husband's creditor, such guarantee being obtained by the influence of the husband and in the absence of independent advice or any explanation from the husband as to the nature and contents of the document (*h*).

Mistake.—Where one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, and the terms have not been reduced into writing, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other (*i*). Where

(*b*) *Shipway* v. *Broadwood*, (1899) 1 Q.B. 369; 68 L.J. Q.B. 360.

(*c*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch.D. 394; 45 L.J. Ch. 465.

(*d*) *Tate* v. *Williamson*, L.R. 2 Ch. 55; *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L.J. Ch. 656.

(*e*) *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717; see *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merioneth Building Society*, (1892) 1 Ch. 173; 61 L.J. Ch. 138; *Barnes* v. *Richards*, 71 L.J. K.B. 341.

(*f*) *Liverpool Marine Credit Co.* v. *Hunter*, L.R. 3 Ch. 487; 37 L.J. Ch. 386.

(*g*) *Ormes* v. *Beadel*, 2 De G. F. & J. 333; 30 L.J. Ch. 1.

(*h*) *Chaplin & Co.* v. *Brammall*, (1908) 1 K.B. 233; 77 L.J. K.B. 366; *Turnbull & Co.* v. *Duval*, (1902) A.C. 429; 71 L.J. P.C. 84; *Bank of Montreal* v. *Stuart*, (1911) A.C. 120.

(*i*) *Scott* v. *Littledale*, 8 E. & B. 815; 27 L.J. Q.B. 201.

at a sale by auction of landed property, the purchaser bids for one lot in mistake for another and the date of sale by inadvertence is wrongly stated in the conditions and form of contract, it would seem that there is no *consensus ad idem*, and therefore no contract (*k*). And even if the terms of the contract have been reduced into writing, and there is a latent ambiguity, and the parol evidence adduced to explain it shows that the parties were not of one mind, there is no contract (*l*). Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract (*m*); but where the person sought to be bound would have been equally willing to make the same contract with any other person, the contract is good (*n*).

Rectification.—Where the terms of the written instrument do not correctly represent the mind of the parties, the court will rectify it, provided the mistake is one of fact (*o*) and common to both parties (*p*). And where a contract has been entered into upon the faith of a state of things which does not exist (*q*), or where one of the parties has made a mistake to which the other has by his acts contributed, even unintentionally, the contract will be rescinded (*r*), provided the court can replace the parties in their original condition (*s*), or specific performance will not be enforced (*t*). Where in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interfering to grant relief; and the court will not decline to do so merely because circumstances may have rendered it difficult to restore the parties exactly to their original condition: and, although, where the mistake arises from ignorance of a well-known rule of law, the court will not interfere, yet, where it arises upon a construction of a document of doubtful meaning, the doctrine of *ignorantia juris neminem excusat* will not apply, and the court will give relief (*u*). So also the court will set aside a contract where there has been

(*k*) *Van Praagh* v. *Everidge*, (1903) 1 Ch. 434; 72 L.J. Ch. 260.

(*l*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L.J. Ex. 160.

(*m*) *Gordon* v. *Street*, (1899) 2 Q.B. 641; 69 L.J. Q.B. 45.

(*n*) *Smith* v. *Wheatcroft*, 9 Ch.D. 223; 47 L.J. Ch. 745; *Hardman* v. *Booth*, 1 H. & C. 803; 32 L.J. Ex. 105.

(*o*) *Powell* v. *Smith*, L.R. 14 Eq. 85; 41 L.J. Ch. 734; *Mid. G. W. Ry.* v. *Johnson*, 6 H.L.C. 798.

(*p*) *Harris* v. *Pepperell*, L.R. 5 Eq. 1; *Paget* v. *Marshall*, 28 Ch.D. 255; 54 L.J. Ch. 575; *Fowler* v. *Fowler*, 4 De G. & J. 250; *Cooper* v. *Phibbs*, L.R. 2 H.L. 149.

(*q*) *Emmerson's case*, L.R. 1 Ch. 433; 36 L.J. Ch. 177.

(*r*) *Torrance* v. *Bolton*, L.R. 8 Ch. 118; 42 L.J. Ch. 177; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534; 66 L.J. Ch. 684.

(*s*) *Emmerson's case*, *supra*.

(*t*) *Bashcomb* v. *Beckwith*, L.R. 8 Eq. 100; 38 L.J. Ch. 536.

(*u*) *Beauchamp* (*Earl*) v. *Winn*, L.R. 6 H.L. 223, 224.

a common mistake without fraud, even where the contract has been completed (*x*). Where there has been no misrepresentation of fact, but a mutual mistake in law, the court will not make one party responsible (*y*). Where there is a mistake upon a sale of land in the acreage, and not in the essence or corpus with which the contract deals, the court will decree performance (*z*). But the court will not decree specific performance of a contract where the contract was made by the defendant under a *bonâ fide* mistake and there would be a manifest injustice in holding him to his bargain (*a*). In all cases, however, the special circumstances are to be considered (*b*). Sometimes the court has decreed cancellation of a contract with the option to the defendant to accept rectification (*c*).

Where the mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence (*d*). But the fact that one party has put an erroneous construction on the contract, and has thought that it included more than it did actually include, does not avoid the contract or preclude him from obtaining specific performance according to what is admitted by the other party to be the true meaning of the contract (*e*). The burden of proving the facts which will warrant the court in rectifying the contract is cast upon the person desiring rectification (*f*). After judgment and money paid, an action for rectification cannot be had (*g*). "The rectification or setting aside or cancellation of deeds or other written instruments" is, by sect. 34 of the Judicature Act, 1873, reserved to the Chancery Division; but the King's Bench Division can also rectify contracts under sect. 24, sub-sect. 1 (*h*). Upon parol evidence of mistake the court may rectify a contract and decree specific performance thereof so rectified, where the Statute of Frauds is not a bar (*i*).

(*x*) *Scott* v. *Coulson*, (1903) 2 Ch. 249; 72 L.J. Ch. 600; *Jones* v. *Clifford*, 3 Ch.D. 779; 45 L.J. Ch. 809.

(*y*) *Eaglesfield* v. *Londonderry* (*Marquis*), 4 Ch.D. 693.

(*z*) *McKenzie* v. *Hesketh*, 7 Ch.D. 675; 47 L.J. Ch. 231.

(*a*) *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L.J. Ch. 652.

(*b*) *Tamplin* v. *James*, 15 Ch.D. 215.

(*c*) *Paget* v. *Marshall*, 28 Ch.D. 255; 54 L.J. Ch. 575; *May* v. *Platt*, (1900) 1 Ch. 616; 69 L.J. Ch. 357.

(*d*) *Broughton* v. *Hutt*, 3 De G. & J. 501; 28 L.J. Ch. 167; *Bentley* v. *Mackay*, 31 Beav. 143; 31 L.J. Ch. 697; see *Phillipson* v. *Kerry*, 32 Beav. 628.

(*e*) *Preston* v. *Luck*, 27 Ch.D. 497; *Prison Commissioners* v. *Middlesex*, 9 Q.B.D. 506; 51 L.J. Q.B. 433.

(*f*) *Tucker* v. *Bennett*, 38 Ch.D. 1; 57 L.J. Ch. 507.

(*g*) *Caird* v. *Moss*, 33 Ch.D. 22; 55 L.J. Ch. 854; see *Att.-Gen.* v. *Tomline*, 7 Ch.D. 388; 44 L.J. Ch. 473.

(*h*) *Mostyn* v. *West Mostyn Coal Co.*, 1 C.P.D. 145; 45 L.J. C.P. 401; *Storey* v. *Waddle*, 4 Q.B.D. 289, where rectification by inserting a right of way into a deed was sought by counter-claim. As to power of County Courts, see 51 & 52 Vict. c. 43, s. 67.

(*i*) *Olley* v. *Fisher*, 34 Ch.D. 367; 56 L.J. Ch. 208; but see *May* v. *Platt*, (1900) 1 Ch. 616; 69 L.J. Ch. 357.

Failure of consideration.—When a contract is simply null and void, and not tainted with illegality, money paid by one of the contracting parties to the other may, in general, be recovered back on the ground of a failure of consideration. If a contract is made for the sale and purchase of railway scrip or shares, foreign state bonds, railway debentures, or other securities, and the scrip, shares, or bonds turn out to be forgeries, so that the purchaser has never obtained that which he agreed to buy and the vendor to sell, he is entitled to maintain an action for the recovery of his purchase-money, on the ground that there has been a total failure of consideration (*k*).

If a thing does not answer the description of that for which it is sold, the buyer is not bound to take it; and, if he has paid for it, he may recover back the money as upon a failure of consideration (*l*). But the purchaser cannot recover back the price where he has got what he bargained for, although the subject-matter of the sale may subsequently turn out to be a thing of no value (*m*).

If a man goes into the money market with a bill or note, and gets it discounted without putting his own name on the back of it, he is not bound to refund the money he receives if the bill is dishonoured; but, if it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained (*n*). But the holder of a bill is entitled to know, on the day it becomes due, whether it is an honoured or dishonoured bill; and, therefore, notice of a forgery must be given to him on the very day that the payment is made to him, so as to enable him to send notice of the dishonour of the bill to the prior parties on that day. If, therefore, he receives the money, and is permitted to retain it during the whole of that day without any such notice having been given him, the parties who paid him the money cannot recover it back; for otherwise, they would deprive the holder of his right to proceed against the other parties to the bill (*o*).

The acceptor of a bill of exchange is bound to know the handwriting of the drawer, and cannot recover money which

(*k*) *Young* v. *Cole*, 3 Bing. N.C. 730; 6 L.J. C.P. 201; *Gompertz* v. *Bartlett*, 23 L.J. Q.B. 65; 2 E. & B. 849; *Kempson* v. *Saunders*, 12 Moo. 49; 5 L.J. (O.S.) C.P. 6; *Westropp* v. *Solomon*, 8 C.B. 345; 19 L.J. C.P. 1.

(*l*) Blackburn, J., *Azemar* v. *Casella*, L.R. 2 C.P. 678; 36 L.J. C.P. 263. See also 56 & 57 Vict. c. 71, s. 13.

(*m*) *Hall* v. *Conder*, 26 L.J. C.P. 138; 2 C.B. N.S. 22; *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*n*) *Jones* v. *Ryde*, 5 Taunt. 494; *Wilkinson* v. *Johnston*, 3 B. & C. 428; 3 L.J. (O.S.) K.B. 58; *Rogers* v. *Langford*, 1 Cr. & M. 637; *Gurney* v. *Womersley*, 4 E. & B. 133; 24 L.J. Q.B. 46.

(*o*) *Cocks* v. *Masterman*, 9 B. & C. 908; 8 L.J. (O.S.) K.B. 77; *London and River Plate Bank* v. *Bank of Liverpool*, (1896) 1 Q.B. 7; 65 L.J. Q.B. 80. See, now, sect. 49 (12) of 45 & 46 Vict. c. 61, *post*, p. 1274.

he has paid upon a forged bill accepted by him, and which has gone into the market accredited with his genuine signature (*p*). It is as much the duty also of bankers to know the handwriting of their customers who draw on them, as it is of an acceptor of a bill to know the drawer's handwriting; and, therefore, if a bill purporting to be drawn by a customer of the bankers' is made payable at the bank, and the bankers take up and pay the bill to a *bonâ fide* indorsee for value, who presents it to them for payment, they cannot recover the amount from such indorsee (*q*). But when a banker merely discounts a bill it is otherwise (*r*). If a party whose signature to a bill of exchange has been forged pays the bill, supposing the signature to be genuine, and so delays the defendant of his remedy against the other parties to the bill, he cannot recover back the money he has paid (*s*).

Partial failure of consideration.—The general rule of law is that, when a contract has been in part performed, no part of the money paid under such contract can be recovered back (*t*), unless the consideration is clearly severable (*u*). Where money has been paid as a premium with an apprentice, it is not apportionable, and no part can be recovered back on the ground of failure of consideration by the death of the master (*x*). Where a person makes a deposit on an illegal consideration to which he is himself a party, he is precluded from obtaining the assistance of the law to recover it back (*y*).

Irregular allotment of shares.—An allotment of shares made by a company to an applicant in contravention of the provisions of sect. 85 of the Companies (Consolidation) Act, 1908 (*z*), is voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and is so voidable notwithstanding that the company is in course of being wound up (*a*).

(*p*) *Price* v. *Neal*, 3 Burr. 1357. See sect. 54 of 45 & 46 Vict. c. 61, *post*, p. 1264.

(*q*) *Smith* v. *Mercer*, 6 Taunt. 81. See *Vagliano* v. *Bank of England*, *post*, p. 1244.

(*r*) *Fuller* v. *Smith*, 1 C. & P. 198.

(*s*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 295; 25 L.J. C.P. 311.

(*t*) *Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Exch. 783; 18 L.J. Ex. 187; *Nicholson* v. *Ricketts*, 29 L.J. Q.B. 55.

(*u*) *Astle* v. *Wright*, 25 L.J. Ch. 864; 23 Beav. 77.

(*x*) *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Ferns* v. *Carr*, 28 Ch.D. 409; 54 L.J. Ch. 478.

(*y*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309.

(*z*) 8 Edw. 7, c. 69, s. 85.

(*a*) 8 Edw. 7, c. 69, s. 86; and see *Finance & Issue, Ltd.* v. *Canadian Produce Corporation*, (1905) 1 Ch. 37; 73 L.J. Ch. 751.

CHAPTER IV.

THE DISCHARGE OF CONTRACTS.

SECTION I.

DISCHARGE BY PERFORMANCE.

Mode of performance.—A party who has contracted to do an act may accomplish it in any manner that is most convenient to himself (*a*); but the performance must be a substantial, *bonâ fide* performance, in accordance with the true meaning of the parties, and not a mere compliance with the letter of the engagement, in violation of the spirit of the compact. If a man enters into an engagement to deliver up a bond or lease, he does not fulfil his contract by returning it cancelled, or with the seal torn off (*b*). If payment is to be made, it must be a true and effectual payment to the right party. If something is to be done according to the direction of a third party, the party bound to do the act must procure the necessary direction. If the concurrence of a stranger is essential, he must procure such concurrence. If he is to deliver corn on board a ship at such a port on such a day, he must go in quest of the ship, and must not wait for notice that the ship is ready. If he is bound to repair a house on timber being found him by the landlord, he must go and seek the timber and say what he wants, and not wait for the timber to come to him (*c*). In every case, the extent of the duty undertaken by the contractor is a question of fact, to be derived from the terms of the contract, express or implied (*d*). When the contract is silent as to the mode of performance, the usage of the place where it is made is deemed to regulate the performance (*e*), and a payment good by the law of the country where it is made is good here (*f*).

(*a*) *Reade* v. *Meniaeff*, 7 C.B. 162.

(*b*) *Richardson* v. *Barnes*, 4 Exch. 128; 18 L.J. Ex. 468.

(*c*) Com. Dig. CONDITION, G. L.

(*d*) *Commonwealth Portland Cement Co.* v. *Weber Lohmann & Co.*, (1905) A.C. 66; 74 L.J. P.C. 25. See also *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, (1909) A.C. 293; 78 L.J. P.C. 115.

(*e*) *Greaves* v. *Legg*, 11 Exch. 645; 26 L.J. Ex. 316.

(*f*) *Ralli* v. *Dennistoun*, 6 Exch. 483; 20 L.J. Ex. 278.

If the condition of a bond be to deliver twenty quarters of wheat or twenty loads of timber, the obligor is not bound to seek the obligee with it, but the obligor, before the day, must go to the obligee, and know where he will appoint to receive it, and there it must be delivered; and "so note a diversity between money and things ponderous or of great weight" (*g*). If in an agreement for the sale and purchase of realty the vendor engages that certain named parties shall join in a conveyance, this sometimes amounts to a warranty that they are in a position to join with effect (*h*). If a lessee covenants to insure in the joint names of himself and the lessor, and insures in the name of the lessor only, the covenant is nevertheless well performed; but, if he has covenanted to insure in the sole name of the lessor, and then effects an insurance in the joint names of himself and the lessor, there is no performance of the covenant (*i*). A covenant to keep a ship insured is broken if the ship is actually uninsured, although for three days only, and although the usual slip for the insurance has been delivered by the underwriters, and a policy is afterwards executed in accordance therewith (*k*). A covenant not to sell farmyard manure off the premises is broken by selling any off, although the covenantor brings back more manure, and of better quality, than that carried off (*l*). A contract to deliver coals of a certain description is not performed by delivering some of that description and some of an inferior quality mixed together (*m*).

Cumulative and alternative stipulations.—If a party engages to do two things, the one is cumulative upon the other, and he must perform both the things agreed to be done; but, if the contract is in the alternative for the performance of one or the other of two different acts, the liability is discharged by the performance of one of the acts (*n*). Under an agreement to perform one of two things, the right of election is in the party who is to do either one or other of the two things. "If a man granteth a rent of 20*s*. or a robe to one and to his heirs, the grantor shall have the election; for he is the first agent by payment of the one or delivery of the other. So, if a man maketh a lease rendering a rent or a robe, the lessee shall have

(*g*) Co. Litt. 210, b; Bac. Abr. AGREEMENTS, B. 3.

(*h*) *Mosley* v. *Hide*, 17 Q.B. 91; 20 L.J. Q.B. 539.

(*i*) *Harens* v. *Middleton*, 10 Hare, 641; 22 L.J. Ch. 746.

(*k*) *Parry* v. *Great Ship Co.*, 4 B. & S. 556; 33 L.J. Q.B. 41.

(*l*) *Leigh* v. *Lillie*, 6 H. & N. 165; 30 L.J. Ex. 25.

(*m*) *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176; *Josling* v. *Kingsford*, 13 C.B. N.S. 447; 32 L.J. C.P. 94; *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, (1909) A.C. 293; 78 L.J. P.C. 115. See also Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, ss. 13, 30.

(*n*) *G. N. Ry.* v. *Kennedy*, 4 Exch. 417, 424; 19 L.J. Ex. 11.

the election. And if one grant to another twenty loads of hazel, or twenty loads of maple, to be taken in his wood, there the grantee shall have election, for he ought to do the first act, viz., to fell and take the same" (*o*). If a vendor of corn agrees to deliver to the purchaser 50 or 100 quarters of corn by a day named, at so much a quarter, and the purchaser agrees to pay the price on the corn being delivered to him, the vendor will have to do the first act, and will have his election to deliver, and demand payment for, either the 50 or the 100 quarters (*p*). If one party has bound himself to do one of two things at the choice of the other, he must, in pleading the performance of his engagement, show that he was ready and offered to do either of them. Therefore, if he is to deliver 20*l.* or ten kine at the option of the other party, he does not perform his contract by tendering the kine without the money (*q*). Where a party has his election of doing one of two things, and makes his election, he is bound by it (*r*). Thus, where a man has got the right to elect whether he will avail himself of a forfeiture and avoid a lease or other contract, and once make his election, he makes it for ever (*s*). So, if a purchaser, on the delivery of goods, has a right to elect whether he will pay by bill or cash, and fails to give the bill, he will be deemed to have made his election to pay cash, and cannot afterwards revoke it (*t*).

Time of performance.—Where no time is fixed for the performance of the contract, it must be performed within a reasonable time, according to the circumstances (*u*). In the case of a contract for the sale of goods, the question, what is a reasonable time, is one of fact (*x*). A contract to do a particular thing "directly," or "as soon as possible," or "forthwith," does not mean that it is to be done *instanter;* but there must be no delay in performance; and such a contract requires a much more speedy fulfilment than a contract to do a thing within a reasonable time (*y*). When a party covenants to pay money

(*o*) Co. Litt. 145, a; *Layton* v. *Pearce*, 1 Doug. 16; *Dann* v. *Spurrier*, 3 Bos. & P. 399; *Price* v. *Nixon*, 5 Taunt. 338; *Reed* v. *Kilburn Co-operative Soc.*, L.R. 10 Q.B. 264: 44 L.J. Q.B. 126.

(*p*) *Penney* v. *Porter*, 2 East, 2; *Chippendale* v. *Thurston*, 4 C. & P. 98.

(*q*) *Fordley's case*, 1 Leon. 68.

(*r*) Co. Litt. 146; *Brown* v. *Royal Ins. Society*, 1 E. & E. 853; 28 L.J. Q.B. 275; *Gath* v. *Lees*, 3 H. & C. 558; see *Borrowman* v. *Free*, 4 Q.B.D. 500; 48 L.J. Q.B. 65.

(*s*) *Ward* v. *Day*, 33 L.J. Q.B. 13; 5 B. & S. 359.

(*t*) *Rugy* v. *Weir*, 16 C.B. N.S. 477; see also 56 & 57 Vict. c. 71, ss. 27, 28, and 41.

(*u*) Co. Litt. 208, a, b; *Startup* v. *Macdonald*, 6 M. & G. 593, 610; 10 L.J. C.P. 84; 12 L.J. Ex. 477; *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292; *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210; *Postlethwaite* v. *Freeland*, 5 A.C. 599; 49 L.J. Ex. 630; *De Waal* v. *Adler*, 12 A.C. 141; 56 L.J. P.C. 25; *Carlton SS. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486; 67 L.J. Q.B. 795; *Hick* v. *Raymond and Reid*, (1893) A.C. 22; 62 L.J. Q.B. 98.

(*x*) Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, ss. 29 (2), 56.

(*y*) *Hyde* v. *Watts*, 12 M. & W. 254;

"immediately on demand," the word "immediately" must receive a reasonable construction, so as to allow the debtor time to procure the money; and, if the demand is not made by the creditor himself, to inquire into the authority of the person making it (*z*). In the case of a covenant to pay rates, the payment must be made within a reasonable time after the rate is made; and it is not necessary to give the covenantor notice to pay, or to make any personal demand upon him, it being his duty to seek out the proper parties to whom the rates are to be paid (*a*). Where a railway company had contracted with the plaintiff for the supply of 350,000 railway sleepers within a certain limited period, to be delivered from time to time in such quantities as should be required, it was held that the company was bound to give the orders, and take the whole quantity, within the specified period (*b*). Whenever time has not been made of the essence of the contract, and either party is guilty of delay, a notice in writing by the other to the effect that he shall consider the contract at an end if it be not completed within a named period (the same being a reasonable time for its completion), will be binding on the party to whom it is given (*c*). By the Sale of Goods Act, 1893 (*d*), "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of the contract. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." A person who has covenanted to do a particular act, impliedly covenants to do nothing which must necessarily have the effect of preventing him from performing his covenant (*e*). And, where a party has agreed to do a particular act, and has deprived himself of the power of performance, or has absolutely refused to perform it (*f*), he may be sued for damages before the expiration of the time limited for performance (*g*), even where the performance

13 L.J. Ex. 41; *Duncan* v. *Topham*, 8 C.B. 225; 18 L.J. C.P. 310; *Attwood* v. *Emery*, 1 C.B. N.S. 110; 26 L.J. C.P. 73; *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 382; *Roberts* v. *Brett*, 20 C.B. N.S. 148; 34 L.J. C.P. 241; *Brighty* v. *Norton*, 3 B. & S. 305; 32 L.J. Q.B. 38; *Staunton* v. *Wood*, 16 Q.B. 638; *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q.B.D. 670.

(*z*) *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 382; *Brighty* v. *Norton*, 3 B. & S. 305; 32 L.J. Q.B. 38; *Massey* v. *Sladen*, L.R. 4 Ex. 13; 38 L.J. Ex. 34.

(*a*) *Davis* v. *Burrell*, 10 C.B. 821.

(*b*) *G. N. Ry.* v. *Harrison*, 12 C.B. 576; 22 L.J. C.P. 49.

(*c*) *Reynolds* v. *Nelson*, 6 Mad. 26; Sugd. V. & P. 243 (ed. 14).

(*d*) 56 & 57 Vict. c. 71, s. 10 (1).

(*e*) *Stirling* v. *Maitland*, 5 B. & S. 840, 852; 34 L.J. Q.B. 1, 3. Presenting a petition in bankruptcy may amount to an unduly delaying proper payment within the meaning of a contract: *Wilkinson, In re, Fowler, Ex parte*, (1905) 2 K.B. 713; 74 L.J. K.B. 969.

(*f*) *Danube and Black Sea Ry.* v. *Xenos*, 11 C.B. N.S. 152; 13 *ib.* 825; 31 L.J. C.P. 84, 284; *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455.

(*g*) *Lovelock* v. *Franklyn*, 8 Q.B. 378; 15 L.J. Q.B. 146; *Short* v. *Stone*, 8 Q.B. 369; 15 L.J. Q.B. 143; *Ford* v. *Tiley*, 6 B. & C. 325; 5 L.J. (O.S.) K.B. 169; *Bowdell* v. *Parsons*, 10 East, 359; *Wild*

is made to depend on a contingency (*h*). By the Bank Holidays Act, 1871 (*i*), no person can be compelled to do any act upon the bank holidays thereby established which he would not be compelled to do on Christmas Day or Good Friday; and the obligation to do such act is postponed to the day following such bank holiday. By the Judicature Act, 1873 (*k*), "Stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contract in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

Conditions precedent to performance.—Sometimes the performance of a contract by one party depends on something to be previously done by the other; and, when that is the case, an action will not lie for non-performance if default has been made in the accomplishment of the precedent act (*l*). Where shares are sold upon the faith of an undertaking by the vendors to take them back at the expiration of six months from the date of the sale if they do not in the meantime rise in the market, a tender of the shares by the purchaser to the vendor is a precedent act to be performed by the purchaser before there can be any default on the part of the vendor, or any breach of his undertaking (*m*). "Where mutual covenants," observes Lord Mansfield, "go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, and where a recompense may be had in damages, there the defendant has a remedy upon his covenant, and shall not plead it as a condition precedent" (*n*). Where a plaintiff covenanted to take out 280 passengers to Jamaica, and the defendant covenanted to have them ready for shipment, and to pay 5*l*. a man for their conveyance, and the plaintiff only took and carried 180 of them, it was held that the contract was

v. *Harris*, 7 C.B. 1004; 18 L.J. C.P. 297. See also *Johnstone* v. *Milling*, 16 Q.B.D. 460, 467; 55 L.J. Q.B. 162; *Rhymney Ry.* v. *Brecon & Merthyr Tydfil Ry.*, 69 L.J. Ch. 813.

(*h*) *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*i*) 34 Vict. c. 17, s. 3. See also 38 Vict. c. 13.

(*k*) 36 & 37 Vict. c. 66, s. 25 (7).

(*l*) *French* v. *Campbell*, 2 H. Bl. 178; *Marlborough* (*Duke*) v. *Osborn*, 33 L.J. Q.B. 148; 5 B. & S. 67. See also *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K.B. 543; 74 L.J. K.B. 688; *Greville* v. *Parker*, (1910) A.C. 335.

(*m*) *Blackwell* v. *Nash*, 1 Str. 535; *Lancashire* v. *Killingworth*, 1 Raym. 686; *Jones* v. *Barkley*, 2 Doug. 684; *Coombe* v. *Greene*, 11 M. & W. 480; 12 L.J. Ex. 291; *Startup* v. *Macdonald*, 6 M. & G. 593, 610; 12 L.J. Ex. 477, 483; *Bank of China, Japan, and the Straits* v. *American Trading Co.*, (1894) A.C. 266; 63 L.J. P.C. 92.

(*n*) *Boone* v. *Eyre*, 1 H. Bl. 273 (n.); Le Blanc, J., *Glazebrook* v. *Woodrow*, 8 T.R. 366, 375; *Franklyn* v. *Miller*, 4 Ad. & E. 605; *Newson* v. *Smythies*, 3 H. & N. 840; 28 L.J. Ex. 97; *London Gas Co.* v. *Chelsea Vestry*, 8 C.B. N.S. 215; *Eastern Counties Ry.* v. *Philipson*, 16 C.B. 12.

divisible, and that the plaintiff was entitled to maintain an action in respect of his partial performance of the contract (*o*). Where a covenant for the performance of various acts and duties by one party is the consideration for a subsequent covenant by another party, it is not in all cases essential that there should be an exact performance of the precedent covenant in every minute particular in order to create a liability upon the subsequent covenant (*p*). The condition of a sale by auction that the lots were to be "cleared away within three days after the sale at the purchaser's expense," was held not to be a condition precedent to the plaintiff's right to claim delivery (*q*).

The time appointed for the performance of some precedent act or condition is sometimes of the very essence of the contract, so that, if the party who was to do the act fails in performance at the time specified, he is liable in damages to the party in whose favour the act was to be done, and the latter is enabled to decline all further performance of the contract (*r*), unless the condition or precedent act has been waived by acceptance or part performance, so as to render it a mere collateral stipulation (*s*). When one thing only is to be done by a day named, it depends on the course of trade and the intention of the parties whether the time appointed for the doing of the act is of the essence of the contract or not; but, when the contract is for the performance of several acts and duties at different times, the performance of any particular act at the exact time specified will not be a condition precedent to the right of action upon the contract, unless the neglect has had the effect of precluding the defendant from deriving any benefit or advantage from the contract (*t*).

Demand of performance, when necessary.—Where, by the express terms of a contract, the duty to pay money or to render some particular service is not to arise until *after* demand or request has been made, there is no cause of action until demand or request has been made, the demand or request being a condition precedent to any cause of action (*u*). So, when a promissory note is made for the payment of a sum of money within a certain limited time after demand, there is no debt or cause of

(*o*) *Tomson* v. *Noel*, 1 Lev. 16; 1 Keb. 100.

(*p*) *Campbell* v. *Jones*, 6 T.R. 573; *Glazebrook* v. *Woodrow*, 8 T.R. 366; *Carpenter* v. *Creswell*, 1 M. & P. 77; *Stavers* v. *Curling*, 3 Bing. N.C. 355; 6 L.J. C.P. 41.

(*q*) *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.

(*r*) *Tidey* v. *Mollett*, 16 C.B. N.S. 308; *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529.

(*s*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204, *ante*, p. 55.

(*t*) *Payne* v. *Banner*, 15 L.J. Ch. 227.

(*u*) *Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Topham* v. *Braddick*, 1 Taunt. 572; *Simpson* v. *Routh*, 2 B. & C. 682; 2 L.J. (O.S.) K.B. 162; *Bach* v. *Owen*, 5 T.R. 409; *Bowdell* v. *Parsons*, 10 East, 360; *Peck* v. *Methold*, 3 Bulstr. 297; *Webb* v. *Martin*, 1 Lev. 48.

action until demand has been made, and the time limited has elapsed (*x*). And where a penalty or forfeiture attaches for non-payment of money or for non-performance of a particular act after demand, demand of performance is a condition precedent to a right of action for the penalty or the forfeiture (*y*); and personal demand is, in these cases, generally necessary, so that demand made upon the wife or servant of the party in his absence, though made at his dwelling-house, is insufficient (*z*). Where, however, there is a debt due, and a promise by the debtor to pay the debt on request, and no particular place for payment is specified, no request need be made; for the law casts upon the debtor the duty of seeking out his creditor whilst he remains within the realm of England (*a*), and paying the money without any request (*b*). Where the debt is payable abroad, the debtor must seek his creditor abroad (*c*). A plea, therefore, that he has not been requested to pay the money is no defence (*d*). Where, however, a place for payment is specified, it appears that there must be a demand for payment at the particular place (*e*). Where the bond, covenant, or promise is for the payment of money generally, the duty to pay arises as soon as the contract is made, and may be at once enforced by action. When the instrument provides for payment by a day named, there is no debt due, or cause of action, until the day arrives; and then the issue of a writ is the only demand that need be made (*f*); and, wherever a debt accrues, or a duty to pay arises, on the performance of certain stipulated acts by the plaintiff, and the precedent acts are done, the duty of performance on the part of the defendant arises without any request on the part of the plaintiff (*g*).

Waiver of demand of performance.—When a request or demand for performance is, by the contract, made a condition precedent to any liability for non-performance, if the party who

(*x*) *Thorpe* v. *Booth*, Ry. & M. 388; *Holmes* v. *Kerrison*, 2 Taunt. 323.

(*y*) *Carter* v. *Ring*, 3 Campb. 460; *Fitz-Hugh* v. *Dennington*, 6 Mod. 227, 259; *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 33, 382; *Brown* v. *Great Eastern Ry.*, 2 Q.B.D. 406; 46 L.J. M.C. 231.

(*z*) See as to licence to distrain after demand, *Belding* v. *Read*, 3 H. & C. 955; 34 L.J. Ex. 212.

(*a*) Co. Litt. 210, b.

(*b*) *Collins* v. *Benning*, 12 Mod. 444; *Wallis* v. *Scott*, 1 Str. 88; *Master Butchers', &c. Co.* v. *Bullock*, 3 B. & P. 434; *Radford* v. *Smith*, 3 M. & W. 254; *Walton* v. *Mascall*, 13 M. & W. 452; 14 L.J. Ex. 54; *Robey* v. *Snaefell Mining Co.*, 20 Q.B.D. 152; 57 L.J. Q.B. 134.

(*c*) *Fessard* v. *Mugnier*, 18 C.B. N.S. 286; 34 L.J. C.P. 126; *Bell & Co.* v. *Antwerp, London and Brazil Line*, (1891) 1 Q.B. 103; 60 L.J. Q.B. 270.

(*d*) *Capp* v. *Lancaster*, Cro. Eliz. 548; *Thomson* v. *Butler*, *ib.* 721; *Rumball* v. *Ball*, 10 Mod. 38.

(*e*) *Thorn* v. *City Rice Mills*, 40 Ch.D. 357; 58 L.J. Ch. 297; *Escalera Silver Lead Mining Co., In re, Tweedy* v. *The Company*, 25 T.L.R. 87.

(*f*) *Gibbs* v. *Southam*, 5 B. & Ad. 911; *Frampton* v. *Coulson*, 1 Wils. 33; *Absolom* v. *Gething*, 32 Beav. 322; 32 L.J. Ch. 786.

(*g*) *Spaeth* v. *Hare*, 9 M. & W. 326; 11 L.J. Ex. 104.

is to do the act has disabled himself from performance, the stipulation as to the request is dispensed with (*h*).

Dispensation of performance of conditions precedent.—That which is a condition precedent to the liability upon a promise when the contract is made may cease to be so by the subsequent conduct of the promisor in treating the contract as a continuing contract, and taking the benefit of a part performance of it, after the expiration of the time appointed for the fulfilment of the condition (*i*). A man may always dispense with the performance of a condition in his own favour; and, if there are several precedent or contemporaneous acts to be performed, and the one party discharges the other from the performance of some of them, it is the same thing as if the things dispensed with had been done (*k*). Thus, if a vendor is to make out a good title to an estate, and a purchaser is to prepare and tender a conveyance to the vendor, which the latter is then to execute, and the purchaser discharges the vendor from the duty of executing the conveyance, it is the same as if the vendor had actually executed it (*l*). The acts done by the contracting parties in fulfilment of a contract may be regarded in order to see what interpretation they have put upon it, and what conditions have been waived or performed; and the construction of the instrument may thus be varied by matter *ex post facto* (*m*). When an incoming tenant, on taking possession of a farm, agreed to pay the out-going tenant for the hay and straw a fair price, to be settled by valuers appointed on both sides, and valuers so appointed were unable to agree, and in the meantime the incoming tenant had consumed all the hay and straw, it was held that he had dispensed with the valuation by two valuers, and must pay for the hay and straw whatever a jury might consider to be a "fair price" (*n*). Where the plaintiffs agreed to sell and the defendants to buy certain casks of butter, to be shipped in October, and the butter was not shipped until November, and the defendants assented to the later date and received the invoice and bill of lading, which was indorsed to them, and after that the vessel with the butter on board went ashore, and part of the butter was lost and the remainder damaged, whereupon the defendants repudiated the contract, contending that the condi-

(*h*) *Bowdell* v. *Parsons*, 10 East, 359; *Hotham* v. *East India Co.*, 1 T.R. 638.

(*i*) *Newson* v. *Smythies*, 3 H. & N. 840; 28 L.J. Ex. 97; *White* v. *Beeton*, 7 H. & N. 42; 30 L.J. Ex. 376.

(*k*) *Jones* v. *Barkley*, 2 Doug. 684. As to when the dispensation must be by deed, see *Thames Ironworks Co.* v. *Royal Mail Packet Co.*, 31 L.J. C.P. 169.

(*l*) *Laird* v. *Pim*, 7 M. & W. 485; 10 L.J. Ex. 259; *East London Union* v. *Metropolitan Ry.*, L.R. 4 Ex. 309; 38 L.J. Ex. 225.

(*m*) *Pust* v. *Dowie*, 5 B. & S. 20; 34 L.J. Q.B. 127.

(*n*) *Clarke* v. *Westrope*, 18 C.B. 784; 25 L.J. C.P. 287.

tion, that the butter should be shipped in the month of October, had not been performed, it was held that the assent of the defendants to the shipment in November, and the acceptance by them of the indorsed bill of lading, amounted to a waiver of the precedent condition; and, the condition being waived, it was as if it had never been inserted in the contract (*o*). In certain cases, where a party intends to waive a condition in his favour, and to hold the other party liable notwithstanding the non-performance of the condition, he is bound to give notice of his intention (*p*).

Tender of performance.—If the act agreed to be done by one party cannot be completed without the concurrence of the party for whom it is to be done, the former must do all that he can do without such concurrence to complete the act; and, if he does this, he does what is equivalent in law to actual performance (*q*). Unless otherwise agreed, when a seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract (*r*). If a vendor is ready and offers to deliver at the place appointed by the contract, and the purchaser insists upon a delivery at another place, this, if persisted in, is a refusal to accept according to the contract (*s*).

Prevention of performance.—It is a principle of law, that a man shall not avail himself of a non-performance which he has himself occasioned. For whenever the plaintiff himself has occasioned the breach of contract, that is an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of was the act of the plaintiff himself, and not, as charged, the act of the defendant. The defendant may say, "This is your own act; and therefore you are not damnified" (*t*). Where, therefore, it was covenanted between the plaintiff and the defendant that the plaintiff should execute a release to the defendant, and the plaintiff offered to execute the release, and tendered a draft for the defendant's perusal, but the defendant said he would have

(*o*) *Alexander* v. *Gardner*, 1 Bing. N.C. 671; 3 L.J. C.P. 223; *Wing* v. *Harvey*, 23 L.J. Ch. 511; 5 De G. M. & G. 265.

(*p*) *Morten* v. *Marshall*, 33 L.J. Ex. 54; 2 H. & C. 305.

(*q*) *Hall* v. *Conder*, 2 C.B. N.S. 22; 26 L.J. C.P. 288.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34 (2); *Startup* v. *Macdonald*, 6 M. & Gr. 593; 12 L.J. Ex. 483; *Isherwood* v. *Whitmore*, 11 M. & W. 347; 12 L.J. Ex. 93, 318.

(*s*) *Lancashire* v. *Killingworth*, 1 Ld. Raym. 686; *Ripley* v. *M'Clure*, 4 Ex. 345; 18 L.J. Ex. 419; *Cort* v. *Ambergate Ry.*, 17 Q.B. 127, 148; 20 L.J. Q.B. 466.

(*t*) Tindal, C.J., *West* v. *Blakeway*, 2 M. & Gr. 729, 750; Com. Dig. CONDITION, L. 5.

nothing to do with it, it was held that the defendant had discharged the plaintiff from doing anything further (*u*). If a man has covenanted to build a house on the land of a covenantee, performance of the covenant is excused if the covenantee will not suffer the covenantor to come upon the land to build (*x*). So, if a man has covenanted with me to collect my rents, and I interrupt him in collecting them, this excuses him from the performance of his covenant (*y*). Where the lessee of a house covenanted to repair it, and some sparks of fire from the lessor's adjoining chimney fell on the house, and burnt it, it was held that the lessee was not liable upon his covenant to repair the damage, the fire having been caused by the lessor himself (*z*). If the obligee of a bond has himself prevented the obligor from fulfilling the condition of the bond, he cannot take advantage of the non-performance of the condition; for that would be enabling him to benefit by his own wrong. Therefore, if the condition of a bond be that the son of the obligor shall serve the obligee for a term of years, and the obligor tenders his son, but the obligee refuses to receive him, or takes him, and within the term commands him to go away, the condition will be deemed to have been fulfilled, and the bond will not be forfeited (*a*). And if the presence of the plaintiff is essential to the performance of the act, and the plaintiff, by absence, has prevented performance, he has no ground of action for non-performance (*b*). Where one of the two contracting parties so conducts himself as to subject the other to an action at the suit of some third person if he duly performs the contract, the non-performance is excused (*c*).

Impossibility of performance.—This is, in general, no answer to an action for damages for non-performance (*d*). If the thing to be done is notoriously physically impossible, and was known to be so by both parties at the time of the making of the contract, the contract will be a void contract; unless, indeed, the promisor has warranted that it is possible (*e*). If a married

(*u*) *Jones* v. *Barkley*, 2 Doug. 684, 694.

(*x*) 1 Rolle Abr. CONDITION, N. pl. 3, p. 453.

(*y*) *Ib.*, p. 454, pl. 7; *Doe* v. *Sutton*, 9 C. & P. 706; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15.

(*z*) 1 Rolle Abr. p. 454, CONDITION, N. pl. 8.

(*a*) 1 Rolle Abr. 455, CONDITION, P. pl. 1; Q. pl. 1; *Hayward* v. *Bennett*, 3 C.B. 423; 15 L.J. C.P. 315; *Holme* v. *Guppy*, 3 M. & W. 389.

(*b*) *Raymond* v. *Minton*, L.R. 1 Ex. 244; 35 L.J. Ex. 153; *Roberts* v. *Bury Commissioners*, L.R. 5 C.P. 310; 39 L.J. C.P. 129.

(*c*) *European Royal Mail Co.* v. *Royal Mail Packet Co.*, 30 L.J. C.P. 246.

(*d*) *Ashmore* v. *Cox*, (1899) 1 Q.B. 436; 68 L.J. Q.B. 72. As to the effect of failure of the purposes of a contract, see *Herne Bay Steam Boat Co.* v. *Hutton*, (1903) 2 K.B. 683; 72 L.J. K.B. 879. As to rescission on the ground of the inability of the other party, see *Poussard* v. *Spiers & Pond*, 1 Q.B.D. 410; 45 L.J. Q.B. 621.

(*e*) *Per* Kenyon C.J. and Ashurst J. in *Nerot* v. *Wallace*, 3 T.R. 17, 22, 23;

man promises marriage with a single woman, it is no answer to an action by the latter to recover damages for non-performance, to set up the illegality of a second marriage, unless the fact of the existing marriage of the promisor was known to the woman at the time of the contract, in which case such contract would be illegal and void (*f*). If, again, the thing to be done was possible at the time of making the contract, but has become impossible since, the promisor is liable to an action for damages for non-performance, if he has either expressly or impliedly undertaken, without any qualification, to do it (*g*). And where the impossibility of performance has been occasioned by the act of a stranger, or by the act of the defendant himself, it constitutes no defence to an action (*h*). Where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, he was held to be responsible in damages for the non-performance of his covenant (*i*). "Where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it" (*k*). This has sometimes been construed to mean that the promisor is answerable in damages where the performance of his promise has become impossible by the act of God, and sometimes that he is answerable where performance has become not impossible, but only more burdensome. A covenant in a lease of a mine,

Clifford v. *Watts*, L.R. 5 C.P. 577, 585; 40 L.J. C.P. 36; *Hills* v. *Sughrue*, 15 M. & W. 253; *Jones* v. *St. John's College, Oxford*, L.R. 6 Q.B. 124; 40 L.J. Q.B. 80; *The Salvador*, 25 T.L.R. 384.

(*f*) *Wild* v. *Harris*, 7 C.B. 999, 1005; 18 L.J. C.P. 297; *Millward* v. *Littlewood*, 5 Exch. 775; 20 L.J. Ex. 2; *Spiers* v. *Hunt*, (1908) 1 K.B. 720; 77 L.J. K.B. 321; *Wilson* v. *Carnley*, (1908) 1 K.B. 729; 77 L.J. K.B. 594.

(*g*) *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180, 185; 38 L.J. Q.B. 98; *Ashcroft* v. *Crow Orchard Colliery Co.*, L.R. 9 Q.B. 540; 43 L.J. Q.B. 194; *Arthur, In re, Arthur* v. *Wynne*, 14 Ch. D. 603; 49 L.J. Ch. 556. As to an express stipulation exempting from liability in case of contract becoming impossible, see *Elliott* v. *Crutchley*, (1906) A.C. 7; 75 L.J. K.B. 147.

(*h*) Bro. Abr. CONDITION, pl. 127; Holt, C.J., *Thornborow* v. *Whitacre*, 2 Raym. 1164; *Hochster* v. *De la Tour*, 2 E. & B. 688; 22 L.J. Q.B. 455; *Herne Bay Steam Boat Co.* v. *Hutton*, (1903) 2 K.B. 683; 72 L.J. K.B. 879.

(*i*) *Barker* v. *Hodgson*, 3 M. & S. 267; *Ardan Steamship Co.* v. *Weir* (1905), A.C. 501; 74 L.J. P.C. 143. As to termination of a seaman's service by reason of the wreck or loss of the ship, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 158; *Sirewright* v. *Allen* (1906), 2 K.B. 81; 75 L.J. K.B. 476.

(*k*) *Paradine* v. *Jane*, Aleyn, 26.

to raise so many tons a year, or to pay a certain minimum rent, is not discharged by proof that the mine is exhausted (*l*). And, the lessee of a house, who covenants generally to repair, is bound to rebuild if the house is burned by accidental fire (*m*). Where, in an action for breach of promise of marriage, the defendant pleaded that consummation had become impossible without danger to his life, it was held to be no answer to the action (*n*). But where both parties to a contract have based their contract on the continued existence of some particular specified thing, then, in the absence of any express or implied warranty that the thing shall exist, the contract is subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor (*o*). So, where a man, upon the marriage of his daughter, covenanted with her intended husband to give and bequeath unto her, by deed or will, an equal share with his other children of the property he should die possessed of, and the daughter died in the lifetime of the covenantor, it was held that the liability upon this covenant was discharged by the death of the daughter, as performance had then become impossible by the act of God(*p*). And where the plaintiffs contracted with the defendant to erect certain machinery upon his buildings in his own occupation for a specified sum, and to keep the whole in order for two years, and, when the machinery was only partly erected, a fire broke out in the buildings, and, without any fault by either party, destroyed both the buildings and the machinery then erected thereon, it was held that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, the whole work contracted to be done by them not having been completed (*q*). Similarly, where a room had been let for the purpose

(*l*) *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 493 ; 14 L.J. Ex. 95 ; *Clark* v. *Glasgow Assurance Co.*, 1 Macq. 668.

(*m*) *Bullock* v. *Dommitt*, 6 T.R. 650.

(*n*) *Hall* v. *Wright*, E. B. & E. 749, 765 ; 29 L.J. Q.B. 43.

(*o*) *Taylor* v. *Caldwell*, 3 B. & S. 826, 837 ; 32 L.J. Q.B. 164 ; *Nickoll & Knight* v. *Ashton, Edridge & Co.* (1901), 2 K.B. 126 ; 70 L.J. K.B. 600 ; *Krell* v. *Henry* (1903), 2 K.B. 740 ; 72 L.J. K.B. 794 ; *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1903), 2 K.B. 756 ; 72 L.J. K.B. 933. The question depends upon the intention of the parties as derived from the contract : *Turner* v. *Goldsmith* (1891), 1 Q.B. 544 ; 60 L.J. Q.B. 274.

(*p*) *Jones* v. *How*, 9 C.B. 19 ; 7 Hare, 267 ; 19 L.J. Ch. 324 ; *Brookman's Trusts, In re*, L.R. 5 Ch. 182 ; 39 L.J. Ch. 138.

(*q*) *Appleby* v. *Myers*, L.R. 2 C.P. 651 ; 36 L.J. C.P. 331 ; *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1903), 2 K.B. 756 ; 72 L.J. K.B. 933 ; *Elliott* v. *Crutchley* (1906), A.C. 7 ; 75 L.J. K.B. 147 (where, however, there was an express stipulation exempting from liability in the event of a contemplated event not taking place).

of viewing a procession which subsequently was abandoned and by the terms of the contract the price of the room was payable before the time at which the procession was abandoned, it was held that the whole price could nevertheless be recovered, the right thereto having accrued before the abandonment of the procession (*r*). Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void (*s*); as also is the case where specific goods sold, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer (*t*). A contract to sell potatoes off a specific piece of land is a contract for a specific crop, although the crop is not then sown; and is subject to the implied condition that the defendant shall be excused, if, before breach, performance becomes impossible by reason of a potato disease which no care of the defendant could prevent (*u*). Incapacity, by reason of the intervention of an act of God, to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve, absolute and unconditional in its terms, because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract (*x*). It has been said that it is an inaccurate expression to say that the act of God excuses the breach of the contract, and that what is meant is that the breach is not within the contract (*y*). If a man has covenanted or agreed to do one of two things, and the performance of one of them is rendered impossible, he is not discharged from his liability to do the other (*z*).

Performance is also excused where it has been rendered impossible by act and operation of law (*a*). "Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders

(*r*) *Chandler* v. *Webster* (1904), 1 K.B. 493; 73 L.J. K.B. 401.

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6.

(*t*) *Ib.*, s. 7.

(*u*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147.

(*x*) *Boast* v. *Firth*, L.R. 4 C.P. 1; 38 L.J. C.P. 1; *Robinson* v. *Davison*, L.R. 6 Ex. 269; 40 L.J. Ex. 172; but see *Hall* v. *Wright*, E. B. & E. 749, 765; 29 L.J. Q.B. 43. As to rescission of such a contract on the ground of the inability of the other party, see *Poussard* v. *Spiers & Pond*, 1 Q.B.D. 410; 45 L.J. Q.B. 621.

(*y*) Hannen, J., *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180, 185; 38 L.J. Q.B. 98.

(*z*) *Barkworth* v. *Young*, 4 Drew. 1, 24; 26 L.J. Ch. 153.

(*a*) *Brown* v. *London* (*Mayor, &c.*), 30 L.J. C.P. 225; 9 C.B. N.S. 726; 31 L.J. C.P. 280; 13 C.B. N.S. 828.

him from doing it, the covenant is repealed" (*b*). And, where the defendant covenanted for himself and his assigns not to permit any messuage, &c., to be built on a certain piece of land, which was afterwards taken by a railway company under their compulsory powers and built upon, it was held that the defendant was not liable for the act of the railway company (*c*). But the fact that a railway company has given the lessee a notice to treat does not absolve him from the obligation to perform his covenants down to the time of the execution of the conveyance to the company (*d*). There is, indeed, nothing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; but people in general must always be considered as contracting with reference to the law as existing at the time of the contract; and the words showing a contrary intention ought to be very clear to rebut that presumption (*e*).

Payment and acceptance of part of an admitted simple contract debt is not in general a satisfaction of such debt (*f*); but, if disputes exist as to the exact amount due, or the money be paid in advance, or some consideration be given and accepted, then the payment and acceptance of the smaller sum may be a satisfaction and discharge of the claim for the larger amount (*g*); and a creditor may agree to take less than the amount of his debt, provided payment is made by a particular day, and in default may recover the whole debt (*h*). Payment by a negotiable security for a smaller amount is a good accord and satisfaction (*i*). Composition deeds, also, form an exception to the rule (*k*). Where money is paid and accepted as a composition on a debt under a mistake of law, it is a discharge (*l*). Payment and acceptance of part of an admitted debt may, under certain circumstances, be evidence of a gift of the remainder (*m*).

(*b*) *Brewster* v. *Kitchell*, 1 Salk. 198; *Davis* v. *Cary*, 15 Q.B. 418; 20 L.J. Q.B. 48; *Wynn* v. *Shropshire Union Railways and Canal Co.*, 5 Exch. 420; *Newington Local Board* v. *Cottingham Local Board*, 12 Ch.D. 725; 48 L.J. Ch. 226.

(*c*) *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; 38 L.J. Q.B. 98; *Slipper* v. *Tottenham Junction Ry.*, L.R. 4 Eq. 112; 36 L.J. Ch. 841; *Newby* v. *Sharpe*, 8 Ch.D. 39; 47 L.J. Ch. 617.

(*d*) *Mills* v. *East London Union*, L.R. 8 C.P. 79; 42 L.J. C.P. 46.

(*e*) *Berwick* (*Mayor*) v. *Oswald*, 3 E. & B. 665; 23 L.J. Q.B. 324.

(*f*) *Pinnel's case*, 5 Co. Rep. 117, a; *Fitch* v. *Sutton*, 5 East, 230; 1 Smith L.C. 415 (ed. 11): *Watters* v. *Smith* 2 B. & Ad. 890; 1 L.J. K.B. 31: *Down* v. *Hatcher*, 10 Ad. & E. 121; 8 L.J. Q.B. 190; *Foakes* v. *Beer*, 9 App.Cas. 605; 54 L.J. Q.B. 130; *Underwood* v. *Underwood*, (1894) P. 204; 63 L.J. P. 109.

(*g*) *Cumber* v. *Wane*, 1 Stra. 426; 1 Smith's L. C. 338 (ed. 11); *Cooper* v. *Parker*, 15 C.B. 822; 24 L.J. C.P. 68; *post*, p. 183.

(*h*) *Thompson* v. *Hudson*, L.R. 2 Ch. 255; 36 L.J. Ch. 388.

(*i*) See *post*, p. 185.

(*k*) *Post*, p. 186; *Pfleger* v. *Browne*, 28 Beav. 391.

(*l*) *Kitchin* v. *Hawkins*, L.R. 2 C.P. 22.

(*m*) *Bramston* v. *Robins*, 12 Moore, 68, 80; 5 L.J. (O.S.) C.P. 13.

Payment and acceptance before action.—Payment of the full amount of an admitted simple contract debt is a satisfaction of the debt and of the nominal damages resulting from the detention or non-payment of the debt (*n*). If parties meet together and state an account, and various pecuniary claims are allowed on both sides, and a balance is struck, and the account settled, the allowances in account are, in contemplation of law, payments (*o*). But this is not the case where the items are all on one side (*p*).

Payment according to direction of creditor.—If a debtor is directed by his creditor to remit the amount of the debt by the post, the debtor is discharged by the delivery at the post-office of a letter containing the money addressed to the creditor at his usual place of residence. But the debtor is not discharged by the transmission through the post of a letter addressed to the creditor at some large town, without any specification of the street or number of the house in which the latter resides, unless it be shown that the letter and money came safe to hand, or that the address was given by the creditor himself (*q*). If a creditor desires his debtor to pay the amount of the debt to his (the creditor's) account at a particular banker's the debt is discharged as soon as the payment has been made pursuant to the directions given; and, if a creditor and debtor both keep an account with the same banker, and the amount of the debt is, at the request or with the assent of the creditor, transferred by the banker from the debtor's to the creditor's account, the transfer is equivalent to a payment, and the debt is extinguished (*r*). But a promise to make a transfer of the credit from one account to the other is not equivalent to an actual transfer; and, therefore, where a debtor directed his banker to place a sum of money to the credit or to the account of the creditor at a future day, and the banker promised to do so, but

(*n*) *Beaumont* v. *Greathead*, 2 C.B. 494, 500; 15 L.J. C.P. 130; *Triston* v. *Barrington*, 16 M. & W. 61; 16 L.J. Ex. 2; *Gell* v. *Burgess*, 7 C.B. 16; 18 L.J. C.P. 153; *Thame* v. *Boast*, 12 Q.B. 808; 17 L.J. Q.B. 339.

(*o*) *Kinnerley* v. *Hossack*, 2 Taunt. 170; *Clewerth* v. *Pickford*, 7 M. & W. 314; 10 L.J. Ex. 41; *Callander* v. *Howard*, 10 C.B. 290; 19 L.J. C.P. 312; *Liringstone* v. *Whiting*, 15 Q.B. 722, 723; 19 L.J. Q.B. 528; *Holland* v. *Russell*, 4 B. & S. 14; 32 L.J. Q.B. 297; *Harmony and Montague Tin and Copper Mining Co., In re, Spargo's case*, 8 Ch.App. 407; 42 L.J. Ch. 488; *Larocque* v. *Beauchemin*, (1897) A.C. 358; 66 L.J. P.C. 59; *North Sydney Investment and Tramway Co.* v. *Higgins*, (1899) A.C. 263; 68 L.J. P.C. 42.

(*p*) *Perry* v. *Attwood*, 25 L.J. Q.B. 408; 6 E. & B. 691.

(*q*) *Warwicke* v. *Noakes*, 1 Peake, 98; *Hawkins* v. *Rutt*, *ib.* 248; *Norman* v. *Ricketts*, 3 T.L.R. 182; cp. *Edmundson* v. *Longton Corporation*, 19 T.L.R. 15 (money put in an automatic slot gas meter). As to loss in case of a remittance by post without direction of the creditor, see *Luttges* v. *Sherwood*, 11 T.L.R. 233; *Pennington* v. *Crossley & Son*, 77 L.T. 43; *Baker* v. *Lipton*, 15 T.L.R. 435.

(*r*) *Eyles* v. *Ellis*, 4 Bing. 112; 5 L.J. (O.S.) C.P. 110; *Bolton* v *Richard*, 6 T.R. 139; *Bodenham* v. *Purchas*, 2 B. & Ald. 39.

became bankrupt before the time arrived, it was held that there was no payment and no extinguishment of the debt (*s*). If a creditor requests his debtor to pay a sum of money on his (the creditor's) account to a third party, and the money is paid, this is equivalent to a payment to the creditor himself (*t*). And, if part of a money demand is paid in cash, and the residue is, by agreement, paid into the hands of a stake-holder or trustee to await the adjustment of certain differences, the payment is a good payment in satisfaction and discharge of the original cause of action (*u*).

Payment by bill or note.—Generally speaking, when a negotiable instrument is taken in lieu of present payment of a debt, it is no more than giving an extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security, so that, if the instrument is not discharged, the creditor may sue for his demand independently, just as if it had never been given (*x*). But, if the creditor has received the bill or note as cash, or if at the time of receiving it he has agreed to take upon himself the risk of its being paid at maturity, or if the security is marred by the creditor's own *laches* in omitting to present it or give notice of its dishonour, the bill becomes money in his hands as between himself and the person from whom he received it (*y*), and the debt will be actually paid and discharged by the delivery and acceptance of the security (*z*). If a creditor, after he has received a bill or note on account of a debt, sues for the debt, a plea by the debtor that a bill or note payable to a third person, or his order, or to bearer, or made by a third person, was given by him, or by a stranger, to the creditor, and was accepted for and on account of the debt, is a sufficient answer in the first

(*s*) *Pedder* v. *Watt*, 2 Peake, 41.

(*t*) *Roper* v. *Bumford*, 3 Taunt. 76.

(*u*) *Page* v. *Meek*, 32 L.J. Q.B. 4; 3 B. & S. 259; cp. *Commercial Bank of Australia* v. *Official Assignee of Wilson & Co.'s Estate*, (1893) A.C. 181; 62 L.J. P.C. 61.

(*x*) *Owenson* v. *Morse*, 7 T.R. 64; *Tapley* v. *Martens*, 8 T.R. 451; *Taylor* v. *Briggs*, Moo. & M. 28; 2 C. & P. 525; *Sayer* v. *Wagstaff*, 5 Beav. 415; 14 L.J. Ch. 116; *Price* v. *Price*, 16 M. & W. 232; 16 L.J. Ex. 99; *Maxwell* v. *Deare*, 8 Moo. P. C. C. 363; *Maillard* v. *Argyll (Duke)*, 6 Sc. N.R. 938; *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418; *Gunn* v. *Bolckow, Vaughan & Co.*, 10 Ch.App. 491; 44 L.J. Ch. 732; *Currie* v. *Misa*, L.R. 10 Exch. 153; 1 App.Cas. 554; *Matthew, In re, Matthew, Ex parte*, 12 Q.B.D. 506; *Romer and Haslam, In re*, (1893) 2 Q.B. 286; 62 L.J. Q.B. 610; *Raatz, In re, Raatz, Ex parte*, (1897) 2 Q.B. 80; 66 L.J. Q.B. 501; *Debtor, In re, Debtor, Ex parte*, (1908) 1 K.B. 344; 77 L.J. K.B. 409.

(*y*) *Smith* v. *Ferrand*, 7 B. & C. 19; 5 L.J. (O.S.) K.B. 355; *Sayer* v. *Wagstaff*, 5 Beav. 415; 14 L.J. Ch. 116; *Sibree* v. *Tripp*, 15 M. & W. 23; 15 L.J. Ex. 318; *Peacock* v. *Pursell*, 14 C.B. N.S. 728; 32 L.J. C.P. 266. As to lien upon bills, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3), *post*, p. 1258; and *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418.

(*z*) *Sard* v. *Rhodes*, 1 M. & W. 155; 5 L.J. Ex. 91; *Lichfield Union* v. *Greene*, 1 H. & N. 889; 26 L.J. Ex. 140; *Caine* v. *Coulton*, 1 H. & C. 764; 32 L.J. Ex. 97; *Hadley (Felix) & Co.* v. *Hadley*, (1898) 2 Ch. 680; 67 L.J. Ch. 694.

instance to the action; and it is for the plaintiff to rebut the plea by showing that the bill was overdue and unpaid at the time of the commencement of the action, and that it remains dishonoured in his possession or that of his agents (*a*). Where the debtor commits an act of bankruptcy pending the currency of an acceptance given by him to the creditor as payment for goods sold and delivered, the creditor is entitled to treat the acceptance as dishonoured (*b*). It is no answer that the debtor has been sued upon the bill, and that judgment has been obtained against him, if the judgment is unsatisfied and the creditor alone is entitled to put it in execution (*c*). If the creditor of a firm in partnership takes the separate bill or note of one of the partners on account of the partnership debt, his remedy against the firm will be suspended whilst the note is running; but the firm at large will not be discharged in case of the non-payment of the instrument when it arrives at maturity, unless it can be proved to have been given and received in satisfaction and discharge of the partnership debt, or unless there has been laches on the part of the creditor or holder in not using the customary means of obtaining payment, and the firm has consequently been prejudiced thereby (*d*). If payment is to be made by "approved bills," and the debtor, without indorsing it, hands to the creditor a bill which "is approved," the payment is conditional only; and, if the bill is dishonoured, the debtor will be liable to the same extent as if he had indorsed it, but to that extent only, and will be discharged if he does not receive due notice of dishonour (*e*).

Acceptance of renewed bills.—Where an action was brought upon a bill of exchange, and it was agreed between the parties that the action should be stayed, and that the defendants should pay the costs, renew the bill, and give a warranty of attorney to secure the debt, and the defendants renewed the bill and gave the warrant of attorney, but did not pay the costs, it was held that

(*a*) *Belshaw* v. *Bush*, 11 C.B. 191, 201; 22 L.J. C.P. 24; *Simon* v. *Lloyd*, 2 C.M. & R. 189; 4 L.J. Ex. 195; *James* v. *Williams*, 13 M. & W. 833; 14 L.J. Ex. 220; *Mercer* v. *Cheese*, 5 Sc. N.R. 664; 12 L.J. C.P. 56; *Maillard* v. *Argyll* (*Duke*), 6 Sc. N.R. 938; *Price* v. *Price*, 16 M. & W. 232, 241; 16 L.J. Ex. 99; *Fearn* v. *Cochrane*, 4 C.B. 285; 16 L.J. C.P. 161. The bill must be in the possession of the creditor at the commencement of the action, see *Davis* v. *Reilly*, (1898) 1 Q.B. 1; 66 L.J. Q.B. 844; *Debtor*, *In re*, *Debtor*, *Ex parte*, (1908) 1 K.B. 344; 77 L.J. K.B. 409.

(*b*) *Raatz*, *In re*, *Raatz*, *Ex parte*, (1897), 2 Q.B. 80; 66 L.J. Q.B. 501.

(*c*) *Tarleton* v. *Allhusen*, 2 Ad. & E. 32; 4 L.J. K.B. 17.

(*d*) *Bedford* v. *Deakin*, 2 B. & Ald. 217. In these cases there is the joint liability of the whole firm in case of non-payment, in addition to the separate liability of the single partner on the bill: *Bottomley* v. *Nuttall*, 5 C.B. N.S. 122, 144; 28 L.J. C.P. 110.

(*e*) *Smith* v. *Mercer*, L.R. 3 Ex. 51; 37 L.J. Ex. 24; but see *Swinyard* v. *Bowes*, 5 M. & S. 62, and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 52 (3), *post*, p. 1270.

the plaintiff might bring a fresh action upon the first bill while the second was outstanding in the hands of an indorsee (*f*). But, where a bill was dishonoured, and the debtor gave the creditor another bill, and a warrant of attorney to confess judgment in case of the non-payment of the second bill, and agreed to pay the expenses of the execution of the warrant of attorney, and the second bill was duly honoured, but those expenses were not paid, it was held that the creditor could not sue the debtor upon the original bill for the purpose of recovering those expenses, as the payment of the second bill operated as a discharge of the first, but that they might be recovered as money paid by the creditor for the use of the debtor (*g*). If a renewed bill is taken in exchange for a former bill no action can be maintained upon the first bill until the second bill becomes due and has been dishonoured and returned (*h*), unless the second bill does not extend to and cover the interest that had accrued due on the first bill at the time such second bill was given, in which case the giving of the second bill does not preclude the creditor from suing upon the first bill for the recovery of such interest (*i*).

Actions for debts secured by dishonoured bills or notes.—When a plaintiff sues for a debt for which a dishonoured bill or note has been given, he must be prepared to show that the instrument is in his possession or under his control, and not outstanding in the hands of an indorsee or any party entitled to sue upon it (*k*); but where, at the request of the creditor, the debtor delivers a promissory note on account of the debt to third persons, as trustees for the creditor, and the debtor knows at the time that these persons are such trustees, the fact that the note is still in their hands is no answer to an action by the creditor for the recovery of his original debt when the note is due and unpaid (*l*). He must, also, if the bill or note is made or accepted by some third party, and is indorsed by the debtor himself, show that it was presented for payment at the time it became due, and that it was dishonoured (*m*); but, if the debtor's name does not appear upon the face of the bill, the creditor is not bound to prove that he gave notice of dishonour

(*f*) *Norris* v. *Aylett*, 2 Camp. 329.

(*g*) *Dillon* v. *Rimmer*, 7 Moore, 431; 1 L.J. (O.S.) C.P. 3.

(*h*) *Kendrick* v. *Lomax*, 2 C. & J. 405; 1 L.J. Ex. 145.

(*i*) *Lumley* v. *Musgrave*, 4 Bing. N.C. 9; 7 L.J. C.P. 49.

(*k*) *Hadwen* v. *Mendizabel*, 10 Moore, C.P. 477; 2 C. & P. 20; *Burden* v. *Halton*, 4 Bing. 454; 6 L.J. (O.S.) C.P. 61; *Price* v. *Price*, 16 M. & W. 243; 16 L.J. Ex. 99; *Davis* v. *Reilly*, (1898) 1 Q.B. 1; 66 L.J. Q.B. 844; *Debtor, In re, Debtor, Ex parte*, (1908) 1 K.B. 344; 77 L.J. K.B. 409.

(*l*) *National Savings Bk. Association* v. *Tranah*, L.R. 2 C.P. 556; 36 L.J. C.P. 260.

(*m*) *Peacock* v. *Pursell*, 14 C.B. N.S. 728; 32 L.J. C.P. 266.

either to the drawer or the debtor (*n*). The keeping of the security an unreasonable time without presenting it for payment has been held to be evidence that the creditor accepted it by way of payment in satisfaction and discharge of the debt (*o*). If the bill or note is duly honoured at maturity, the payment dates from the time the money due on it was paid, and not from the time the bill or note was originally given, unless there be circumstances to show that the delivery and acceptance of the security were regarded by the parties as actual payment (*p*). Fraudulent and invalid bills and notes may in general be considered as waste paper; and the creditor may resort at once to his original demand (*q*).

Payment by cheque.—The production of a cheque drawn by the defendant on his bankers, having the plaintiff's name or signature in his own handwriting, or that of his agent, on the cheque, is *primâ facie* evidence of payment (*r*). If the debtor makes an order upon his banker for payment of the amount of the debt, and the creditor accepts it, and keeps it in his hands an unreasonable time before presenting it for payment, and the banker becomes insolvent, the debtor is discharged on account of the laches of the creditor (*s*). It is difficult to say what is an unreasonable time; and probably each case must depend more or less on its own circumstances. In one case four months (*t*), and in another three weeks (*u*), were held to be an unreasonable time for a draft, cheque, or order on a banker to be retained without presentment in the hands of the creditor (*x*). If the creditor, on presenting the draft or order to the banker or person on whom it is made, instead of receiving a cash payment, for his own convenience, or the convenience of the drawee, elects to take a note or bill for the amount, the original debt is discharged (*y*). If a cheque received as payment is lost by the creditor, he may, on giving security to the drawer if required to indemnify him, compel the drawer to give him a duplicate (*z*).

Payment by stolen bank note.—A bank note payable to bearer,

(*n*) *Goodwin* v. *Coates*, 1 Moo. & R. 221; *Swinyard* v. *Bowes*, 5 M. & S. 62; *Bishop* v. *Rowe*, 3 M. & S. 368.

(*o*) *Griffith* v. *Pope*, cited Andr. 189.

(*p*) *Harries, In re*, 13 M. & W. 3; 13 L.J. Ex. 259.

(*q*) *Bristol* (*Earl*) v. *Wilsmore*, 1 B. & C. 514; 1 L.J. (O.S.) K.B. 179; Tindal, C.J., *Maillard* v. *Argyll* (*Duke*) 6 Sc. N.R. 945; *Wilson* v. *Vysar*, 4 Taunt. 288; *Cundy* v. *Marriott*, 1 B. & Ad. 696; 9 L.J. (O.S.) K.B. 70. As to fraud with respect to bills, see Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 29 (2); s. 30, *post*, pp. 1255, 1257.

(*r*) *Egg* v. *Barnett*, 3 Esp. 196; *Mountford* v. *Harper*, 16 M. & W. 825; 16 L.J. Ex. 184. See *Defries & Sons, In re*, (1909) 2 Ch. 423; 78 L.J. Ch. 720.

(*s*) *Camidge* v. *Allenby*, 6 B. & C. 373; 5 L.J. (O.S.) K.B. 95.

(*t*) *Chamberlyn* v. *Delarive*, 2 Wils. 353; *Smith* v. *Wilson*, Andr. 190.

(*u*) *Hopkins* v. *Ware*, L.R. 4 Ex. 265; 38 L.J. Ex. 147.

(*x*) As to what is a reasonable time for presentment, see Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 74, *post*, p. 1290.

(*y*) *Post*, p. 160.

(*z*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 69, 70.

and transferable by delivery, is considered as money, so that every person who takes it, in the ordinary course of business, has a good title to it, and his right to enforce payment of it is unaffected by any infirmity of title in the person who delivered it to him (*a*). If, therefore, a tradesman gives change for a stolen note in ignorance that the note has been stolen, and then pays the note to a creditor in discharge of a debt, it is a good payment, and the creditor may enforce the security against the banker who issued it (*b*).

Payment by delivery of goods.—As to this see *post*, p. 183.

Payment by legacy.—A legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be considered a satisfaction of the debt (*c*). But a legacy to be satisfaction must be due at the time of the testator's death and not on a contingency, or at a future day (*d*).

Payment by stranger.—Where a third person pays the debt of another without authority, that of itself will not discharge the debtor (*e*). But it is competent for the debtor to adopt and ratify the payment (*f*), even after the creditor has commenced an action for the debt (*g*). Where the payment is not made by way of gift for the benefit of the debtor, but by a person who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, whereupon the effect of payment is at an end, and the debtor remains responsible (*h*).

Proof of payment.—Where the plaintiff's solicitor wrote to the defendant requesting him to remit the balance due to the plaintiff with 13*s.* 4*d.* costs, and the defendant sent a bank bill

(*a*) *Raphael* v. *Bank of England*, 17 C.B. 161; 25 L.J. C.P. 33; and see *Lucas* v. *Wilkinson*, 1 H. & N. 420; 26 L.J. Ex. 13.

(*b*) *Miller* v. *Race*, 1 Burr. 452; 2 Smith, L.C. 463 (ed. 11); *Grant* v. *Vaughan*, 3 Burr. 1516.

(*c*) *Fowler* v. *Fowler*, 3 P. Wms. 353; *Gaynor* v. *Wood*, 1 Dick. 331; *Fletcher, In re*, 38 Ch. D. 373; *Rattenberry, In re, Ray* v. *Grant*, (1906) 1 Ch. 667; 75 L.J. Ch. 304; *Blundell, In re, Blundell* v. *Blundell*, (1906) 2 Ch. 222; 75 L.J. Ch. 561. As to satisfaction of debts by annuities, see *Atkinson* v. *Littlewood*, L.R. 18 Eq. 595; *Dowse, In re*, 50 L.J. Ch. 285; *Horlock, In re*, (1895) 1 Ch. 516.

(*d*) *Clark* v. *Sewell*, 3 Atk. 96, 98. It is sufficient if it be an immediate legacy, although, of course, only payable in due course of administration: *Rattenberry, In re, Ray* v. *Grant*, (1906) 1 Ch. 667; 75 L.J. Ch. 304.

(*e*) *Kemp* v. *Balls*, 10 Exch. 607; 24 L.J. Ex. 47; *Keighley Maxted & Co.* v. *Durant*, (1901) A.C. 240; 70 L.J. K.B. 662; *Rowe, In re, Derenburg & Co., Ex parte*, (1904) 2 K.B. 483; 73 L.J. K.B. 594.

(*f*) Co. Litt. 206, b; Tindal, C.J., in *Wilson* v. *Tumman*, 6 M. & G. 236, 242; 12 L.J. C.P. 306; *Belshaw* v. *Bush*, 11 C.B. 191; 22 L.J. C.P. 24; *James* v. *Isaacs*, 12 C.B. 791; 22 L.J. C.P. 73; *Cork* v. *Lister*, 13 C.B. N.S. 543, 594; 32 L.J. C.P. 121, 126.

(*g*) *Simpson* v. *Eggington*, 10 Exch. 845; 24 L.J. Ex. 312.

(*h*) *Walter* v. *James*, L.R. 6 Ex. 124; 40 L.J. Ex. 104.

for the amount of the debt only, which the plaintiff's solicitor by letter refused to receive but nevertheless retained, it was held that the facts constituted evidence of payment (*i*). Where, however, there was a request to remit, and a post-office order was sent which was not available because a mistake had been made in the name of the payee, it was held that there was no evidence of payment, although the order had been retained (*k*); and, where the defendant sent the plaintiff a cheque which purported to be drawn for the balance of the plaintiff's account, and would, consequently, if presented by him, have been tantamount to the giving a receipt in full for all demands, and the plaintiff by letter declined to receive the cheque as a payment of all that was due, and expressed his willingness to return it, but retained it in his hand, it was held that there was no evidence of payment (*l*). A receipt is nothing more than a *primâ facie* acknowledgment that money has been paid, and may be contradicted or explained (*m*). So, a general receipt on the back of a bill of exchange is no evidence of payment of the bill by the acceptor; the receipt of itself proves nothing until it is explained (*n*).

Presumption of payment.—Any great lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords a *primâ facie* presumption that payment has been made (*o*). Where servants are in the habit of being paid weekly or monthly, and supporting themselves by their week's or month's wages, the presumption is in favour of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any demand of payment on the part of the servant, or any admission or acknowledgment on the part of the employer of arrears being due (*p*). When a bill, proved to have been once in circulation after having been accepted, gets back again into the hands of the acceptor, and is produced by him, the presumption is that he has got it back by having paid it; but payment is not to be presumed from a receipt indorsed on a bill unless the receipt is

(*i*) *Caine* v. *Coulton*, 1 H. & C. 764; 32 L.J. Ex. 97.

(*k*) *Gordon* v. *Strange*, 1 Exch. 477.

(*l*) *Hough* v. *May*, 4 Ad. & E. 954; 5 L.J. K.B. 186.

(*m*) *Wyatt* v. *Hertford* (*Marquis*), 3 East, 147; *Skaife* v. *Jackson*, 3 B. & C. 421; 3 L.J. (O.S.) K.B. 43; *Graves* v. *Key*, 3 B. & Ad. 313; *Farrar* v. *Hutchinson*, 9 Ad. & E. 641; 8 L.J. Q.B. 107; *Foster* v. *Dawber*, 6 Exch. 839; 20 L. J. Ex. 385; *Bowes* v. *Foster*, 2 H. & N. 779; 27 L.J. Ex. 262; *Lee* v. *Lancashire and Yorkshire Ry.*, L.R. 6 Ch. 527; *Oliver* v. *Nautilus Steam Shipping Co.*, (1903) 2 K.B. 639, 648; 72 L.J. K.B. 857; *Duncan* (*W. W.*) *& Co., In re*, (1905) 1 Ch. 307; 74 L.J. Ch. 188.

(*n*) *Phillips* v. *Warren*, 14 M. & W. 380; 15 L.J. Ex. 3.

(*o*) *Cooper* v. *Turner*, 2 Stark. 497.

(*p*) *Lucas* v. *Norosilieski*, 1 Esp. 295.

shown to be in the handwriting of a person entitled to demand payment (*q*).

Payment to an agent in the ordinary course of business is a payment to the principal, unless the latter has countermanded the agent's authority, and given the proper notice to the defendant before the payment was made (*r*). So payment to a person in a merchant's counting house, apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority from the merchant to receive it (*s*). But, where goods deposited with a warehouse keeper were sold by the owner, and the warehouse keeper's clerk, after the sale, wrote without authority to the purchaser, and falsely represented that his employer, the warehouse keeper, was authorised to receive the money on behalf of the vendor, and induced the purchaser to send a remittance by post, in a letter addressed to the warehouse keeper, which letter and remittance the clerk got possession of and absconded with, it was held that there had been no payment to the vendor (*t*). Payment to the solicitor of a plaintiff in an action is a payment to the plaintiff himself, but a payment to an agent of the solicitor is not (*u*). An agent employed to sell an estate has no implied authority to receive the purchase-money (*x*); nor has a solicitor who has possession of a mortgage deed signed by the mortgagor (*y*). An authority to receive the interest of a sum of money, invested on mortgage or other real or personal security, does not carry with it any authority to receive the principal, unless the party receiving the interest was himself previously intrusted with possession of the principal, and has himself invested it, and dealt with it in the way of his trade (*z*).

In the absence of any custom of the trade to the contrary, a money payment is the only authorised mode of payment, as between commission-agents for sale and the purchasers with whom they deal (*a*); and, therefore, if a person buys goods of

(*q*) *Pfiel* v. *Vanbatenberg*, 2 Campb. 439.

(*r*) Payment of a private debt due to a member of a firm to the firm is not payment to the creditor in the absence of evidence that he authorised the firm to receive it: *Powell* v. *Brodhurst*, (1901) 2 Ch. 160; 70 L.J. Ch. 587.

(*s*) *Barrett* v. *Deere*, Moo. & M. 200; *Wilmot* v. *Smith*, 3 C. & P. 453; Moo. & M. 238; *Mitcheson* v. *Oliver*, 5 E. & B. 349; 25 L.J. Q.B. 39.

(*t*) *Kaye* v. *Brett*, 5 Exch. 269; 19 L.J. Ex. 346.

(*u*) *Yates* v. *Frickleton*, 2 Doug. 623.

(*x*) *Mynn* v. *Joliffe*, 1 Moo. & R. 327.

(*y*) *Swinbanks, Ex parte*, 11 Ch.D. 525; 48 L.J. Bank. 120. See *Gordon* v. *James*, 30 Ch.D. 249; *London Freehold and Leasehold Property Co.* v. *Suffield*, (1897) 2 Ch. 608; 66 L.J. Ch. 790.

(*z*) *Wilkinson* v. *Candlish*, 5 Exch. 91; 19 L.J. Ex. 166.

(*a*) *Barker* v. *Greenwood*, 2 Y. & C. Ex. 414, 419; 6 L.J. Ex. (Eq.) 54; *Sweeting* v. *Pearce*, 7 C.B. N.S. 485; 29 L.J. C.P. 272; *Crossley* v. *Magniac*, (1893) 1 Ch. 594.

an agent, knowing him to be an agent, and knowing who the principal is, he cannot, by paying the agent in goods, discharge himself from liability for the price to the principal, without ascertaining whether such a course of dealing has been authorised by the latter (*b*). So, if a person buys goods of another, having notice that he is an agent and not a principal, though he does not know who the principal is, he cannot set off a debt due to him from such agent, in an action by the principal for the price of the goods (*c*). "The general rule of law is that, if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but, if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged" (*d*). Thus, where the known agent of a wine-merchant sold wine to a customer, who paid for it by returning to the agent his own cheque, which the customer had cashed a few days previously, it was held that this was not, as between the principal and the customer, a payment for the wine sold to the latter through the medium of the agent (*e*). A solicitor as agent gave to a stockbroker directions to sell stock, and the stockbroker sent him a cheque for part of the purchase-money, and carried the balance to the solicitor's credit in the account between them, which account was afterwards settled; it was held that the stockbroker must have had notice that the solicitor was an agent, and that carrying the balance to the credit of the solicitor's account was not a payment (*f*). It is the duty of the person paying, on learning that the contract was made on behalf of a principal, to ascertain whether the latter has sanctioned any other than the usual mode of payment (*g*).

Payment by delivery of a bill of exchange to the agent is not a valid payment to the principal, unless the agent was expressly authorised to receive payment by bill, or unless such payment was in accordance with the usual and customary course of business, or has been assented to and adopted by the principal (*h*). But payment by a cheque which is duly honoured

(*b*) *Capel* v. *Thornton*, 3 C. & P. 352; *Howard* v. *Chapman*, 4 C. & P. 508.

(*c*) *Semenza* v. *Brinsley*, 18 C.B. N.S. 467; 34 L.J. C.P. 161; *Dresser* v. *Norwood*, 17 C.B. N.S. 466; 34 L.J. C.P. 48; see *Dixon, Ex parte*, 4 Ch.D. 133; 46 L.J. Bank. 20.

(*d*) *Russell* v. *Bangley*, 4 B. & Ald. 398.

(*e*) *Underwood* v. *Nicholls*, 17 C.B. 239; 25 L.J. C.P. 79.

(*f*) *Pearson* v. *Scott*, 9 Ch.D. 198; 47 L.J. Ch. 705; *Crossley* v. *Magniac*, (1893) 1 Ch. 594.

(*g*) *Pratt* v. *Willey*, 2 C. & P. 350; *Cornish* v. *Abington*, 4 H. & N. 555; 28 L.J. Ex. 262.

(*h*) *Ward* v. *Evans*, 2 Ld. Raym. 930; *Williams* v. *Evans*, L.R. 1 Q.B. 352; 35 L.J. Q.B. 111; *Hogarth* v. *Wherley*, L.R. 10 C.P. 630; 44 L.J. C.P. 330; *Blumberg* v. *Life Interests, &c. Corporation*, (1898) 1 Ch. 27; 67 L.J. Ch. 118.

is a good payment (*i*). An assurance broker, as agent of the assured, is, in general, only entitled to receive payment for the assured from the underwriter in money (*k*). But, where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of the business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that, where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the intention and with the authority of the principal (*l*).

When money has been paid to an agent to be transmitted to his principal, or to be placed to the credit of the latter in his account with his agent, the party paying the money loses all control over it as soon as it reaches the hands of the agent (*m*).

Payment by agent.—If a principal has authorised the agent to pledge the principal's credit in the commercial world, and the principal is consequently disclosed and debited in the first instance, he at once becomes responsible upon the contract, and continues liable until the creditor has received actual payment, or has taken security from the agent, having had an option of a cash payment from the latter at the time he did so. If the principal furnishes the agent with money to pay the debt, and the agent, instead of making a cash payment, gives the creditor a bill of exchange or promissory note, or a cheque on a banker, and the security fails or is dishonoured, the principal is not discharged, unless it appears that the creditor knew that he might have had cash, but preferred a bill for his own accommodation. If, having had the option of receiving money, he nevertheless thinks fit to take the acceptance of the agent, he is deemed to have accepted the credit of the latter, in lieu of that of the principal, and to have discharged the principal (*n*). If the agent

(*i*) *Bridges* v. *Garrett*, L.R. 5 C.P. 451; 39 L.J. C.P. 251; *Pape* v. *Westacott*, (1894) 1 Q.B. 272; 63 L.J. Q.B. 22; *Walker* v. *Barker*, 16 T.L.R. 393.

(*k*) *Todd v. Reid*, 4 B. & Ald. 210; *Wall* v. *Cockerell*, 10 H.L.C. 229; 32 L.J. Ch. 276; but see *Catterall* v. *Hindle*, L.R. 2 C.P. 368; 35 L.J. Q.B. 161.

(*l*) *Stewart* v. *Aberdein*, 4 M. & W. 211; 7 L.J. Ex. 292; *Catterall* v. *Hindle*, *supra*.

(*m*) *Williams* v. *Deacon*, 4 Exch. 497.

(*n*) *Marsh* v. *Pedder*, 4 Camp. 257; *Clarke* v. *Noel*, 3 Camp. 411; *Everett* v. *Collins*, 2 Camp. 515; *Strong* v. *Hart*, 6 B. & C. 160; *Smith* v. *Ferrand*, 7 B. & C. 19; 5 L.J. (O.S.) K.B. 355; *Tapley* v. *Martens*, 8 T.R. 451; *Robinson* v. *Read*, 9 B. & C. 449; 7 L.J. (O.S.) K.B. 237; *Anderson* v. *Hillies*, 12 C.B. 504; 21 L.J. C.P. 150.

pays by a cheque of his own, the creditor, if he accepts it, must present it for payment within a reasonable time; and if he, by his delay, alters for the worse the position of the debtor, the latter is discharged (*o*). And, if he gives his receipt to the agent as for a cash payment, when he has only obtained a bill, and the principal pays money to the agent, and alters the state of his accounts with the latter to the principal's own prejudice, upon the supposition that the demand has been satisfied as the receipt imports, the creditor cannot afterwards, in case of the insolvency of the agent, and the failure of the security he has taken from the latter, resort to the principal for payment (*p*).

If, on the other hand, the principal is not known or disclosed at the time of the making of the contract, if the agent deals in his own name, and is debited accordingly, and the principal, in ignorance of the intention of the creditor to look to him for payment, and being misled by the conduct of the creditor, has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterwards, if the agent dies, or becomes insolvent with the money in his hands, resort to the principal for payment (*q*). The mere circumstance of the agent's being indebted to the principal at the time of his insolvency, or of his having a balance in hand out of which he might have paid the debt, is not of itself sufficient to discharge the principal (*r*). The principal must show that the creditor has himself misled him into supposing that the creditor has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay by the creditor in enforcing payment from the agent, even although it has misled the principal into settling with the agent, will not be sufficient to discharge the principal from liability (*s*).

Payment to creditor of creditor.—Payment by a garnishee, or execution levied upon him, is a valid discharge to him, as against the judgment debtor, of the amount paid or levied, although the proceedings may be set aside or the judgment reversed (*t*). But to discharge the garnishee there must be a judge's order for payment; payment upon notice of attachment only is no discharge (*u*). The order of attachment does not con-

(*o*) *Hopkins* v. *Ware*, L.R. 4 Ex. 268; 28 L.J. Ex. 147.

(*p*) *Wyatt* v. *Hertford (Marquis)*, 3 East, 147.

(*q*) *Heald* v. *Kenworthy*, 10 Exch. 739; 24 L.J. Ex. 76; *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598; 41 L.J. Q.B. 253; as explained by *Irvine* v. *Watson*, 5 Q.B.D. 414; 49 L.J. Q.B. 531.

(*r*) *Waring* v. *Favenck*, 1 Camp. 85.

(*s*) *Davison* v. *Donaldson*, 9 Q.B.D. 623.

(*t*) Order XLV., rule 7; *Smith, In re*, 20 Q.B.D. 321; 57 L.J. Q.B. 212; *Turnbull* v. *Robertson*, 47 L.J. C.P. 294; *Culverhouse* v. *Wickens*, L.R. 3 C.P. 295; 37 L.J. C.P. 107.

(*u*) *Turner* v. *Jones*, 1 H. & N. 878; 26 L.J. Ex. 262; *London Corporation* v. *London Joint Stock Bank*, 6 App.Cas. 392, 415; 50 L.J. Q.B. 594.

clusively vest the debt in the judgment creditor as against the trustee of the judgment debtor, if the latter is adjudicated a bankrupt before the order is made absolute, and therefore in such a case the garnishee should show cause against the order being made absolute (*x*). But, if the order is made absolute, and payment is made under it without notice of the adjudication, the payment is a good discharge (*y*). Whether it is equally a discharge where there has been notice of the adjudication after the order was made absolute, and in sufficient time to enable the garnishee to apply for a stay of execution, is unsettled. In such a case the safer course for the garnishee is either to apply for a stay of execution, or to give the trustee notice of the order informing him that it would be obeyed unless the trustee got the order set aside (*z*). If the trustee waives his claim, the garnishee has no independent right to resist payment to the judgment creditor (*a*).

Payments to joint creditors, trustees, &c.—Payment to one of two joint creditors or to one of two trustees, acting in the execution of a trust, is a payment to both, unless the payment be a payment as between banker and customer (*b*). It is part of the law merchant that bankers shall not pay to one of several persons jointly interested without the consent of the others except by express agreement; and therefore, if two persons give a power of attorney to bankers to sell their joint stock, the bankers must place the proceeds to the joint account of the two, and both must concur in drawing out the money. If it is meant that the money should be paid to one, an authority ought to be given to that effect by the other to the bankers (*c*); and, if money is paid into a bank by three persons not partners, one of them cannot draw cheques without the concurrence of the others, as it would defeat the object of paying in the money jointly (*d*). Payment to one of several executors of a debt due to their testator is a good payment as against the others; for each executor has authority under the will to collect debts due to the estate independently of his co-executors (*e*). Payment to a person who has obtained probate of a forged will is a discharge to the party so paying, although the probate be afterwards declared null, and administration be granted to the intestate's

(*x*) *Holmes* v. *Tutton*, 5 E. & B. 15; 24 L.J. Q.B. 346.
(*y*) *Wood* v. *Dunn*, L.R. 2 Q.B. 73; 36 L.J. Q.B. 27.
(*z*) *Wood* v. *Dunn*, *supra*.
(*a*) *European Bank* v. *Fox*, L.R. 2 Q.B. 85, note.
(*b*) *Husband* v. *Davis*, 10 C.B. 645; 20 L.J. C.P. 118; *Wallace* v. *Kelsall*, 7 M. & W. 264; 10 L.J. Ex. 12; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160; 70 L.J. Ch. 587.
(*c*) *Stone* v. *Marsh*, 6 B. & C. 551; 5 L.J. (O.S.) K.B. 201.
(*d*) *Innes* v. *Stephenson*, 1 Moo. & R. 147.
(*e*) *Can* v. *Read*, 3 Atk. 695.

next of kin; for the debtor cannot controvert the authority of the probate so long as it remains unrepealed (*f*). Payment, also, to an administrator, before the will is found, is a good defence to an action subsequently brought by an executor (*g*). Payment to one of several assignees of a bankrupt's estate of a debt due to the bankrupt is a valid payment to the assignees generally (*h*), unless the other assignees have expressed their dissent, and interfered to prevent the payment (*i*).

Payments made to bankrupt.—Nothing in the Bankruptcy Act, 1883, is to render invalid any payment made for value received to any bankrupt before the date of the receiving order by a person not having at the time of such payment notice of any available act of bankruptcy committed by the bankrupt before that time (*k*).

Payment to one of several joint creditors.—A man may discharge a debt by payment to one of several persons with whom he has contracted jointly; and the inability of bankers so to discharge themselves arises from the peculiar contract and relation which exists between them and their customers (*l*).

Appropriation of payments.—The general rule of law is that, where several debts are due from a party who pays money, he has a right to apply that payment to such of these debts as he thinks fit (*m*). If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money (*n*). If, therefore, money becomes due on a bond, and a debt is also owing for goods sold and delivered, and the debtor makes a payment, declaring it to be on account of the bond debt, the creditor cannot appropriate it to the simple contract debt. But, if the payment be made generally on account, the creditor may appropriate it to whichever debt he pleases (*o*). The application of the money is governed, not by any rule of law, but by the intention of the debtor or of the creditor expressed, implied, or presumed (*p*); and in arriving at a conclusion as to such in-

(*f*) *Allen* v. *Dundas*, 3 T.R. 125.

(*g*) *Pond* v. *Underwood*, 2 Ld. Raym. 1210.

(*h*) *Smith* v. *Jamesons*, 1 Esp. 114.

(*i*) *Bristow* v. *Eastman*, *ib.* 174.

(*k*) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 49, *post*, p. 434.

(*l*) *Wallace* v. *Kelsall*, 7 M. & W. 264; 10 L.J. Ex. 12; *Husband* v. *Davis*, 10 C.B. 645; 20 L.J. C.P. 118; *Foley* v. *Hill*, 2 H.L. Cas. 28; *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160; 70 L.J. Ch. 587. See also *post*, pp. 188, 315 *et seq.*

(*m*) *Peters* v. *Anderson*, 5 Taunt. 596; *Devaynes* v. *Noble*, *Clayton's case*, 1 Mer. 572, 608; *Croft* v. *Lumley*, 6 H.L.C. 672, 694; 27 L.J. Q.B. 321.

(*n*) *Simson* v. *Ingham*, 2 B. & C. 72; 1 L.J. (O.S.) K.B. 234; *Hooper* v. *Keay*, 1 Q.B.D. 178; *Cory Bros. & Co.* v. *Owners of Turkish SS. Mecca*, (1897) A.C. 286; 66 L.J. P. 86.

(*o*) *Anon*, Cro. Eliz. 78; *Devaynes* v. *Noble*, *Clayton's case*, 1 Mer. 572, 585; *Kinnaird* v. *Webster*, 10 Ch. D. 139; 48 L.J. Ch. 348.

(*p*) *Newmarch* v. *Clay*, 14 East, 239; *Peters* v. *Anderson*, 5 Taunt. 596; *Marryatts* v. *White*, 2 Stark. 101; *Shaw*

tention the conduct of the parties may be material (*q*). Where two debts were due to the plaintiff, one on a covenant, and the other on a simple contract debt, it was held that he might appropriate payments made generally on account to the simple contract debt (*r*). And, where a creditor had received money without any specific appropriation by the debtor, he was permitted to appropriate it to the discharge of a purely equitable debt (*s*). The appropriation by the creditor may be made at any time before the case comes under the consideration of a jury; and he is not bound at the time he makes the appropriation to give the debtor any notice thereof (*t*). If, however, he communicates his election to the debtor, he is bound thereby, and cannot make a different appropriation without the assent of the debtor. The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital (*u*).

Appropriation by debtor.—If there are several debts due, and application is made by the creditor for one of these in particular, the payment made in answer to the application is obviously made on account of the specific debt named, and cannot be appropriated by the creditor to a different debt (*x*). If a bill of exchange becomes due, or goods are sold and delivered on credit for a certain sum, and the exact amount of the bill or of the purchase-money for the goods is paid by the party liable, the payment is deemed to have been made on account of the bill or in respect of the price of the goods (*y*). Where money is paid as an instalment of a composition in respect of several debts, it must be appropriated to those debts rateably (*z*).

Appropriation by creditor.—If there be one debt due on a lawful contract, and another debt arising out of an illegal transaction, the creditor cannot appropriate the payment to the un-

v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29; *Bardwell* v. *Lydall*, 7 Bing. 489; 9 L.J. (O.S.) C.P. 148; *Raikes* v. *Todd*, 8 Ad. & E. 846; 8 L.J. Q.B. 35; *Young* v. *English*, 7 Beav. 10; 13 L.J. Ch. 76; *Burn* v. *Boulton*, 2 C.B. 476; 15 L.J. C.P. 97; *Gee* v. *Pack*, 33 L.J. Q.B. 49; *Lowther* v. *Hearer*, 41 Ch. D. 248; 58 L.J. Ch. 482; *Kirkpatrick* v. *South Australia Ins.*, 11 App.Cas. 177; *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L.J. Ch. 737; *Mackusick* v. *Fleming*, 73 L.J. Ch. 826; affirming *Fleming* v. *Loe*, (1902) 2 Ch. 359; 71 L.J. Ch. 687; *Langrish* v. *Watts*, (1903) 1 K.B. 636; 72 L.J. K.B. 435; *Deeley* v. *Lloyds Bank* (1910) 1 Ch. 648; 79 L.J. Ch. 561.

(*q*) See cases cited *infra*, p. 166.

(*r*) *Peters* v. *Anderson*, 5 Taunt. 596.

(*s*) *Bosanquet* v. *Wray*, 6 Taunt, 597.

(*t*) *Philpott* v. *Jones*, 2 Ad. & E. 44; 4 L.J. K.B. 65; *Cory Bros. & Co.* v. *Owners of Turkish SS. Mecca*, (1897). A.C. 286; 66 L.J. P. 86; *Seymour* v. *Pickett*, (1905) 1 K.B. 715; 74 L.J. K.B. 413.

(*u*) *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

(*x*) *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29.

(*y*) *Newmarch* v. *Clay*, 14 East, 239, 244; *Marryatts* v. *White*, 2 Stark. 101.

(*z*) *Thompson* v. *Hudson*, L.R. 6 Ch. 320; 40 L.J. Ch. 28; *Accidental Death Ins. Co., In re*, 7 Ch.D. 568; 47 L.J. Ch. 396.

lawful demand so as to enable him to sue for the lawful debt (*a*); but, if the contract creating the debt is not absolutely unlawful, the creditor being merely prevented from suing upon it by some statutory enactment framed for the purpose of protecting the debtor from particular actions, then the creditor may appropriate the payment to the demand the right of action for which is barred by the statute, and sue for the other debt. Such is the case when the right of action for one of two debts is barred by the Statute of Limitations, or by the Acts regulating the sale of spirituous liquors on credit (*b*). Where a solicitor had several claims against a corporation for work and services and money paid, some of which he could enforce by action against the body corporate, and some of which he was precluded from enforcing by reason of a technical defect in his appointment, it was held that he might appropriate a general payment to the latter claims, and proceed for the recovery of those debts which the law permitted him to enforce (*c*). But, where a solicitor delivered a bill containing taxable and untaxable items, and a general payment was made on account, it was held that the attorney could not appropriate the payment to the taxable items, so as to enable him to sue for the other charges without delivering a signed bill pursuant to the statute (*d*). If there be a debt due from the debtor in a representative character, and another in his own right, a general payment on account is deemed to be a payment of the debt due from the debtor in his own right, and the creditor cannot, without the express assent of such debtor, appropriate it in discharge of a debt due from him as executor (*e*).

Separate accounts and one entire running account.—Where there are distinct accounts and a general payment, and no appropriation by the debtor at the time of payment, the creditor may apply the payment to which account he pleases; but, where a variety of transactions are included in one general account, the items of credit are, in the absence of other appropriation, to be appropriated to the items of debit in order of date (*f*). This presumption, however, may be rebutted by an express stipulation,

(*a*) *Wright* v. *Laing*, 3 B. & C. 165; *Lamprell* v. *Billericay Union*, 3 Exch. 283; 18 L.J. Ex. 282; *Keeping* v. *Broom*, 11 T.L.R. 595.

(*b*) *Bosanquet* v. *Wray*, 6 Taunt. 597; *Mills* v. *Fowkes*, 5 Bing. N.C. 455; 8 L.J. C.P. 276; *Williams* v. *Griffith*, 5 M. & W. 300; *Cruickshanks* v. *Rose*, 1 Moo. & R. 100; *Philpott* v. *Jones*, 2 Ad. & E. 41; 4 L.J. K.B. 65; *Seymour* v. *Pickett*, (1905) 1 K.B. 715; 74 L.J. K.B. 413.

(*c*) *Arnold* v. *Poole* (*Mayor*), 5 Sc. N.R. 741; 12 L.J. C.P. 97.

(*d*) *James* v. *Child*, 2 Cr. & J. 678; 2 L.J. Ex. 78.

(*e*) *Goddard* v. *Cox*, 2 Str. 1194.

(*f*) *Devaynes* v. *Noble*, *Clayton's case*, 1 Mer. 608; *Kirby* v. *Marlborough* (*Duke*), 2 M. & S. 18; *Bodenham* v. *Purchas*, 2 B. & Ald. 39; *Kinnaird* v. *Webster*, 10 Ch.D. 139; 48 L.J. Ch. 348; *Mutton* v. *Peat*, (1900) 2 Ch. 79; 69 L.J. Ch. 484.

or by a particular mode of dealing between the parties (*g*), or by the circumstances of the case showing that this could not have been their intention (*h*). And the presumption does not apply to a case where there is no account current between the parties, nor where, from an account rendered or other circumstances, it appears that the creditor intended not to make any appropriation, but to reserve the right (*i*). So, if the account is not treated as one entire running account, but is divided into separate and distinct accounts, the payments are not necessarily appropriated to the earlier items (*k*).

Avoidance of payment.—A payment good at the time as extinguishing the debt may be rendered void by matter subsequent, as, in the event of the bankruptcy of the debtor, within three months after the date of the payment (*l*). In order, however, to render a payment by the debtor within three months prior to his bankruptcy void as a fraudulent preference, there must have been an intention to prefer the creditor (*m*).

Tender of payment.—Bank of England notes are a good tender for all sums above 5*l.*, so long as the Bank of England continues to pay its notes on demand in legal coin; but neither the Bank, nor any branch bank, can make a legal tender of payment in its own notes to a party requiring gold (*n*). Gold coin is a good tender for payment of any amount. Silver coin is a good tender for sums not exceeding 40*s.*, and bronze coins for sums not exceeding 1*s.* (*o*). But no valid tender can be made of gold, silver, or bronze coin, defaced by names or words stamped thereon, or bent by any machine or instrument (*p*). To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by express declaration or equivalent act of the creditor (*q*). If an absolute and unconditional covenant or promise be made for the payment of money, without any time of payment being men-

(*g*) *Henniker* v. *Wigg*, 4 Q.B. 795; *Williams* v. *Rawlinson*, 3 Bing. 71; 3 L.J. (O.S.) C.P. 164; *Sherry, In re*, 25 Ch.D. 692; 53 L.J. Ch. 404; *Deeley* v. *Lloyds Bank*, (1910) 1 Ch. 648; 79 L.J. Ch. 561.

(*h*) *City Discount Co.* v. *McLean*, L.R. 9 C.P. 692; 43 L.J. C.P. 344.

(*i*) *Cory Brothers & Co.* v. *Owners of Turkish SS. Mecca*, (1897) A.C. 286; 66 L.J. P. 86.

(*k*) *Simson* v. *Ingham*, 2 B. & C. 65; 1 L.J. (O.S.) K.B. 234.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48.

(*m*) *Hill, Ex parte*, 23 Ch.D. 659; 52 L.J. Ch. 903; *Taylor, Ex parte*, 18 Q.B.D. 295; 56 L.J. Q.B. 195; *Gaze, Ex parte*, 23 Q.B.D. 74; 58 L.J. Q.B. 373.

(*n*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6; *Wright* v. *Reed*, 3 T.R. 554; *Suffell* v. *Bank of England*, 9 Q.B.D. 555, 563; 51 L.J. Q.B. 401.

(*o*) Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 4; and see sect. 6 as to the legalisation of gold coins issued from colonial or foreign mints.

(*p*) 24 & 25 Vict. c. 99, s. 17; 33 & 34 Vict. c. 10, s. 7; 54 & 55 Vict. c. 72, s. 1.

(*q*) *Douglas* v. *Patrick*, 3 T.R. 683; *Thomas* v. *Evans*, 10 East, 101; *Glasscott* v. *Day*, 5 Esp. 48; *Alexander* v. *Brown*, 1 C. & P. 288; *Ryder* v. *Townsend* (*Lord C.*), 7 Dow. & R. K.B. 119; 4 L.J. (O.S.) K.B. 27; *Finch* v. *Brook*, 1 Scott, 70, 76; 4 L.J. C.P. 1; *Danks, Ex parte*, 12 De G. M. & G. 936; 22 L.J. Bank. 73.

tioned, there is an immediate cause of action, in respect of which a writ may be at once issued. Every plea of tender, being pleadable only in bar of the costs of an action, must allege the defendant's continued readiness to pay, accompanied by a payment into court of the money tendered; if the plaintiff can falsify the averment of the defendant's continued readiness, he avoids the plea altogether (*r*). A demand after tender should be made personally (*s*); and, if there be two joint debtors, a demand of one is a demand of both (*t*). If the creditor is offered a larger sum than the amount due to him, and, without any objection on the ground of want of change, makes quite a collateral objection, the tender will be a good tender (*u*). Where change is required, however, it is different, unless the objection be waived (*x*). If provincial bank notes or cheques on bankers are offered in payment, and not objected to, but more money is required, the tender is good, if enough money has been tendered (*y*). But where a solicitor was authorised to accept a tender of money on behalf of his client, it was held that a tender of a cheque was insufficient (*z*).

A tender to one of several joint creditors is a good tender to all (*a*). A tender to a clerk or servant having a general authority to receive money for his employer is a good tender to the latter (*b*). When by command of the creditor a solicitor writes for the debt, directing it to be paid to him at his office by a day named, tender of the money to any person found in possession of the office will, in general, be sufficient (*c*). And, if the solicitor demands payment of the cost of his letter, which is refused, and a writ is issued, the writ may be set aside (*d*). As to tender to a bailiff, see *post*, p. 801. A tender to an executor may be good, although he has not proved the will, provided he afterwards proves the will, and takes upon himself the burthen of administration (*e*).

(*r*) *Coore* v. *Callaway*, 1 Esp. 116; *Rivers* v. *Griffiths*, 5 B. & Ald. 630. See R.S.C. Order XXII., rule 3.

(*s*) *Edwards* v. *Yeates*, Rv. & M. 360.

(*t*) *Peirse* v. *Bowles*, 1 Stark. 323.

(*u*) *Bevans* v. *Rees*, 5 M. & W. 308; 8 L.J. Ex. 263; *Dean* v. *James*, 4 B. & Ad. 546; Broom's Maxims, 138 (ed. 7).

(*x*) *Wade's case*, 5 Co. Rep. 114, a; *Black* v. *Smith*, 1 Peake, 121; *Betterbee* v. *Davis*, 3 Camp. 70; *Robinson* v *Cook*, 6 Taunt. 336; *Cadman* v. *Lubbock*, 5 Dow. & R. K.B. 289; 3 L.J. (O.S.) K.B. 41; *Bevans* v. *Rees*, 5 M. & W. 306; 8 L.J. Ex. 263.

(*y*) *Polglass* v. *Oliver*, 2 Cr. & J. 15; 1 L.J. Ex. 5; *Jones* v. *Arthur*, 8 Dowl. P.C. 442.

(*z*) *Blumberg* v. *Life Interests Corporation*, (1897) 1 Ch. 171; 66 L.J. Ch. 127; affirmed on facts, (1898) 1 Ch. 27; 67 L.J. Ch. 118; *Johnston* v. *Boyes*, (1899) 2 Ch. 73; 68 L.J. Ch. 425.

(*a*) *Douglas* v. *Patrick*, 3 T.R. 683.

(*b*) *Goodland* v. *Blewith*, 1 Camp. 477; *Moffat* v. *Parsons*, 5 Taunt. 307.

(*c*) *Watson* v. *Hetherington*, 1 C. & K. 36; *Kirton* v. *Braithwaite*, 1 M. & W. 310; 5 L.J. Ex. 165; *Wilmot* v. *Smith*, 3 C. & P. 454; M. & M. 239; *Barrett* v. *Deere*, M. & M. 200; *Finch* v. *Boning*, 4 C.P.D. 143.

(*d*) *Holman* v. *Stevens*, 6 Jur. N.S. 124; *Caine* v. *Coulton*, 1 H. & C. 764; 32 L.J. Ex. 97.

(*e*) 1 Eq. Cas. Abr. 319.

Offers of payment not amounting to tender.—Readiness to pay a debt, without an actual tender of money or money's worth, is nothing; and, therefore, if a debtor merely offers to pay the debt, there is no tender (*f*); but if the debtor, having the money at hand, offers cash, and the creditor tells him he need not give himself the trouble of offering it, or producing it, as he will not take it, there is a good tender (*g*). And, where a sum of money was tendered to the maid-servant of the plaintiff, who received it, and said she would take it to her master, and retired, and then came back with the money, saying that her master would not receive it, it was held that this was evidence from which a jury, if they thought fit, might infer that a tender had been made (*h*). An offer of money by a debtor to a creditor, and a request on the part of the latter for a day's delay before receiving it, on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor (*i*).

Conditional tenders.—A tender clogged with reservations, and made in such terms that the party accepting the tender would be drawn into an admission against himself, is a bad tender; for the debtor has no right to expect the creditor to take the money, if by doing so he will furnish evidence against himself of the extent of his demand (*k*). Therefore an offer of money, to be accepted as "all that is due" (*l*), or "in full of all demands" (*m*), or "as the balance due" (*n*), or as a "settlement" (*o*), does not constitute a valid tender. But, if the party offers the money as being all that he admits to be due, not requiring the other party to accept it as all that is due, but leaving the latter free to insist upon any ulterior demand, the tender is then a good tender. If he says, "I am come to settle," or, "I am come with the amount of your bill," and then goes on to offer the money, leaving the other party, after he has got the money, to treat it as "a settlement," or as "the amount of the bill," or not, as he may think fit, the tender is a good tender (*p*). A tender "under protest" is a perfectly good

(*f*) *Kraus* v. *Arnold*, 7 Moore, 59; *Leatherdale* v. *Sweepstone*, 3 C. & P. 342.

(*g*) *Finch* v. *Brook*, 1 Sc. 70; 4 L.J. C.P. 1; *Harding* v. *Davies*, 2 C. & P. 78.

(*h*) *Anon.*, 1 Esp. 349.

(*i*) *Jenkyns* v. *Brown*, 14 Q.B. 503; 19 L.J. Q.B. 286.

(*k*) *Hastings* (*Marquis*) v. *Thorley*, C. & P. 573; *Foord* v. *Noll*, 2 Dowl. N.S. 617; 12 L.J. C.P. 2; *Bevans* v. *Rees*, 5 M. & W. 306, 309; 8 L.J. Ex. 263; *Finch* v. *Miller*, 5 C.B. 428; *Steam Stoker Co., In re*, L.R. 19 Eq. 416; 44 L.J. Ch. 386.

(*l*) *Sutton* v. *Hawkins*, 8 C. & P. 259; *Field* v. *Newport, &c. Ry.*, 3 H. & N. 409; 27 L.J. Ex. 396.

(*m*) *Cheminant* v. *Thornton*, 2 C. & P. 51; *Strong* v. *Harvey*, 3 Bing. 304; 4 L.J. (O.S.) C.P. 57; *Hough* v. *May*, 4 Ad. & E. 954; 5 L.J. K.B. 186.

(*n*) *Evans* v. *Judkins*, 4 Campb. 156.

(*o*) *Mitchell* v. *King*, 6 C. & P. 237.

(*p*) *Bowen* v. *Owen*, 11 Q. B. 130; 17 L.J. Q.B. 5; *Robinson* v. *Ferreday*, 8 C. & P. 752; *Eckstein* v. *Reynolds*, 7 Ad. & E. 80; 6 L.J. K.B. 198; *Henwood* v. *Oliver*, 1 Q.B. 409; 10 L.J. Q.B. 158.

tender (*q*). Whether a tender is conditional or unconditional is a question of fact (*r*). If a debtor tendering money requires a receipt for the amount, he ought himself to be prepared with the paper and writing materials, and the stamp, when a stamp is necessary, and tender them to the creditor together with the money (*s*).

Apportionment of periodical payments.—By the Apportionment Act, 1870 (*t*), all periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly (*u*). The apportioned part is payable, in the case of a continuing payment, when the entire portion becomes due; and, in the case of a payment determined by death or otherwise, when the entire portion would have become due (*x*). The Act apportions liabilities as well as rights (*y*); but does not extend to annual sums made payable in policies of assurance of any kind (*z*); nor to cases in which it is expressly stipulated that no apportionment shall take place (*a*); nor to any sum duly and properly paid before the happening of the event which is said to require the apportionment (*b*). The Crown is not bound by the Act (*c*).

(*q*) *Manning* v. *Lunn*, 2 C. & K. 13; *Scott* v. *Uxbridge and Rickmansworth Ry.*, L.R. 1 C.P. 596; 35 L.J. C.P. 292; *Sweny* v. *Smith*, L.R. 7 Eq. 324; 38 L.J. Ch. 446; *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1; 61 L.J. Ch. 59.

(*r*) *Marsden* v. *Goole*, 2 Car. & K. 133; *Eckstein* v. *Reynolds*, 7 Ad. & E. 80; 6 L.J. K.B. 198.

(*s*) *Laing* v. *Meader*, 1 C. & P. 257; *Blyther* v. *Townsend*, 4 L.J. (O.S.) K.B. 27; *Richardson* v. *Jackson*, 8 M. & W. 298; 10 L.J. Ex. 303.

(*t*) 33 & 34 Vict. c. 35, s. 2.

(*u*) *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 48 L.J. Ex. 344; *South Kensington Co-operative Stores, In re*, 17 Ch. D. 161; 50 L.J. Ch. 446; *Hartcup* v. *Bell*, C. & E. 19; *Bouch* v. *Sproule*, 12 App. Cas. 385; 56 L.J. Ch. 1037; *Alsbury, In re, Sugden* v. *Alsbury*, 45 Ch.D. 237; 60 L.J. Ch. 29; *Wilson, In re*, 62 L.J. Q.B. 628; *Armitage, In re*, (1893) 3 Ch. 337; *Malam, In re*, (1894) 3 Ch. 578; 63 L.J. Ch. 797; *Howell, In re*, (1895) 1 Q.B. 844; 64 L.J. Q.B. 454; cp. *Clapham* v. *Draper*, C. & E. 484; *United Club Co., In re*, 1 Meg. 186; *Jones* v. *Ogle*, L.R. 8 Ch. 192; 42 L.J. Ch. 334; *Cox's Trusts, In re*, 9 Ch.D. 159; *Griffith, In re*, 12 Ch.D. 655. The annual sums payable by a bishop in commutation of first fruits and tenths are periodical payments in the nature of income: *Rochester (Bishop of)* v. *Le Fanu*, (1906) 2 Ch. 513; 75 L.J. Ch. 743.

(*x*) 33 & 34 Vict. c. 35, s. 3.

(*y*) *Rochester (Bishop of)* v. *Le Fanu*, (1906) 2 Ch. 513; 75 L.J. Ch. 743.

(*z*) Sect. 6.

(*a*) Sect. 7.

(*b*) *Ellis* v. *Rowbotham*, (1900) 1 Q.B. 740; 69 L.J. Q.B. 379; see also *Barnett* v. *Eastman*, 67 L.J. Q.B. 517; *Oppenheimer, In re, Oppenheimer* v. *Boatman*, (1907) 1 Ch. 399; 76 L.J. Ch. 287.

(*c*) *Rochester (Bishop of)* v. *Le Fanu*, (1906) 2 Ch. 513; 75 L.J. Ch. 743.

SECTION II.

DISCHARGE BY CONSENT OF THE PARTIES.

Dispensation of performance.—It is competent to the parties to a parol contract to dispense by word of mouth with performance of the contract. Thus, if a written contract for the sale of goods provides for the transmission of the goods to the purchaser on a particular day, and the purchaser subsequently gives a verbal order for them to be sent a day later, performance of the original written contract as to the time of delivery is thereby dispensed with, so that the liability upon a contract in writing may be wholly or partially discharged before breach by a subsequent verbal agreement (*d*), unless the written contract is required to be in writing by the Statute of Frauds or the Sale of Goods Act, 1893, in which case it cannot be varied by any subsequent agreement by word of mouth only (*e*). There is, however, no clause in either statute requiring the dissolution of a contract to be in writing; and, therefore, a contract required by statute to be in writing may, before breach, be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering upon the contract which was in writing (*f*). A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding, but that the other party had the same understanding (*g*).

Renunciation of a contract by one party amounting to dispensation of performance by another party.—Non-payment on the one hand or non-delivery on the other may be evidence for a jury of an intention wholly to abandon the contract and set the

(*d*) *Stead* v. *Dawber*, 10 Ad. & E. 57, 65; 9 L.J. Q.B. 101, adopting the language of *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58, 65; 2 L.J. K.B. 127.

(*e*) *Harvey* v. *Grabham*, 5 Ad. & E. 61; 5 L.J. K.B. 235; *Stowell* v. *Robinson*, 3 Bing. N.C. 928; 6 L.J. C.P. 326; *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L.J. Ex. 126; *Giraud* v. *Richmond*, 2 C.B. 835; 15 L.J. C.P. 180; *Moore* v. *Campbell*, 10 Exch. 323; 23 L.J. Ex. 310; *Noble* v. *Ward*, L.R. 2 Ex. 135; 36 L.J. Ex. 91; *Sanderson* v. *Graves*, L.R. 10 Exch. 234; 44 L.J. Ex. 210; *Plevins* v. *Downing*, 1 C.P.D. 220; 45 L.J. C.P. 695; *Vezey* v. *Rashleigh*, (1904) 1 Ch. 634; 73 L.J. Ch. 422.

(*f*) *Goman* v. *Salisbury*, 1 Vern. 240; *Price* v. *Dyer*, 17 Ves. 356; *Robinson* v. *Page*, 3 Russ. 114; *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47; *Vezey* v. *Rashleigh*, (1904) 1 Ch. 634; 73 L.J. Ch. 422.

(*g*) *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 36 L.J. Ch. 404; L.R. 2 H.L. 43.

other party free (*h*). And, where the question as to the breach of the contract sued upon going to the root thereof depends upon the construction of a written document, the judge may himself decide it, and a finding of the jury will not be necessary (*i*). If A. has agreed to have a steam-vessel at a named port by a day specified, and there to take on board and carry a cargo to a particular destination, and B. has agreed to have a cargo in readiness for shipment at the time and place appointed, and A., before the time arrives, repudiates the contract, and declares that he will not receive the cargo, B. may treat this as a dispensation of performance of his part of the agreement, and may forthwith engage another vessel (*k*). Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated (*l*). Where a manufacturer, by a contract of sale, had agreed to manufacture and deliver to a purchaser certain goods, by a day certain, and the purchaser, before the time appointed for delivery, told the manufacturer he need not manufacture them, as he had no occasion for them, and would not accept or pay for them, performance by the manufacturer was held to have been dispensed with (*m*). Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract (*n*). But a neglect or refusal by one party to fulfil his part of the contract will not

(*h*) *Hoare* v. *Rennie*, 5 H. & N. 19 ; 29 L.J. Ex. 19 ; see also *Honck* v. *Muller*, 7 Q.B.D. 92 ; 50 L.J. Q.B. 529 ; *Freeth* v. *Burr*, L.R. 9 C.P. 208, 213 ; 43 L.J. C.P. 91 ; *General Bill Posting Co.* v. *Atkinson*, (1909) A.C. 118, 122 ; 78 L.J. Ch. 77.

(*i*) *Emery* (*Geo. D.*) *Co.* v. *Wells*, (1906) A.C. 515 ; 75 L.J. P.C. 104.

(*k*) *Danube and Black Sea Ry.* v. *Xenos*, 13 C.B. N.S. 825 ; 31 L.J. C.P. 284 ; *Hochster* v. *De la Tour*, 2 E. & B. 693 ; 22 L.J. Q.B. 455 ; see *post*, p. 207.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2). See *post*, p. 602.

(*m*) *Cort* v. *Ambergate, &c. Ry.*, 17 Q.B. 127 ; 20 L.J. Q.B. 460 ; *Ripley* v. *M'Clure*, 4 Exch. 345 ; 18 L.J. Ex. 419.

(*n*) *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588 ; 43 L.J. C.P. 375 ; *Morgan* v. *Bain*, L.R. 10 C.P. 15 ; 44 L.J. C.P. 47 ; *Withers* v. *Reynolds*, 2 B. & Ad. 882 ; 1 L.J. K.B. 30.

release the other from his engagement, unless such neglect or refusal operates as an entire frustration of the whole contract (*o*). Thus, where the defendant agreed to supply the plaintiff with a certain quantity of coal, to be delivered into the plaintiff's waggons at the defendant's collieries in equal monthly quantities during the period of twelve months, and during the first month the plaintiff only sent in waggons to receive less than one-third of the stipulated quantity, it was held that the defendant was not on that account entitled to rescind the contract (*p*). So, again, non-payment for the first portion of iron contracted to be delivered in two lots, unattended by any other act on the part of the purchaser, does not put an end to the contract so as to disentitle the purchaser to maintain an action for the non-delivery of the second portion, but only gives the seller remedy by action (*q*). So where in a lease for twenty-one years, terminable by the lessee by notice at the end of the first four years, the lessor covenanted to rebuild the premises at the expiration of the first four years upon six months' notice to do so from the lessee, and before the expiration of the four years he told the lessee that he would be unable to rebuild, and the lessee thereupon gave notice that he would terminate the lease at the end of the four years, but continued after that time to occupy the premises, it was held that there had not been a repudiation of his covenant by the lessor, and that the lessee had not elected to treat what was done by the lessor as a repudiation (*r*).

Powers of revocation and defeasance of contracts.—Where two or more persons enter into a contract of a continuing nature, without reservation of a power to put an end to the contract by notice or otherwise, one of them cannot by his own act discharge himself from liability, and put an end to the contract, without the consent of the other (*s*). Where one party agreed to furnish iron to another, to be delivered as required, it was held that the party who had thus agreed to furnish the iron could not put an end to the contract, and refuse to supply the iron on the ground that the other party had not within a reasonable time required him to furnish iron; that he ought in the first instance to

(*o*) *Jonassohn* v. *Young*, 4 B. & S. 299; 32 L.J. Q.B. 385.

(*p*) *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28.

(*q*) *Freeth* v. *Burr*, L.R. 9 C.P. 208; 43 L.J. C.P. 91; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497; see *Rhymney Ry.* v. *Brecon, &c. Ry.*, 69 L.J. Ch. 813.

(*r*) *Johnstone* v. *Milling*, 16 Q.B.D. 460; 55 L.J. Q.B. 162; *Smith* v. *Butler*, (1900) 1 Q.B. 694; 69 L.J. Q.B. 521.

(*s*) *G. N. Ry.* v. *Manch. S. & L. Ry.*, 18 L.T. (O.S.) 344; *Llanelly Ry.* v. *L. & N. W. Ry.*, L.R. 7 H. L. 550; 45 L.J. Ch. 539. As to a contract for a definite period with an option for an extension of such period, see *Austin* v. *Newham*, (1906) 2 K.B. 167; 75 L.J. K.B. 563.

inquire of the other if he meant to have the iron, and require him to give the order, and then, if the order was not given within a reasonable time, he might abandon the contract (*t*). Parties may, by mutual agreement, reserve to themselves the power of putting an end to the contract, by notice or otherwise, at any particular period, or upon the happening of any given event. When the contract is made defeasible by notice, the notice is good although the party on whom it is served is insane (*u*). When a party has reserved to himself the power of annulling a contract under certain contingencies, the courts will not permit the power to be exercised for the purpose of perpetrating a downright fraud; but there must be a clear want of *bona fides* on the part of the person exercising the power to warrant the interference of the court (*x*).

Release and discharge of covenants before breach.—Covenants under seal could not at common law be discharged before breach by parol contract, whether executory or executed (*y*). Neither could performance of a covenant be waived by parol at common law (*z*). But the liabilities upon a deed might in equity be diminished, and the effect of the contract controlled, by collateral writings not under seal (*a*); and a parol dispensation may be pleaded as a defence to an action upon the deed (*b*).

Release and discharge of causes of action ex contractu.—Whenever a contract, not being a bill of exchange or promissory note, had been broken, the cause of action could only be discharged at common law by a release under seal, or by an agreement that something should be given or done on the one side, and received on the other, in satisfaction and discharge of the debt or damages resulting from the breach, and by the gift or performance and acceptance of the thing agreed to be given or done, termed in law "an accord and satisfaction" (*c*). But a release, or agreement amounting to a release, made upon good consideration, though not under seal, might have been enforced

(*t*) *Jones* v. *Gibbons*, 8 Exch. 920; 22 L.J. Ex. 347.

(*u*) *Robertson* v. *Lockie*, 15 Sim. 286; 15 L.J. Ch. 379.

(*x*) *Page* v. *Adam*, 4 Beav. 269; 10 L.J. Ch. 407; *Roberts* v. *Wyatt*, 2 Taunt. 268; *Turpin* v. *Chambers*, 30 L.J. Ch. 470; 29 Beav. 104.

(*y*) *Kaye* v. *Waghorn*, 1 Taunt. 428; *Spence* v. *Healey*, 8 Exch. 668; 22 L.J. Ex. 249; *Thames Iron Works Co.* v. *Royal Mail Steam Packet Co.*, 31 L.J. C.P. 169; 13 C.B. N.S. 358.

(*z*) *West* v. *Blakeway*, 3 Sc. N.R. 199; 10 L.J. C.P. 173; *Sellers* v. *Bickford*, 1 Moore, 460; *Thomson* v. *Brown*, *ib.* 358; *Cordwent* v. *Hunt*, 8 Taunt. 596; 2 Moore, 660; *Littler* v. *Holland*, 3 T.R. 592; *Gwynne* v. *Davy*, 1 M. & G. 857; *Doe* d. *Muston* v. *Gladwin*, 6 Q.B. 953; 14 L.J. Q.B. 189.

(*a*) *Smith* v. *E. I. Co.*, 16 Sim. 76; 17 L.J. Ch. 178.

(*b*) *Webb* v. *Hewitt*, 3 Kay. & J. 438; *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11).

(*c*) 3 Hen. 6. pl. 36; *Treswaller* v. *Keyne*, Cro. Jac. 620; *Langden* v. *Stokes*, Cro. Car. 383; *Edwards* v. *Weeks*, 1 Mod. 262; 2 Mod. 259.

in equity (*d*). And so might a representation by the creditor of his intention to release the debt, if acted upon by the debtor (*e*). But "an agreement to abandon a claim, unless there be a consideration shown, is a mere *nudum pactum*." Thus, if there be an admitted debt due, and the debtor agrees to pay half the debt on receiving a discharge in full, and the creditor accordingly gives a written acknowledgment of the receipt of the money in full of all demands, this will not discharge the remaining moiety of the debt, unless the acknowledgment is under seal, or some valid consideration has been given and received for the discharge (*f*).

Oral renunciation of claims on bills and notes.—Bills of exchange, however, which are regulated by the custom of merchants, formed an exception to the general rule of law, that a cause of action once accrued could only be discharged by deed, or by accord and satisfaction; for the liability of an acceptor, though complete, might, it was held, be discharged by an express renunciation on the part of the holder of his claim on the bill, although such renunciation were by word of mouth only, unaccompanied with satisfaction or any solemn instrument. But now a renunciation must be in writing, unless the bill be given up (*g*).

Release of one of several joint, or joint and several, contractors.—Generally speaking, a release to one of several joint, or joint and several, covenantors or promisors releases all (*h*). Therefore, where the plaintiff, having received a sum of money, from one of the parties to a promissory note, erased his name from the instrument, it was held that such erasure operated as a release to the other parties to the note (*i*). A party may give a qualified release, and discharge one of several joint, or joint and several, covenantors or promisors, and reserve his right of action against the others (*k*). But a creditor cannot release one of

(*d*) *Taylor* v. *Manners*, L.R. 1 Ch. 48; 35 L.J. Ch. 128.

(*e*) *Yeomans* v. *Williams*, L.R. 1 Eq. 184; 35 L.J. Ch. 283.

(*f*) *Edwards* v. *Chapman*, 1 M. & W. 231; 5 L.J. Ex. 139; *Foakes* v. *Beer*, 9 App.Cas. 605; 54 L.J. Q.B. 130; *Underwood* v. *Underwood*, (1894) P. 204; 63 L.J. P. 109.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62, 89; see *post*, p. 1283.

(*h*) Bac. Abr. RELEASE, G.; Co. Litt. 232; *Lacy* v. *Kinaston*, 1 Ld. Raym. 690.

(*i*) *Nicholson* v. *Revill*, 4 A. & E. 675; 5 L.J. K.B. 129; *Cheetham* v. *Ward*, 1 B. & P. 633: *E. W. A., In re*, (1901) 2 K.B. 642; 70 L.J. K.B. 810; *Webb* v. *Hewitt*, 3 Kay & J. 438, 442. As to the presumption of a joint security, see *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302.

(*k*) *Dean* v. *Newhall*, 8 T.R. 168; *Hutton* v. *Eyre*, 6 Taunt. 289; *Solly* v. *Forbes*, 2 Brod. & B. 38; 4 Moore, 448; *North* v. *Wakefield*, 13 Q.B. 536; 18 L.J. Q.B. 214; *Price* v. *Barker*, 4 E. & B. 760; 24 L.J. Q.B. 130; *Willis* v. *De Castro*, 4 C.B. N.S. 216; 27 L.J. C.P. 243; *Bateson* v. *Gosling*, L.R. 7 C.P. 9; 41 L.J. C.P. 53; *Ward* v. *National Bank of New Zealand*, 8 App.Cas. 755; 52 L.J. P.C. 65; *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; 62 L.J. Q.B. 69; *Rice* v. *Reed*, (1900) 1 Q.B. 54, 67; 69 L.J. Q.B. 33.

several joint debtors, and hold another liable by a reserve of remedies (*l*), unless the original contract reserves to him the power of releasing one without discharging the others (*m*), or unless the instrument of release can by reason of the context be construed, as it generally will, as a covenant not to sue (*n*), not amounting to a release of the action, but giving rise only to a cross claim for damages in case of breach (*o*). Each particular release is to be construed according to the plain intention of the parties (*p*). Where one joint covenantor is released by deed parol evidence will be inadmissible to prove a promise by the other covenantors to remain liable (*q*). And, generally, a release contained in a deed must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part (*r*).

General releases.—A general release of all claims and demands will operate as a discharge of every known cause of action that existed at the date of the release (*s*); but it no longer has the extensive operation which it formerly had at common law, and will not now extend to matters of which the releasor was entirely ignorant at the time he executed the release, and to which the instrument was never intended to extend (*t*); and it may be restricted by the language of the recitals or of other parts of the deed (*u*). A receipt in full of all demands does not necessarily amount to a release (*v*). The operation of a release is of course confined to debts and causes of action which have actually become vested in the releasor at the date of the release, and does not extend to any contract which has not then been broken (*w*). A renunciation under seal of the benefit of a contract, or an unqualified covenant not to sue upon it, or an acknowledgment that the contract has been rescinded will, if properly authenticated, operate as a re-

(*l*) *Cheetham* v. *Ward*, 1 B. & P. 633.

(*m*) *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133.

(*n*) Parke, B., *Kearsley* v. *Cole*, 16 M. & W. 136; 16 L.J. Ex. 115; *Price* v. *Barker*, 4 E. & B. 760; 24 L.J. Q.B. 133; *Green* v. *Wynn*, L.R. 4 Ch. 204; 38 L.J. Ch. 76.

(*o*) *Ford* v. *Beech*, 11 Q.B. 852, 871; 17 L.J. Q.B. 114; *Willis* v. *De Castro*, 4 C.B. N.S. 216; 27 L.J. C.P. 246.

(*p*) *Walters* v. *Smith*, 2 B. & Ad. 889; *Good, Ex parte*, 5 Ch.D. 46; 46 L.J. Bank. 65.

(*q*) *Cocks* v. *Nash*, 9 Bing. 341; 2 L.J. C.P. 17; *Brooks* v. *Stuart*, 9 Ad. & E. 854; 8 L.J. Q.B. 184.

(*r*) *Perkins, In re, Poyser* v. *Beyfus*, (1898) 2 Ch. 183, 190; 67 L.J. Ch. 454.

(*s*) *Tynan* v. *Bridges*, Cro. Jac. 300; Co. Litt. 291, b.

(*t*) *Lyall* v. *Edwards*, 6 H. & N. 337; 30 L.J. Ex. 193; *L. & S. W. Ry.* v. *Blackmore*, L.R. 4 H.L 610; 39 L.J. Ch. 713; *Ecclesiastical Commissioners for England* v. *N. E. Ry.*, 4 Ch.D. 845; 47 L.J. Ch. 20; *Armitage, In re. Good, Ex parte*, 5 Ch.D. 46; 46 L.J. Bank. 65.

(*u*) *Haselgrove* v. *House*, 35 L.J. Q.B. 1; L.R. 1 Q.B. 101.

(*v*) *Lee* v. *Lancashire and Yorkshire Ry.*, L.R. 6 Ch. 527.

(*w*) *Radburn* v. *Morris*, 1 Moo. & P. 648, 654; *Neale* v. *Sheffield*, Yelv. 192; 6 L.J. (O.S.) C.P. 152; *Payler* v. *Homersham*, 4 M. & S. 423; *Lambourne* v. *Cork*, 1 D. & R. 211.

lease (*x*). But the operation of a release may be controlled by a written agreement not under seal (*y*). A release "of all manner of demands" is the best release to him to whom it is made that he can have, and shall enure most to his advantage (*z*). Such a release given after action brought will include the damages for the detention of the debt as well as the debt itself, and, if given after judgment recovered, will include the execution (*a*).

Conditional releases.—A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with (*b*). Thus, a release may be conditional on the payment of money within a specified time, and in that case it must be shown that the money has been paid, or at any rate tendered (*c*).

Fraudulent releases.—Whenever a release has been fraudulently given to defeat an action, the court will set it aside, and not allow it to be pleaded (*d*).

Composition in bankruptcy.—A composition under the Bankruptcy Act, 1883, is, if the requirements of the Act (*e*) have been complied with, binding upon all the creditors, so far as relates to any debts due to them from the debtor, and provable in bankruptcy (*f*). The composition is, however, not binding as regards a debt or liability from which a discharge in bankruptcy would not discharge the debtor, unless the creditor has assented to the composition (*g*).

Covenants not to sue.—Where a creditor has covenanted that he will not put his contract in suit at any time, there the covenant amounts to a release; but, when the covenant is not to sue

(*x*) See as to covenants not to sue, *Hickmot's case*, 9 Co. 52, b; *Ford* v. *Beech*, 11 Q.B. 852; 17 L.J. Q.B. 114; cp. *Morley* v. *Frear*, 6 Bing. 547; 8 L.J. (O.S.) C.P. 176; *Hutton* v. *Eyre*, 6 Taunt. 289; *Thimbleby* v. *Barron*, 3 M. & W. 210; 7 L.J. Ex. 128; *Webb* v. *Spicer*, 13 Q.B. 886; 18 L.J. Ex. 143; *Foley* (*Lady Emily*) v. *Fletcher*, 3 H. & N. 769; 28 L.J. Ex 100.

(*y*) *Cocks* v. *Nash*, 9 Bing. 341; 2 L.J. C.P. 28; *Baker* v. *Heard*, 9 Exch. 959; 20 L.J. Ex. 444.

(*z*) Co. Litt. 508.

(*a*) *Tetley* v. *Wanless*, L.R. 2 Ex. 275; 36 L.J. Ex. 153.

(*b*) *Newington* v. *Levy*, L.R. 6 C.P. 180; 40 L.J. C.P. 29; cp. *Hall* v. *Levy*, L.R. 10 C.P. 154; 44 L.J. C.P. 89.

(*c*) *Fessard* v. *Mugnier*, 18 C.B. N.S. 286; 34 L.J. C.P. 126.

(*d*) *Sargent* v. *Wedlake*, 11 C.B. 732; *Manning* v. *Cox*, 7 Moore, 617; 1 L.J. (O.S.) C.P. 36; *Barker* v. *Richardson*, 1 Y. & J. 362; *Rawstorne* v. *Gandell*, 15 M. & W. 305; 15 L.J. Ex. 291; *Morrison*, *Ex parte*, *Clunn*, *In re*, 33 L.J. Bank. 47; *De Pothonier* v. *De Mattos*, E. B. & E. 461; 27 L.J. Q.B. 260. As to a fraudulent release to deprive a solicitor of his costs, see *Games*, *Ex parte*, 3 H. & C. 294; 33 L.J. Ex. 317.

(*e*) 46 & 47 Vict. c. 52, s. 18.

(*f*) *Steinman* v. *Magnus*, 11 East, 390; *Good* v. *Cheesman*, 2 B. & Ad. 328; 9 L.J. (O.S.) K.B. 234; *Evans* v. *Powis*, 1 Exch. 601; *Boyd* v. *Hind*, 1 H. & N. 938; 26 L.J. Ex. 164; *Pfleger* v. *Browne*, 28 Beav. 391; *Kitchin* v. *Hawkins*, L.R. 2 C.P. 22; *Couldery* v. *Bartrum*, 19 Ch.D. 394; 51 L.J. Ch. 265. As to deeds of arrangement, see 50 & 51 Vict. c. 57, ss. 4, 5.

(*g*) Sect. 19. See *Jacobs*, *In re*, *Halford*, *Ex parte*, L.R. 19 Eq. 436; 44 L.J. Bank. 53. As to proof of assent, see *Thorp* v. *Dakin*, 52 L.T. 856.

for a certain time, or not to sue, provided certain payments are made at specified times (*h*), there it is only a covenant, not a release, unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, in which case it operates as a release by force of the condition, if the action be brought within the time (*i*). Covenants not to sue have been held equivalent to a release to avoid circuity of action, *i.e.*, the absurdity of allowing A. to recover against B. in one action the identical sum which B. has a right to recover in another against A. But, if the parties thus opposed in interest are not the same, the principle cannot apply. If, therefore, one of two plaintiffs has covenanted not to sue for a joint debt due to them both, he is liable for a breach of covenant if both afterwards sue; but the covenant so entered into by the one cannot be treated as a release of the joint action by both (*j*). A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other; and an agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant not to sue (*k*).

Covenants not to sue for limited time.—Covenants and agreements to suspend a right of action for some specified period of time are deemed to be contracts to forbear from suing for the time named, and are consequently not pleadable in bar of an action brought contrary to the agreement, but give rise to a cross claim for the damages resulting from the creditor's suing during the time he had agreed not to sue (*l*). But, where a deed contains a covenant for the payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, an action cannot be brought before the end of the month, such a proviso being construed as extending the time of payment (*m*). The ancient principle of law, that a right of action, suspended by act of the party for ever so short a time, is extinguished and gone for ever, does not hold in all cases, as clauses of forfeiture and defeasance are frequently annexed to contracts in the event of their being put

(*h*) *Ray* v. *Jones*, 19 C.B. N.S. 416; 34 L.J. C.P. 306.

(*i*) *Ailoffe* v. *Scrimpshire*, Carth. 63; *Dene* v. *Jefferies*, Cro. Eliz. 352; *Walker* v. *Nevill*, 3 H. & C. 403; 34 L.J. *Ex.* 73.

(*j*) *Fitzgerald* v. *Trant*, 11 Mod. 254; *Lacy* v. *Kinaston* 12 *ib.* 552; *Dean* v. *Newhall*, 8 T.R. 171; *Hutton* v. *Eyre*, 6 Taunt. 294; *Walmesley* v. *Cooper*, 11 Ad. & E. 216; 10 L.J. Q.B. 49.

(*k*) *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; 62 L.J. Q.B. 69.

(*l*) *Ford* v. *Beech*, 17 L.J. Q.B. 116; 11 Q.B. 866; *Webb* v. *Salmon*, 19 L.J. Q.B. 34; *Thimbleby* v. *Barron*, 3 M. & W. 216; 7 L.J. Ex. 128; *Ayliff* v. *Scrimsheire*, 1 Show. 43.

(*m*) *Foley* (*Lady*) v. *Fletcher*, 3 H. & N. 769, 777; 28 L.J. Ex. 100.

in suit before the expiration of a certain period, in which case the right to sue is effectually suspended for the limited time. There are also cases in the books where, a contract having been broken, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that, if the new contract is carried out by the new parties in all its integrity, the original cause of action is extinguished; and, if it is not fully carried out, the party is remitted to his original right of action upon the original contract. To the general rule of law, also, that a cause of action once accrued cannot be suspended, there is an exception in favour of bills of exchange and promissory notes (*n*).

Release by novation and substitution.—The making of a new contract, and the substitution thereof in the place and stead of the original contract, before breach of the latter, may operate as a discharge and extinguishment of the original contract (*o*). One deed may be substituted for another, or a simple contract may be substituted for a deed; but both parties must consent to the substitution (*p*).

Substitution of new contract in place of original contract.—When several persons are mutually indebted to each other, they may, by agreement amongst themselves, vary their respective liabilities, and substitute one debt in the place of another. By a mutual arrangement between all the parties interested—creditor, debtor, and payee—the original debts are extinguished; and the annihilation of those debts is a sufficient consideration for the promise to pay the new debt (*q*). Where, in an action by two plaintiffs upon an account stated, it appeared that the defendant was indebted to M., one of the plaintiffs, in a large sum of money, and afterwards the other plaintiff was admitted a partner with M., and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it

(*n*) *Belshaw* v. *Bush*, 11 C.B. 201; 22 L.J. C.P. 24; *James* v. *Isaacs*, 12 C.B. 800; 22 L.J. C.P. 73; *Tatlock* v. *Smith*, 3 Moo. & P. 676; 8 L.J. (O.S.) C.P. 54; *Stracey* v. *Bank of England*, 4 Moo. & P. 639; 8 L.J. (O.S.) C.P. 234. As to payment in due course, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59, *post*, p. 1250.

(*o*) *Taylor* v. *Hilary*, 1 C.M. & R. 741; 4 L.J. Ex. 72; *Commercial Bank of Tasmania* v. *Jones*, (1893) A.C. 313; 62 L.J. P.C. 104.

(*p*) *The Blairmore*, (1898) A.C. 593; 60 L.J. P.C. 96. As to what is evidence of consent, see *European Assurance Society Arbitration Acts, In re, Conquest's case*, 1 Ch.D. 334; 45 L.J. Ch. 336.

(*q*) Buller, J., *Tatlock* v. *Harris*, 3 T.R. 180; *Browning* v. *Stallard*, 5 Taunt. 450; *Wilson* v. *Coupland*, 5 B. & Ald. 228; *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 L.J. K.B. 98. As to assignment of debts, see Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, *post*, p. 222.

was agreed that all the money due to M. before his partnership with the other plaintiff should be taken into that account, and that the balance should be paid to both the plaintiffs, it was held that the action was properly brought by them jointly (*r*). But, if there had been no special agreement or consent on the part of the defendant to substitute the one debt for the other, the plaintiffs would not, by reason of any agreement amongst themselves, have been entitled to join in the action (*s*). There must be a mutual agreement between all the three parties, the creditor, his immediate debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt; for, if that continues to subsist, there is no consideration for the new contract, and no valid substitution takes place, and the case, as regards the intended new debtor, "is no more than if I promise a stranger to whom I do not owe anything, that, if he will accept me to be his debtor for 60*l.*, I will pay it to him: yet this is but a *nudum pactum*, because I was not indebted to him before; and my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all" (*t*). Where A. and B. were both indebted to C., and B. was also indebted to A., and it was agreed between B. and C. only that B. should take A.'s debt upon himself, and pay the amount thereof to C., it was held that there was no substitution of the one debt for the other, as A. had not assented to the arrangement, and B.'s liability to him still continued (*u*). If the agreement be made between A. and B., without the concurrence of C., the situation of the parties is not altered (*x*). An agreement between a creditor and two joint debtors, that the sole and separate liability of one of them shall be substituted in extinguishment and discharge of the joint liability, is a valid agreement, founded on a good consideration, "as the sole security of one of two joint debtors may be more beneficial to the creditor than the joint responsibility of both" (*y*).

Drafts and orders for money operating by way of novation.—An order addressed by a creditor to the defendant, his debtor, given to the plaintiff, to whom such creditor is indebted, in satisfaction of his debt, and presented by the plaintiff to the defendant, and assented to by the latter, operates as a substitution of a new debt in the place of the original demand. But

(*r*) *Moor* v. *Hill*, 2 Peake, 10.

(*s*) *Wilsford* v. *Wood*, 1 Esp. 183.

(*t*) *Forth* v. *Stanton*, 1 Saund. 211; *Thomas* v. *Shillibeer*, 1 M. & W. 124; 5 L.J. Ex. 138.

(*u*) *Coxon* v. *Chadley*, 3 B. & C. 591; 3 L.J. (O.S.) K.B. 63; *Liversidge* v. *Broadbent*, 4 H. & N. 605; 28 L.J. Ex. 332.

(*x*) *Price* v. *Easton*, 4 B. & Ad. 433; 2 L.J. K.B. 51; *Cockrane* v. *Green*, 30 L.J. C.P. 97; 9 C.B. N.S. 448.

(*y*) *Lyth* v. *Ault*, 7 Exch. 669; 21 L.J. Ex. 217.

the mutual assent of the three parties is essential to the novation, and if one of them is not a party to the contract, the original debt is not released and extinguished; there is no novation, and can be no substitution (*z*). Where a landlord, being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay his, the landlord's, debt to the plaintiff out of the next rent that would become due, and the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject, and at the next rent-day the defendant produced the order to his landlord, and told him he would pay the amount of it to the plaintiff, and then paid to the landlord the difference between the amount of the order and the sum due for the rent, and obtained a receipt for the whole amount of the rent, and the plaintiff subsequently applied to the defendant for the debt specified in the order, which the defendant refused to pay, whereupon the plaintiff brought an action for the money, it was held that, as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, the action could not be maintained (*a*). And, where the plaintiff, being indebted to one Jones, gave the defendant 8*l.* to pay Jones, and the defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money, it was held that he was entitled so to do, and that the defendant was bound to pay it back, inasmuch as he had not placed himself under any engagement with Jones to pay it to him (*b*).

When, however, the debtor or the depositary of the money has assented to the order, and promised the payee or remittee to hold the amount specified at his disposal, the authority to pay the money is irrevocable, the original debt is discharged, and none of the parties can then recede from the arrangement (*c*). D. applied to the plaintiff to lend him the sum of 70*l.*, but the plaintiff refused to advance it without security, whereupon D.

(*z*) *Williams* v. *Everett*, 14 East, 582, 597; *Noble* v. *Nat. Disct. Co.*, 5 H. & N. 228; 29 L.J. Ex. 210.

(*a*) *Wharton* v. *Walker*, 4 B. & C. 163; 3 L.J. (O.S.) K.B. 183.

(*b*) *Owen* v. *Bowen*, 4 C. & P. 93; *Cobb* v. *Becke*, 6 Q.B. 930; 14 L.J. Q.B. 108.

(*c*) *Meert* v. *Moessard*, 1 Moo. & P. 8, 11; 6 L.J. (O.S.) C.P. 3; *Peate* v. *Dicken*, 1 C. M. & R. 430; 4 L.J. Ex. 28; *Lacy* v. *M'Neile*, 4 Dowl. & Ry. 9; *Dickinson* v. *Marrow*, 14 M. & W. 719.

gave to the plaintiff an order upon the defendants, who were his debtors, to pay to the plaintiff the amount of their debts. This order was forwarded by the plaintiff to the defendants, with a request that they would acknowledge their having given the plaintiff credit for it. The defendants accepted the order, and promised that they would pay to the plaintiff all the money that they owed D., and the plaintiff then advanced 70*l.* to D. Subsequently the defendants refused to pay the amount of the debt to the plaintiff, and, an action having been brought against them by the latter in his own name, it was held that he was entitled to recover it (*d*).

A sum of money being due from the defendant to a Mr. Streather upon a balance of account, the exact amount of which had not been ascertained, Streather gave to Messrs. Solly and Sons, to whom he was largely indebted, a letter addressed to the defendant, saying, "I shall be obliged by your paying to Messrs. Isaac Solly and Sons the balance due to me for building; and their receipt shall be a sufficient discharge to you." This letter was forwarded by Solly and Sons to the defendant, who replied, "I received your letter, inclosing Mr. Streather's, and shall be happy to make the payment to you, instead of to him, as requested;" and it was held that the defendant, after his receipt and acceptance of the order, held the money mentioned therein at the disposal of Messrs. Solly and was accountable to them, and to no one else, for the amount deposited in his hands (*e*).

In these cases, when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not a promise to answer for the debt of another within the Statute of Frauds, as no such debt exists: it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand (*f*). If, however, a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him (*g*). An order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding, equitable assignment of so much of the fund (*h*).

Novation in case of Life Assurance Companies.—By the

(*d*) *Israel* v. *Douglas*, 1 H. Bl. 239.

(*e*) *Crowfoot* v. *Gurney*, 2 M. & Sc. 473; 2 L.J. C.P. 21; *Hutchinson* v. *Heyworth*, 9 Ad. & E. 375; 8 L.J. Q.B. 17.

(*f*) *Anstey* v. *Marden*, 1 B. & P. N.R. 131.

(*g*) *South, Ex parte*, 3 Swans. 392; *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, (1905) A.C. 454; 74 L.J. K.B. 898.

(*h*) *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702; 9 L.J. Ch. 65; *Addison* v. *Cox*, L.R. 8 Ch. 76; 42 L.J. Ch. 291.

Assurance Companies Act, 1909 (*i*), sect. 13 (4), no life assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the court, and by sect. 13 (3), before any application to the court, notice of the intention to make the application must be published in the *London Gazette* and a statement of the nature of the amalgamation or transfer, together with an abstract of the agreement for amalgamation or transfer and copies of the actuarial or other reports relative thereto, must be transmitted to each policy-holder of the companies concerned. Policy-holders may be heard by the court upon the petition (sect. 13 (2)). If the amalgamation or transfer is completed, the combined company or the purchasing company must, within ten days, deposit with the Board of Trade statements of the assets and liabilities of the companies concerned and of the nature and terms of the amalgamation or transfer (sect. 14). By s. 30 (*d*), the Court is not to sanction any amalgamation or transfer where it appears that the life policy-holders representing one-tenth or more of the total amount assured in the company dissent from the amalgamation or transfer.

Substituted performance of something different from what was stipulated to be done.—If the obligor of a bond has bound himself to pay a sum of money by a day named, it has been held not to be essential to the defeasance of the bond, to show that the money was paid; for the obligor may show that, before or upon the day appointed for payment of the money, he gave to the obligee " a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and that the latter received it in satisfaction, though the horse or the other thing were not of the twentieth part of the value of the money " (*k*). Where a defendant has covenanted to pay a sum of money to the plaintiff, it is competent to the defendant to show that, at the time appointed for the payment of the money, the defendant tendered to the plaintiff, and the plaintiff accepted and received, part payment in goods in lieu of money (*l*).

Discharge by accord and satisfaction.—If, before action, the defendant delivers to the plaintiff, and the plaintiff accepts from the defendant either money or chattels, or securities for money, in satisfaction and discharge of the debt or cause of action, that is a good answer to an action for a debt or for damages for a breach of contract, whether the contract be under seal, or

(*i*) 9 Edw. 7, c. 49.

(*k*) Litt. s. 344; and see Co. Litt. 213, a; *Anon.*, Dyer, 56, b, pl. 18.

(*l*) *Hands* v. *Burton*, 9 East, 349; *Saxty* v. *Wilkin*, 11 M. & W. 622; 12 L.J. Ex. 381; *Smith* v. *Battams*, 26 L.J. Ex. 232.

whether it be a simple contract, and whether the action be founded on a deed, or on a parol agreement (*m*). To constitute acceptance there must be an act of the will (*n*); but, if the party accepts the thing, though but for a moment, in satisfaction, he cannot afterwards, by his subsequent dissatisfaction, get rid of the effect of it (*o*). But, where the defendant sent to the plaintiff a cheque for a less amount than the plaintiff claimed, stating that it was in full of all demands, and the plaintiff kept the cheque, but declared that he did so on account, it was held that this was not conclusive evidence of an accord and satisfaction of the claim (*p*). As to how far the giving of a receipt is accord and satisfaction, see *ante*, p. 158.

An accord executory, or a contract to do what the party has already bound himself to perform, and has left unperformed, has been held to be no bar to an action (*q*), as where an agreement had been made between a plaintiff and a defendant to settle all matters in dispute, and to bind themselves under a penalty not to sue each other (*r*); or where an agreement had been made between a plaintiff and a defendant to submit the plaintiff's claim to arbitration, and arbitrators had been appointed and had undertaken the reference, and a reasonable time for making an award had not elapsed (*s*); or where it was agreed between a plaintiff and a defendant that the defendant should pay the plaintiff 3*l.*, and his solicitor's bill, and he paid the 3*l.*, and was always ready to pay the bill, but the plaintiff never showed him the bill (*t*); or where a defendant irrevocably constituted the plaintiff his agent to receive money due to the defendant to an amount exceeding the debt, and authorized the plaintiff to retain the debt out of such money when received, and the plaintiff might and ought to have received such money pursuant to the authority confided to him by the defendant, but did not receive it in consequence of his own default, whereby the money became wholly lost to the defendant (*u*); or where

(*m*) *Blake's case*, 6 Co. 43, b; 44, a; Bro. Abr. ACCORD, pl. 11; *Andrew* v. *Boughey*, Dyer, 75, b; *Lavery* v. *Turley*, 6 H. & N. 239; 30 L.J. Ex. 49; *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302.

(*n*) So it is not an accord and satisfaction of the debts of a member of the Stock Exchange who has been declared a defaulter that his contracts have been dealt with by the official assignee of the Stock Exchange, and that dividends have been paid by such official assignee to his creditors: *Mendelssohn* v. *Ratcliff*, (1904) A.C. 456; 73 L.J. K.B. 1027.

(*o*) *Hardman* v. *Bellhouse*, 9 M. & W. 600; 11 L.J. Ex. 135.

(*p*) *Day* v. *McLea*, 22 Q.B.D. 610; 58 L.J. Q.B. 293.

(*q*) *Bayley* v. *Homan*, 3 Bing. N.C. 915; 6 L.J. C.P. 309; *Collinghourne* v. *Mantell*, 5 M. & W. 289; 8 L.J. Ex. 251.

(*r*) *James* v. *David*, 5 T.R. 141.

(*s*) *Harris* v. *Reynolds*, 7 Q.B. 71; 14 L.J. Q.B. 241.

(*t*) *Cock* v. *Honychurch*, T. Raym. 203; *Norris* v. *Aylett*, 2 Camp. 329; *Carter* v. *Wormald*, 1 Exch. 86; 16 L.J. Ex. 231.

(*u*) *Gifford* v. *Whittaker*, 6 Q.B. 249; 13 L.J. Q.B. 325.

a defendant gave, and the plaintiff accepted, an order from the defendant on a third party for the delivery of certain securities for money, to be received by the plaintiff in discharge of the cause of action, and the plaintiff kept the order in his hands an unreasonable time without presenting it, whereby the securities became wholly lost to the defendant (*x*). But, if, by a subsequent executory simple contract, made and accepted in satisfaction of a simple contract debt or cause of action, increased liabilities are undertaken by the defendant, if an additional sum of money is agreed to be paid, or additional acts and duties are agreed to be performed, for the non-performance of which an action will lie against the defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract with the remedies thereon, will constitute a good accord and satisfaction (*y*). The substitution, by agreement of all parties, of the separate liability of one of several persons jointly liable, may be a good satisfaction and discharge of the joint liability of the others (*z*).

Delivery and acceptance of specialty securities, or of additional simple contract securities, in satisfaction and discharge of simple contract debts and causes of action, pursuant to a parol agreement of the parties in that behalf, constitute a good accord and satisfaction of the simple contract debt or cause of action, by reason of the superiority of the specialty security to the simple contract, provided the specialty security is co-extensive in its operation with the antecedent simple contract, and was given and accepted in lieu thereof, and not as a collateral security (*a*). But, if the securities are accepted on the faith of a representation by the other party that they are binding, and they turn out not to be so, the transaction may be repudiated by the party who has been deceived (*b*). Where a debtor by simple contract executed a deed in which he admitted the amount of his debt and secured it by an assignment of property to his creditor, but the deed contained no agreement to pay the debt, it was held that the deed did not make the debt a specialty (*c*). The delivery and acceptance of a negotiable

(*x*) *Griffiths* v. *Owen*, 13 M. & W. 58 ; 13 L.J. Ex. 345.

(*y*) Com. Dig. ACCORD, B. 4 ; as to pleading an agreement by way of accord and satisfaction, see *Graham* v. *Gibson*, 4 Exch. 768 ; 19 L.J. Ex. 204 ; *Barclay* v. *Bank of New South Wales*, 5 App. Cas. 374.

(*z*) *Peytoe's case*, 9 Co. Rep. 77, b ; *Lyth* v. *Ault*, 21 L.J. Ex. 217 ; 7 Exch. 669.

(*a*) *Price* v. *Moulton*, 10 C.B. 561 ; 20 L.J. C.P. 102 ; *Yates* v. *Aston*, 4 Q.B. 196 ; 12 L.J. Q.B. 160 ; *Commissioners of Stamps* v. *Hope*, (1891) A.C. 476 ; 60 L.J. P.C. 44.

(*b*) *Stears* v. *South Essex Gas Co.*, 9 C.B. N.S. 180 ; 30 L.J. C.P. 49.

(*c*) *Marryat* v. *Marryat*, 28 Beav. 224 ; 29 L.J. Ch. 665 ; *Jackson* v. *N. E. Ry.* 7 Ch.D. 573 ; 47 L.J. Ch. 303.

security, in satisfaction and discharge of an existing debt, is a good accord and satisfaction, although such acceptance is for a less amount than the debt (*d*). But, in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt (*e*). A bill of exchange received by one of two joint creditors in satisfaction of the joint debt will be a good satisfaction of the debt due to both (*f*).

Composition deeds and agreements.—When creditors covenant or agree by deed to take a certain specified composition of so much in the pound on the amount of their debts, the operation of the deed as a satisfaction and discharge of the debt is in general made dependent upon the composition being paid at the time appointed, so that, if the debtor makes default in carrying into effect his part of the contract, the deed will not operate as a satisfaction and discharge, but the creditors will be remitted to their original rights (*g*). An agreement by simple contract on the part of a creditor, to accept a composition of so much in the pound on the amount of his debt, cannot be set up against an action of debt upon a bond or covenant (*h*); for a bond or covenant, or a specialty debt, cannot be satisfied and discharged by parol agreement; and in the case of a simple contract debt, if the agreement for the composition is only between the debtor and a single creditor, it is inoperative as a discharge of the debt, as there is no consideration for the agreement by the creditor, on receiving part of the debt, to give up the residue (*i*); but, if some additional security is taken, or the liability of some new party is introduced into the agreement, the case is different (*k*). When some or all of the creditors join together and agree to take a portion of the debts due to them, in satisfaction and discharge of such debts, and not to sue the debtor, the joint agreement to accept the composition and relieve the debtor from his embarrassments is a sufficient consideration to each of them for the agreement of each to accept the composition and discharge the debtor (*l*); and, if the agreement is carried into effect by the receipt of the composition, there is a good accord executed, which is pleadable in discharge

(*d*) *Sibree* v. *Tripp*, 15 M. & W. 35; 15 L.J. Ex. 318; *Curlewis* v. *Clark*, 3 Exch. 375; 18 L.J. Ex. 144; *Soward* v. *Palmer*, 2 Moore, 274; *Goddard* v. *O'Brien*, 9 Q.B.D. 37; *Bidder* v. *Bridges*, 37 Ch.D. 406; 57 L.J. Ch. 300.

(*e*) *Taylor* v. *Briggs*, Moo. & M. 28; 2 C. & P. 525; *Tapley* v. *Martens*, 8 T.R. 451; *Maxwell* v. *Deare*, 8 Moo. P.C.C. 363; *Price* v. *Price*, 16 M. & W. 232; 16 L.J. Ex. 99; *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418; 34 Beav. 332.

(*f*) *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 L.J. K.B. 98.

(*g*) *Newell* v. *Van Praagh*, L.R. 9 C.P. 96; 43 L.J. C.P. 94.

(*h*) *Lowe* v. *Eginton*, 7 Pr. 604.

(*i*) *Lynn* v. *Bruce*, 2 H. Bl. 319.

(*k*) *Steinman* v. *Magnus*, 11 East, 393.

(*l*) *Norman* v. *Thompson*, 4 Exch. 755; 19 L.J. Ex. 193.

of any action brought by a creditor who is a party to the composition agreement for the recovery of the residue of his debt (*m*). If, however, the composition is not paid, the agreement will be a mere accord executory, producing no satisfaction of the debt, and the creditors will be remitted to their original rights (*n*): and, when the agreement is founded on the joint assent of all the creditors, all must sign, or none will be bound thereby (*o*).

If a debtor makes an assignment of all his property to a trustee for the benefit of such of his creditors as shall come in and execute the deed, and any one of the creditors communicates with the trustee, and assents by word of mouth to the transaction, so as to create the relationship of trustee and *cestui que trust* between himself and the trustee, the assignment cannot afterwards be revoked (*p*). And, where the party taking the legal interest under the deed has also a beneficial interest, the property will pass to him, unless he expressly disclaims (*q*). When the composition agreement provides additional security for the payment of the composition, beyond what previously existed for the payment of the entire debt—if, for instance, a surety comes forward and guarantees the payment of the composition, or if the debtor assigns all his property to trustees, to be divided amongst his creditors (*r*)—it is for a jury to determine whether the agreement, with the additional security thereby provided, was accepted as a substitution for, or in satisfaction and discharge of, the original debts, or whether it was the performance of the agreement by the actual payment and acceptance of the composition itself, which was offered and accepted in satisfaction and discharge. In the former case, the right to sue for the original debts would be extinguished from the time of the making of the agreement; and the remedy would be upon the agreement for the recovery of the instalment. In the latter case, there would be no satisfaction or discharge of the debts until the composition was actually paid and received (*s*).

Where, by an agreement between a debtor and his creditors,

(*m*) Distinguish, however, the case where a composition is accepted without an agreement that it shall be in discharge of the debt: see *Mendelssohn* v. *Ratcliff*, (1904) A.C. 456; 73 L.J. K.B. 1027.

(*n*) *Heathcote* v. *Crookshanks*, 2 T.R. 24; *Garrard* v. *Woolner*, 8 Bing. 264; 1 M. & Sc. 336; *Shipton* v. *Casson*, 5 B. & C. 378; 4 L.J. (O.S.) K.B. 199.

(*o*) *Boyd* v. *Hind*, 25 L.J. Ex. 246; in err., 1 H. & N. 938; 26 L.J. Ex. 164.

(*p*) *Harland* v. *Binks*, 15 Q.B. 720; 20 L.J. Q.B. 126.

(*q*) *Siggers* v. *Evans*, 5 E. & B. 377; 24 L.J. Q.B. 305. See also *Standing* v. *Bowring*, 31 Ch.D. 282; 55 L.J. Ch. 218.

(*r*) *Tatlock* v. *Smith*, 3 Moo. & P. 688; 8 L.J. (O.S.) C.P. 54.

(*s*) *Cork* v. *Saunders*, 1 B. & Ald. 50; *Evans* v. *Powis*, 1 Exch. 601; *Pfleger* v. *Browne*, 28 Beav. 391; *Kitchin* v. *Hawkins*, L.R. 2 C.P. 22; *Couldery* v. *Bartrum*, 19 Ch.D. 394; 51 L.J. Ch. 265.

the debtor was to give, and the creditors to accept, certain securities for the payment of a certain portion of the debts due to each, and the creditors were to forbear from enforcing their original demands, it was held that this was a new agreement substituted in the place of the original contracts between the debtor and his creditors, which were extinguished, and that the creditors consequently could no longer sue for their original debt (*t*). And, where a creditor signed an agreement to accept a composition of five shillings in the pound on the amount of his debt, payment of such composition to be secured by the joint note of hand of the debtor and his father, and the joint note of hand was accordingly delivered to him, it was held that this was an accord and satisfaction of the original debt, and completely discharged the debtor's liability in respect thereof (*u*). If a third party comes forward and guarantees the payment of a certain sum to creditors who execute the deed by a day named, time is of the essence of the contract, and the benefit of the deed is confined to those who execute it by the day named (*x*). Where the plaintiff by his own act has prevented the satisfaction from being made pursuant to the terms of the accord or agreement, the accord will, as to him, be deemed to be accomplished, and that which was agreed to be done will be taken as done (*y*). If the amount of the debt is not specified, the creditor will be bound for his actually existing debt which is capable of proof (*z*).

Transfer of property by way of accord and satisfaction.—Where property, real or personal, is accepted in satisfaction of a debt, care should be taken so to assign the property that the transaction may not be avoided either as a fraud on the other creditors of the assignor or as an act of bankruptcy. Every transfer which is fraudulent as against creditors is also void as against the trustee in bankruptcy (*a*).

Accord and satisfaction with one of several joint plaintiffs.—Where several persons are joined together in suing upon a joint cause of action, all are bound by the act of one; and therefore a satisfaction to one of several joint plaintiffs of the joint cause of action in respect of which they sue is in general a satisfaction to all, whether made before or after the commencement of the action (*b*).

(*t*) *Good* v. *Cheesman*, 2 B. & Ad. 328; 9 L.J. (O.S.) K.B. 234.

(*u*) *Lewis* v. *Jones*, 4 B. & C. 506; 3 L.J. (O.S.) K.B. 270.

(*x*) *Williams* v. *Mostyn*, 33 L.J. Ch. 54; *Crowe* v. *Lysaght*, 12 Ir. C.L.R. 481.

(*y*) *Reay* v. *White*, 1 Cr. & M. 748; 2 L.J. Ex. 229; *Bradley* v. *Gregory*, 2 Campb. 383.

(*z*) *Harrhy* v. *Wall*, 1 B. & Ald. 103.

(*a*) *Doe* v. *Ball*, 11 M. & W. 531; 12 L.J. Ex. 328; and see *ante*, p. 87.

(*b*) *Wallace* v. *Kelsall*, 7 M. & W. 264; 10 L.J. Ex. 12; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160; 70 L.J. Ch. 587. See, however, *Steeds* v. *Steeds*, 22 Q.B.D.

SECTION III.

DISCHARGE BY OPERATION OF LAW.

Alterations of contracts in writing (*c*).—If a deed, after it has been signed, sealed, and delivered, or a simple contract in writing, after it has been finally signed, is altered in any material part, whether it be by interlineation, addition, drawing a line through the words, writing new letters on the old, or erasure, by the plaintiff himself, or by any stranger without the privity of the obligee, the deed or other contract in writing becomes void (*d*). But if a party, after having signed his name to a contract, makes an interlineation to correct a mistake, or add a new term, it is not necessary for him to re-sign the contract (*e*). And a contract in writing, which is sufficient within the Statute of Frauds, cannot be affected by a subsequent abortive attempt to put it into a more formal shape (*f*). So, with the consent of both parties to the contract, even an alteration inconsistent with the original terms of the contract may be made, this amounting to a new agreement superseding the original one (*g*). And an alteration made by the defendant, or by some third party, without the plaintiff's consent, whilst the contract was out of the plaintiff's hands, will have no effect; and the contract will remain as it originally stood, provided the nature of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed (*h*). If the alteration is of such a nature as to render this a matter of doubt, the contract is extinguished as effectually as if the writing had been obliterated (*i*). Where the obligation is by reason of the instrument, and there is a material alteration in the instrument, the instrument is void; but where the obligation is by reason of the parol contract of the parties, the writing

537; 58 L.J. Q.B. 302. See also *ante*, p. 163, and *post*, pp. 315 *et seq.*

(*c*) As to alterations in bills and notes, see Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 64, *post*, p. 1294.

(*d*) *Pigot's case*, 11 Co. 27, a; *Master* v. *Miller*, 5 T.R. 637; *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; 37 L.J. Q.B. 201. As to what is a material alteration, see *Suffell* v. *Bank of England*, 9 Q.B.D. 555; 51 L.J. Q.B. 401.

(*e*) *Bluck* v. *Gompertz*, 7 Exch. 862; 21 L.J. Ex. 278.

(*f*) *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.

(*g*) See *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 65; 2 L.J. K.B. 127. Where a new contract is created, the instrument evidencing it must be re-stamped: see *Perring* v. *Hone*, 4 Bing. 28; 5 L.J. C.P. 33; *Catton* v. *Simpson*, 8 Ad. & E. 136.

(*h*) *Waugh* v. *Bussell*, 5 Taunt. 710; *Hemming* v. *Trenery*, 9 Ad. & E. 934; 8 L.J. Q.B. 160; *Henfree* v. *Bromley*, 6 East, 310; *Raper* v. *Birkbeck*, 15 East, 17.

(*i*) *Davidson* v. *Cooper*, 13 M. & W. 352; 13 L.J. Ex. 276; *Crookewit* v. *Fletcher*, 1 H. & N. 913; 26 L.J. Ex. 153.

may be used as evidence of the terms of the contract notwithstanding the alteration (*k*).

It is not every alteration of a contract in a material particular that will avoid it. The erasure, for example, of the name of a shareholder from a deed of settlement of a joint-stock company does not prevent the deed from being evidence that another person, whose name is not erased, is a shareholder of the company (*l*). The following alterations and additions to simple contracts, made without the privity and assent of the parties sued thereon, have been held to discharge the contract:—the affixing of a seal to the defendant's signature of a simple contract, whilst the contract is in the possession or under the control of the plaintiff, so as to give the contract the character of a deed (*m*); the striking out of the body of a policy of insurance the time of the warranty of sailing and inserting in the margin of the policy a different time of sailing without the sanction of the underwriter, after the policy has been subscribed by him (*n*); the insertion in a broker's bought and sold note, either by the vendor himself, or by the broker at his request, after the notes have been exchanged, of a stipulation to the effect that damaged articles are to be taken at a valuation (*o*), or that the things sold are to be of the vendor's own manufacture (*p*).

Immaterial alterations.—Whenever the alteration is immaterial, the contract is not vitiated (*q*). Thus, where a house was by mistake described in a lease as No. 38, whereas it was in fact No. 35, and the 8 was altered into a 5 whilst the lease was in the plaintiff's hands, it was held that the contract was not avoided by the alteration (*r*). So, a bond remaining in the hands of the agent of the obligor as an escrow in not avoided by the addition of another obligor, with the assent of the agent, before the delivery of the instrument to the obligee (*s*). And, when a deed *inter partes* is in progress of execution, and an alteration is made to meet the wishes of the parties who are

(*k*) *Pattinson* v. *Luckley*, L.R. 10 Ex. 330; 44 L.J. Ex. 180.

(*l*) *Agricult. Cattle Ins. Co.* v. *Fitzgerald*, 16 Q.B. 432; 20 L.J. Q.B. 244.

(*m*) *Davidson* v. *Cooper*, 13 M. & W. 352; 13 L.J. Ex. 276.

(*n*) *Fairlie* v. *Christie*, 7 Taunt. 416.

(*o*) *Powell* v. *Divett*, 15 East, 29.

(*p*) *Mollet* v. *Wackerbath*, 5 C.B. 191; 17 L.J. C.P. 47.

(*q*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; 37 L.J. Q.B. 201; *Suffell* v. *Bank of England*, 9 Q.B.D. 555; 51 L.J. Q.B. 401. As to this case, see *Leeds and County Bank* v. *Walker*, 11 Q.B.D. 84; 52 L.J. Q.B. 590; *Crediton (Bishop of)* v. *Exeter (Bishop of)*, (1905) 2 Ch. 455; 74 L.J. Ch. 697.

(*r*) *Hutchins* v. *Scott*, 2 M. & W. 816; 6 L.J. Ex. 186; *Sanderson* v. *Symonds*, 4 Moore, 46; *Howgate and Osborn's Contract, In re*, (1902) 1 Ch. 451; 71 L,J. Ch. 279.

(*s*) *Matson* v. *Booth*, 5 M. & S. 226; *Hudson* v. *Revett*, 5 Bing. 368; 7 L.J. (O.S.) C.P. 145.

about to execute it, such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, will not avoid the deed (*t*).

Alteration of deeds.—If, after a deed is executed, material blanks purposely left in it are filled up with the assent of all the parties to the instrument, or if a schedule is added to the deed describing certain property upon which the deed is to operate, and the deed is insensible and inoperative without the schedule (*u*), or if a new covenantor is added (*x*), the deed must be re-delivered (*y*), and must have a fresh stamp (*z*); but blanks left for filling in dates previously agreed upon, or the names of persons not being parties to the deed, may be filled up after the execution of the instrument (*a*).

Evidence to explain alterations.—It lies upon the party suing upon an altered contract to account for any material alteration that appears upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument. In the case of an alteration on a deed, the presumption is that it was made before execution (*b*).

Cancellation by mistake.—If a contract is cancelled by mistake, the cancellation will be of no effect if the writing is legible. Where the seals of a deed were torn off by a little boy in sport, it was held that the operation of the deed was not affected thereby (*c*). But it is otherwise, if the seals are torn off by the agreement of all the parties to a deed, with intent to cancel the instrument (*d*). If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces can be pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it in ignorance of its having been cancelled (*e*).

(*t*) *Doe* v. *Bingham*, 4 B. & Ald. 676; *Hall* v. *Chandless*, 12 Moore, 316; 4 Bing. 123; *Wood* v. *Slack*, L.R. 3 Q.B. 379; 37 L.J. Q.B. 130.

(*u*) *Weekes* v. *Maillard*, 14 East, 572; *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 12 L.J. Ex. 359.

(*x*) *Gardner* v. *Walsh*, 5 E. & B. 83; 24 L.J. Q.B. 285. But see *Wood* v. *Slack*, L.R. 3 Q.B. 379; 37 L.J. Q.B. 130.

(*y*) *Markham* v. *Gonaston*, 9 East, 354, n.; *Hudson* v. *Revett*, 5 Bing. 368; 7 L.J. (O.S.) C.P. 145; *Hall* v. *Chandless*, *supra*; *Keele* v. *Wheeler*, 13 L.J. C.P. 170; 8 Sc. N.R. 323; *Enthoren* v. *Hoyle*, 21 L.J. C.P. 100; 13 C.B. 373.

(*z*) *French* v. *Patton*, 9 East, 351.

(*a*) *Adsetts* v. *Hives*, 33 Beav. 56; *Crediton* (*Bishop of*) v. *Exeter* (*Bishop of*), (1905) 2 Ch. 455; 74 L.J. Ch. 697.

(*b*) *Doe* v. *Catomore*, 16 Q.B. 745; 20 L.J. Q.B. 364.

(*c*) *Argoll* v. *Cheney*, Palm. 403.

(*d*) 1 Shep. Touch. 70.

(*e*) *Ingham* v. *Primrose*, 28 L.J. C.P. 295; 7 C.B. N.S. 82; see Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 63. As to meaning of "cancel," see 2 Bl. Comm. 308, 309; *Bamberger* v. *Commercial Credit*, 15 C.B. 676; 24 L.J. C.P. 115; *Ward* v. *Lumley*, 5 H. & N. 87; 29 L.J. Ex. 322; *Jamieson In re*, (1895) 2 Q.B. 90; 64 L.J. Q.B. 560.

Merger of simple contract in contract under seal.—If, after a simple contract or promise has been entered into or made, a contract under seal is executed for the performance of the same act or duty as that stipulated for by the simple contract, the simple contract becomes merged in the higher security, and can no longer be enforced (*f*), provided the contracts are between the same parties and the remedies upon them are co-extensive (*g*); but a contract under seal from some third party, given as a collateral security, will not merge a simple contract or promise (*h*); nor will a bond or a deed for a debt different from the debt secured by the simple contract (*i*). A debt secured by a specialty may be further secured by a promissory note, provided such note be given after the execution of the deed.

Judgment recovered.—If there be a breach of contract by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, which is changed into matter of record, and the inferior remedy is merged in the superior (*k*), provided the cause of action in the two suits is identical (*l*). If judgment is given for the defendant, such judgment operates as an estoppel against the plaintiff, and precludes him from maintaining a second action for the same cause (*m*). A judgment, therefore, in the county court is a bar to an action on the same subject-matter in any other court (*n*).

A judgment recovered against one of two or more joint debtors or joint contractors may (though unsatisfied) be pleaded in bar to any action brought against the others upon the joint contract,

(*f*) *Schack* v. *Anthony*, 1 M. & S. 573; *Price* v. *Moulton*, 10 C.B. 561; 20 L.J. C.P. 102; *Saunders* v. *Milsome*, L.R. 2 Eq. 573; *Commissioners of Stamps* v. *Hope*, (1891) A.C. 476; 60 L.J. P.C. 44. See *Marryat* v. *Marryat*, 28 Beav. 224; 29 L.J. Ch. 665, *ante*, p. 185.

(*g*) *Ansell* v. *Baker*, 15 Q.B. 20; *Sharpe* v. *Gibbs*, 16 C.B. N.S. 527; *Boaler* v. *Mayor*, 19 C.B. N.S. 76; 34 L.J. C.P. 230; *Chetwynd* v. *Allen*, (1899) 1 Ch. 353; 68 L.J. Ch. 160.

(*h*) *White* v. *Cuyler*, 6 T.R. 176; *Twopenny* v. *Young*, 3 B. & C. 211; 5 D. & R. 261; *Holmes* v. *Bell*, 3 Sc. N.R. 479; *Mowatt* v. *Lord Londesborough*, 4 E. & B. 1.

(*i*) *Norfolk Ry.* v. *M'Namara*, 3 Exch. 628.

(*k*) *Higgen's case*, 6 Co. Rep. 44, b; *Bagot* v. *Williams*, 3 B. & C. 235; *Siddall* v. *Rawcliffe*, 1 Cr. & M. 487; 2 L.J. Ex. 237; *King* v. *Hoare*, 13 M. & W. 504, 506; 14 L.J. Ex. 29; *Buckland* v. *Johnson*, 15 C.B. 163; 23 L.J. C.P. 264; *Kitchen* v. *Campbell*, 3 Wils. 308; 2 W. Bl. 827; *Stewart* v. *Todd*, 16 L.J. Q.B. 327; 9 Q. B. 767; *European Central Ry., In re, Oriental Financial Corporation, Ex parte*, 4 Ch.D. 33; 46 L.J. Ch. 57; *Sneyd, In re, Fewings, Ex parte*, 25 Ch.D. 338; 53 L.J. Ch. 545. It does not extinguish the debt for the purpose of bankruptcy proceedings; *King and Beesley, In re*, (1895) 1 Q.B. 189; 64 L.J. Q.B. 126.

(*l*) *Slade's case*, 4 Co. 94, b; *Phillips* v. *Berryman*, 3 Doug. 288; *Florence* v. *Jenings*, 2 C.B. N.S. 454; 26 L.J. C.P. 274; *Nelson* v. *Couch*, 33 L.J. C.P. 46; 15 C.B. N.S. 99; *Popple* v. *Sylvester*, 22 Ch.D. 98; 52 L.J. Ch. 54; *Wegg-Prosser* v. *Evans*, (1895) 1 Q.B. 108; 64 L.J. Q.B. 1. See also *Economic Life Assurance Society* v. *Usborne*, (1902) A.C. 147; 71 L.J. Ch. 34.

(*m*) *Vooght* v. *Winch*, 2 B. & Ald. 662; *Overton* v. *Harvey*, 9 C.B. 324; 19 L.J. C.P. 256; *Greathead* v. *Bromley*, 7 T.R. 456; *Langmead* v. *Maple*, 18 C.B. N.S. 255; *Newington* v. *Levy*, L.R. 6 C.P. 180; 40 L.J. C.P. 29.

(*n*) *Austin* v. *Mills*, 9 Exch. 288; 23 L.J. Ex. 42; *Berkeley* v. *Elderkin*, 1 E. & B. 805; 22 L.J. Q.B. 281.

or for the recovery of the joint debt (*o*), even when one of the contractors is a married woman contracting in respect of her separate property (*p*); and even where the judgment against one of the debtors has been obtained by consent in the same action (*q*). But where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied (*r*). And, if one of such joint debtors was beyond seas at the time the cause of action arose, the recovery of judgment against those who were not beyond seas will not prevent an action being brought against him on his return (*s*). A judgment against one of two joint guarantors upon a negotiable instrument given by him for the amount jointly due under the guarantee is, if unsatisfied, no bar to an action against the joint guarantors, or either of them, upon the guarantee (*t*).

Where the plaintiff had two demands against the defendant, one on a promissory note and the other for the price of goods sold, and the defendant suffered judgment by default, and, on executing a writ of enquiry, evidence was only given on the first demand, and the plaintiff recovered damages adapted to that amount, the other demand for the goods remaining unsatisfied, it was held that, as there were two distinct demands, and the plaintiff had failed through inadvertence in proving one of them, he might maintain a second action for it (*u*). "If a plaintiff offers no evidence in the first action on a particular part of his claim, then a new action may be brought for such part; but, if he does offer evidence and fails, he is prevented from bringing a fresh action" (*x*). So, where different rights are infringed, though by one and the same wrongful act, there are distinct causes of action; and, therefore, the recovery in an action in respect of the infringement of one right is no bar

(*o*) *King* v. *Hoare*, 13 M. & W. 494; 14 L.J. Ex. 29; *Kendall* v. *Hamilton*, 4 App.Cas. 504; 48 L.J. C.P. 705; *Hammond* v. *Schofield*, (1891) 1 Q.B. 453; 60 L.J. Q.B. 539.

(*p*) *Hoare* v. *Niblett*, (1891) 1 Q.B. 781; 60 L.J. Q.B. 565.

(*q*) *McLeod* v. *Power*, (1898) 2 Ch. 295; 67 L.J. Ch. 551; following Bowen, L.J., in *Hodgson*, *In re*, 31 Ch.D. 177; 55 L.J. Ch. 241.

(*r*) *Blumfield's case*, 5 Co. Rep. 86, b; *Ayrey* v. *Davenport*, 2 Bos. & P. N.R. 474; *King* v. *Hoare*, 13 M. & W. 494; 14 L.J. Ex. 29; *Davison*, *In re*, *Chandler*, *Ex parte*, 13 Q.B.D. 50; *Bermondsey* (*Vestry*) v. *Ramsay*, L.R. 6 C.P. 247; 40 L.J. C.P. 206; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337; 60 L.J. Ch. 66.

(*s*) Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 11.

(*t*) *Wegg-Prosser* v. *Evans*, (1895) 1 Q.B. 108; 64 L.J. Q.B. 1; following *Drake* v. *Mitchell*, 3 East, 251; and overruling *Cambefort* v. *Chapman*, 19 Q.B.D. 229; 56 L.J. Q.B. 639.

(*u*) *Seddon* v. *Tutop*, 6 T.R. 609.

(*x*) *Stafford* v. *Clark*, 9 Moore, 738; 3 L.J. (O.S.) C.P. 48; *Hadley* v. *Green*, 2 Cr. & J. 376; 1 L.J. Ex. 137.

to an action subsequently brought in respect of the infringement of the other right (*y*). Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action (*z*).

If all matters in difference between a plaintiff and defendant are referred to an arbitrator, the award is no bar to any cause of action that was not inquired into before the arbitrator (*a*); though it is conclusive as to all matters which it professes to decide (*b*). It may be made a condition precedent to the right to maintain an action that the amount of damages to be recovered, or the time of payment, be first determined by arbitration (*c*). But an award does not, like a judgment, change the nature of a debt; and, consequently, an action may, notwithstanding an award fixing the amount of the debt, be maintained, on the original consideration, to recover the amount awarded (*d*). Where, however, a claim for unliquidated damage has been referred to arbitration, an award fixing the amount and creating a debt between the parties extinguishes the original demand for unliquidated damage (*e*).

Foreign and colonial judgments.—Judgments in foreign courts are not upon the same footing as judgments in our own courts of record. They do not bar or stay an action *ex contractu* (*f*). But judgment recovered in a foreign court and payment of the sum recovered is a good bar to the same cause of action (*g*). A judgment of a foreign or colonial court is conclusive *inter partes*, unless it can be shown that the court had no jurisdiction, or that it was obtained by fraud, or perhaps that it was given against good faith and natural justice (*h*).

Discharge by death.—Contracts for personal services and contracts founded exclusively on the personal skill of the parties die with them, and do not give rise to any liability on the part of their personal representatives, *e.g.*, contracts by an author to write a book for a publisher, by a physician to cure a

(*y*) *Brunsden* v. *Humphrey*, 14 Q.B.D. 141; 53 L.J. Q.B. 476.

(*z*) *Carter* v. *James*, 13 M. & W. 137; 13 L.J. Ex. 373.

(*a*) *Ravee* v. *Farmer*, 4 T.R. 146.

(*b*) *Cummings* v. *Heard*, L.R. 4 Q.B. 669; 30 L.J. Q.B. 9; *Martin* v. *Boulanger*, 8 App.Cas. 296; 52 L.J. P.C. 31; *Hutcheson* v. *Eaton*, 13 Q.B.D. 861; *North Western Rubber Co., Ld. and Hüttenbach & Co., In re*, (1908) 2 K.B. 907, 912; 78 L.J. K.B. 51; and see Arbitration Act, 1889, 52 & 53 Vict. c. 49, s. 2, Sched. I.

(*c*) See cases cited *ante*, p. 82.

(*d*) *Allen* v. *Milner*, 2 Cr. & J. 47; 1 L.J. Ex. 7.

(*e*) *Gascoyne* v. *Edwards*, 1 Y. & J. 19.

(*f*) *Hall* v. *Odber*, 11 East, 124; *Smith* v. *Nicolls*, 5 Bing. N.C. 208; 8 L.J. C.P. 92; 2 Smith's L. C., pp. 797, 823 (ed. 11); *Plummer* v. *Woodburne*, 4 B. & C. 625; 4 L.J. (O.S.) K.B. 6; *Bank of Australasia* v. *Harding*, 9 C.B. 661; 19 L.J. C.P. 345; *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341; *Scott* v. *Pilkington*, 2 B. & S. 11, 41; 31 L.J. Q.B. 81, 89.

(*g*) *Barber* v. *Lamb*, 8 C.B. N.S. 95; 29 L.J. C.P. 234; *Taylor* v. *Hollard*, (1902) 1 K.B. 676; 71 L.J. K.B. 278.

(*h*) *Post*, p. 554.

patient of a particular disease, by a teacher or master to instruct a pupil or apprentice, promises of marriage, &c. (*i*). A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term, that appearing to have been the intention of the parties (*k*). So, where A. was hired by P. to serve as farm-bailiff at weekly wages, with other advantages, the service to be determinable by a six months' notice, or payment of six months' wages, and P. died during the service, it was held that P.'s personal representative was not bound to continue A. in her service or to pay him six months' wages (*l*). And, where a person had authorised the plaintiff to sell a picture promising him 100*l.* for his trouble in case he succeeded in selling it, but before any sale had been effected the person died intestate, and after his death the plaintiff sold the picture and claimed the 100*l.*, it was held that the authority to sell was revoked by the death of the intestate, and that his administrator was not bound to pay the 100*l.* (*m*). But where the agreement was to pay to a person a certain commission on all accounts introduced by him so long as business was done with the persons he placed on the books, the commission was held to be payable to his executors after his death so long as business continued to be done with the persons introduced by him (*n*). And, *a fortiori*, a contract involving personal confidence is not rescinded by death so as to take away a right of action already vested (*o*). The death of the surety does not operate as a revocation of a continuing guarantee (*p*).

Discharge by bankruptcy.—An order of discharge in bankruptcy discharges the bankrupt from all debts provable in bankruptcy except any debt on a recognizance, or any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, or any

(*i*) *Baxter* v. *Burfield*, 2 Str. 1266; *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164; *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q.B. 247.

(*k*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207. See *Phillips* v. *Hull Alhambra Palace Co.*, (1901) 1 K.B. 59; 70 L.J. K.B. 26.

(*l*) *Farrow* v. *Wilson*, L.R. 4 C.P. 744; 38 L.J. C.P. 326; and see *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Robinson* v. *Davison*, L.R. 6 Ex. 269; 40 L.J. Ex. 172.

(*m*) *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 15.

(*n*) *Wilson* v. *Harper*, (1908) 2 Ch. 370; 77 L.J. Ch. 607.

(*o*) *Stubbs* v. *Holywell Ry.*, L.R. 2 Ex. 311; 36 L.J. Ex. 166.

(*p*) *Bradbury* v. *Morgan*, 31 L.J. Ex. 462; 1 H. & C. 249.

debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, or any debt or liability whereof he has obtained forbearance by any fraud to which he was a party. An order of discharge does not release a person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of surety for him. The order of discharge is conclusive evidence of the bankruptcy, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, he may plead that the cause of action occurred before his discharge (*q*).

The word "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as respects mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion (*r*). But the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and such debt or liability will not then be provable, and will not be barred by the order of discharge (*s*). It is the duty of the court to bring within the Act all possible contracts that have been broken, so as to discharge the bankrupt (*t*); but the order of discharge will not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust (*u*), nor from any debt or liability by means of any fraud or breach of trust committed by his partner (*x*). An order of discharge granted to a debtor, who is one of a partnership firm, in his separate bankruptcy or liquidation, re-

(*q*) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 30.

(*r*) Sect. 37 (8).

(*s*) Sect. 37 (6). See *Robinson* v. *Ommaney*, 23 Ch.D. 285; 52 L.J. Ch. 440.

(*t*) *Waters, Ex parte*, L.R. 8 Ch. 562; see also *Peacock, Ex parte*, L.R. 8 Ch. 682; 42 L.J. Bankr. 78.

(*u*) As to the meaning of these words, see *Emma Mining Co.* v. *Grant*, 17 Ch.D. 122; 50 L.J. Ch. 449; *Hemming, Ex parte*, 13 Ch.D. 163; 49 L.J. Bankr. 17; *Hale* v. *Boustead*, 8 Q.B.D. 453; 51 L.J. Q.B. 255; *Ramskill* v. *Edwards*, 31 Ch.D. 100; 55 L.J. Ch. 81.

(*x*) *Cooper* v. *Prichard*, 11 Q.B.D. 351; 52 L.J. Q.B. 526.

leases him from his joint as well as from his separate debts (*y*). The landlord's remedy, by way of distress, for the recovery of rent due to him at the time of the bankruptcy, appears to remain unaffected by the order of discharge, although he has proved for the rent (*z*). No distress levied after the commencement of the bankruptcy is to be available for more than six months (*a*) rent accrued due prior to the order of adjudication, but the landlord or any other person to whom the rent may be due may prove under the bankruptcy for the surplus due for which the distress may not have been available (*b*). The landlord cannot both prove and distrain for the same rent (*c*). A covenant that a creditor shall be at liberty to seize after-acquired property of the debtor if he fails to pay the debt, is at an end if the debtor afterwards becomes bankrupt and is discharged from the debt (*d*), and so is a covenant to indemnify the assignors of a lease from their liability to repair (*e*). Proof of a debt under an adjudication in bankruptcy is no answer to an action for the debt (*f*).

In the case of an executory contract insolvency does not *per se* put an end to or alter the contract, but when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract and may treat it as rescinded (*g*). Subject to the provisions of the Sale of Goods Act, 1893, the unpaid seller of goods who is in possession of them is entitled to retain possession until payment or tender of the price, where the buyer becomes insolvent (*h*).

A discharge is good although the plaintiff relies upon a subsequent promise to pay (*i*); but if the subsequent promise is founded on a good consideration arising after the discharge, the promise may be sued upon (*k*).

Operation of payment of dividend.—Payment of a dividend in bankruptcy is not payment of the debt, except as against the

(*y*) *Hammond*, *Ex parte*, L.R. 16 Eq. 614.

(*z*) *Newton* v. *Scott*, 10 M. & W. 471; 11 L.J. Ex. 121; *Phillips* v. *Shervill*, 6 Q.B. 952; 14 L.J. Q.B. 144.

(*a*) See Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, s. 28.

(*b*) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 42 (1).

(*c*) *Grove*, *Ex parte*, 1 Atk. 104.

(*d*) *Thompson* v. *Cohen*, L.R. 7 Q.B. 527; 41 L.J. Q.B. 221.

(*e*) *Hardy* v. *Fothergill*, 13 App.Cas. 351; 58 L.J. Q.B. 44.

(*f*) *Spencer* v. *Demett*, L.R. 1 Ex. 123; 35 L.J. Ex. 73. In such a case the proper course would seem to be to apply to stay the action. See Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 10.

(*g*) *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

(*h*) 56 & 57 Vict. c. 71, s. 41, sub-s. 1 (c).

(*i*) *Heather* v. *Webb*, 2 C.P.D. 1; 46 L.J. C.P. 89. See *Elmslie* v. *Corrie*, 4 Q.B.D. 295; 48 L.J. Q.B. 462.

(*k*) *Jakeman* v. *Cook*, 4 Ex.D. 26; 48 L.J. Ex. 165; but this does not apply to a debtor in bankruptcy who has not paid his composition. See *Barrow*, *Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71.

debtor himself, and does not discharge the debtor's estate (*l*) or confer any right on the bankrupt or his trustee to call upon the creditor to surrender any collateral security (*m*).

Composition with creditors.—The offer by a debtor of a composition in satisfaction of his debts, made to and accepted by the creditors in the manner provided by the Bankruptcy Act, 1890, when approved by the court, is binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy (*n*). If default is made in payment of any instalment due in pursuance of the arrangement, or if it appears to the court that the arrangement cannot be carried out without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, on application by the official receiver or the trustee, or by any creditor, adjudge the debtor bankrupt and annul the arrangement, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the arrangement (*o*). No arrangement is to be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt (*p*). The acceptance by a creditor of a composition does not release any person who under the Bankruptcy Acts would not be released by an order of discharge if the debtor had been adjudged bankrupt, *e.g.*, a co-debtor or a surety (*q*). Where a joint and several promissory note was given by two partners to secure a debt of the firm, it was held that the acceptance of a composition on the joint debt was not a satisfaction of the separate liability (*r*); so where bankers were joint creditors of two persons in copartnership, with a security by deposit of deeds upon the separate property of one, it was held that the acceptance of a composition by the bank did not discharge the separate security (*s*). It has been held that resolutions for a composition give an implied authority to the debtor to carry on

(*l*) *Overend, Gurney & Co., In re; Grissell's case*, L.R. 1 Ch. 528; 35 L.J. Ch. 752; *West Coast Gold Fields, Ld., In re*, (1906) 1 Ch. 1; 75 L.J. Ch. 23.

(*m*) *Ewart* v. *Latta*, 4 Macq. 983.

(*n*) Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, s. 3. As to debts which are not thereby released, see s. 3 (12).

(*o*) Sect. 3 (15). But a debtor who pays a debt to the trustee under a deed of assignment for the benefit of creditors within three months from the execution of the deed does so at his own peril, and is not discharged as against the trustee in bankruptcy: *Davis* v. *Petrie*, (1906) 2 K.B. 786; 75 L.J. K.B. 992.

(*p*) Sect. 3 (18).

(*q*) Sect. 3 (19); and see *Megrath* v. *Gray*, L.R. 9 C.P. 216; 43 L.J. C.P. 63; *Jacobs, Ex parte*, L.R. 10 Ch. 211; 44 L.J. Bankr. 34.

(*r*) *Simpson* v. *Henning*, L.R. 10 Q.B. 406; 44 L.J. Q.B. 143.

(*s*) *Manchester and Liverpool District Bank, Ex parte*, L.R. 18 Eq. 249; 43 L.J. Bankr. 73. See, however, *Couldery* v. *Bartrum*, 19 Ch.D. 394; 51 L.J. Ch. 265.

business in the ordinary way, and to pledge the assets to raise money for that purpose (*t*).

The debtor has complete dominion over his property and full power to dispose of it, and a purchaser from him is not bound to inquire as to the payment of instalments (*u*).

Effect of discharge in bankruptcy on debts contracted abroad.—The English bankruptcy law is binding upon the colonies, and the English courts are bound by its provisions in actions on foreign and colonial as well as on English debts (*x*). Thus, an English certificate in bankruptcy has been held to be a good answer to a debt arising in Calcutta, and sued for in the Supreme Court there (*y*); and the same has been held in Scotland with reference to a debt contracted there (*z*). So, also, an English certificate has been held in the English courts to discharge a debt contracted in Ireland (*a*); and a debt contracted in England, and sued for there, has been held to be discharged by a discharge under a Scotch sequestration (*b*), or by an Irish certificate (*c*), or a discharge in Newfoundland (*d*). But a foreign bankruptcy does not discharge the bankrupt from a contract made and to be performed in England (*e*).

The Statutes of Limitation (*f*)*—Limitation of actions for the recovery of fee-farm rents and money charged on land.*—By 3 & 4 Will. 4, c. 27 (*g*), and 37 & 38 Vict. c. 57, ss. 1, 9, it is enacted that all actions and suits brought for the recovery of rent by persons not being ecclesiastical or eleemosynary corporations (sect. 29 of 3 & 4 Will. c. 27) shall be brought within twelve years after the right thereto has accrued (see 3 & 4 Will. 4, c. 27, ss. 3, 5, and 37 & 38 Vict. c. 57, s. 2) to the plaintiff or to the person through whom he claims (*h*). As regards money

(*t*) *Allard, Ex parte*, 16 Ch.D. 505.

(*u*) *Kearley's Contract, In re*, 7 Ch.D. 615; 47 L.J. Ch. 474.

(*x*) *Ellis* v. *M'Henry*, L.R. 6 C.P. 228; 40 L.J. C.P. 109.

(*y*) *Edwards* v. *Ronald*, 1 Knapp, P.C. 259.

(*z*) *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462, 486.

(*a*) *Lynch* v. *M'Kenny*, cited 2 H. Bl. 554.

(*b*) *Sidaway* v. *Hay*, 8 B. & C. 477, 481; 2 L.J. (O.S.) K.B. 215.

(*c*) *Ferguson* v. *Spencer*, 1 Man. & G. 987; 10 L.J. C.P. 20.

(*d*) *Philpotts* v. *Reed*, 1 B. & B. 294.

(*e*) *Smith* v. *Buchanan*, 1 East, 6; *Gibbs* v. *Société des Métaux*, 25 Q.B.D. 399; 59 L.J. Q.B. 510; approved in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*, (1898) A.C. 49; 67 L.J. P.C. 10.

(*f*) As to presumption of *omnia rite acta* after long lapse of time, see *Watt* v. *Assets Co.*, *Bain* v. *Assets Co.*, (1905) A.C. 317; 74 L.J. P.C. 82.

(*g*) Sects. 2, 5, 16, 17, 23, 28, 40, are repealed by 37 & 38 Vict. c. 57, s. 9, and similar provisions substituted; the rest of the Act remains in force, except that in sect. 18 six years is to be read instead of ten years, and twelve instead of twenty.

(*h*) This does not apply to an action on a covenant to pay a rent charged on land: *Manning* v. *Phelps*, 10 Exch. 59; 24 L.J. Ex. 62; nor to rents reserved on leases for years, but to ancient rent service, fee-farm rent and the like: *Grant* v. *Ellis*, 9 M. & W. 113; 11 L.J. Ex. 228; *Archbold* v. *Scully*, 9 H.L. Cas. 360. As to tithes, see *Ely* (*Dean*) v. *Cash*, 15 M. & W. 617; 15 L.J. Ex. 341.

secured by mortgage, judgment (*i*), or lien, or otherwise charged upon or payable out of land, it is enacted that no action or suit shall be brought for the recovery thereof but within twelve years (*k*) next after a present right to receive such money (*l*) shall have accrued to some person capable of giving a discharge for, or a release of, the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*m*), or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent (*n*), to the person entitled thereto, or his agent, in which case the action or suit is to be brought within twelve years (*o*) after the payment or acknowledgment; and no arrears of rent, or of interest in respect of money charged on land, and no damages in respect of such arrears of rent or interest, are by sect. 42 of 3 & 4 Will. 4, c. 27, to be recovered by any private person by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*p*). So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 of the 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years (*q*). Where, under a power of sale in a mortgage deed, the property mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the mortgagee, upon a petition by trustees of the parties beneficially entitled to the fund in court, it was held that they were entitled to the full arrears of interest on the mortgage, the

(*i*) The expression "judgment" is not restricted to judgments operating as charges upon land: *Hebblethwaite* v. *Peever*, (1892) 1 Q.B. 124.

(*k*) 37 & 38 Vict. c. 57, s. 8. This limitation applies to the personal remedy on the covenant as well as to the remedy against the land: *Sutton* v. *Sutton*, 22 Ch.D. 511; 52 L.J. Ch. 333; *Kirkland* v. *Peatfield*, (1903) 1 K.B. 756; 72 L.J. K.B. 355; *Shaw* v. *Crompton*, (1910) 2 K.B. 370; 80 L.J. K.B. 52; but see *Frisby*, *In re*, 43 Ch.D. 106; 59 L.J. Ch. 94.

(*l*) *Sheppard* v. *Duke*, 9 Sim. 567; 8 L.J. Ch. 228. When the right of action of a mortgagee to recover land has accrued, the possession of the land by a prior mortgagee does not suspend the running of the period of limitation against the subsequent mortgagee: *Johnson & Sons* v. *Brock*, (1907) 2 Ch. 533; 76 L.J. Ch. 602.

(*m*) *I.e.*, by the person himself liable to pay. See *Harlock* v. *Ashberry*, 19 Ch.D. 539; 51 L.J. Ch. 394; *Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430; 71 L.J. Ch. 627 (considered in *Lacey*, *In re*, *Howard* v. *Lightfoot*, (1907) 1 Ch. 330; 76 L.J. Ch. 316).

(*n*) *Forsyth* v. *Bristowe*, 8 Exch. 720; 22 L.J. Ex. 255; *Staley* v. *Barrett*, 26 L.J. Ch. 321.

(*o*) 37 & 38 Vict. c. 57, s. 8.

(*p*) An acknowledgment contained in a deed speaks from the time of the execution of the deed: *Jaynes* v. *Hughes*, 24 L.J. Ex. 116; 10 Exch. 430. As to what constitutes an acknowledgment, see *Goode* v. *Job*, 28 L.J. Q.B. 1; 1 E. & E. 6.

(*q*) *Archbold* v. *Scully*, 9 H.L. Cas. 360.

fund after sale having been in their possession, and no recovery by distress, suit, or action being requisite (*r*). In a suit to foreclose, a mortgagee can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor (*s*). The words in sect. 8, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing an acknowledgment (*t*). Where a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired as good a title under the statute as if a conveyance had been made to him can restore the old title (*u*).

Where any prior mortgagee or incumbrancer shall have been in possession of land, or the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, although such time may have exceeded the said term of six years. The effect of 3 & 4 Will. 4, c. 27, s. 42, is qualified by 3 & 4 Will. 4, c. 42, s. 3, which enacts that actions for rent on an indenture of demise, and actions of covenant or debt on any bond or specialty, must be brought within twenty years after the accrual of the cause of action; so that, although the land cannot be charged with more than six years' arrears of rent or interest (*x*), yet, if there be a covenant for the payment thereof, twenty years' arrears may be recovered by action on the covenant (*y*).

Where a mortgage deed had been executed in 1830, to secure a principal sum and interest, with a covenant therein for the payment of the interest, and the mortgagor died, and his co-heirs sought to redeem, and there was a long arrear of interest unpaid, it was held that six years' arrears only were a charge upon the land under the 3 & 4 Will. 4, c. 27, s. 42, but that

(*r*) *Edmunds* v. *Waugh*, L.R. 1 Eq. 418; 35 L.J. Ch. 234; *Lloyd*, *In re*, *Lloyd* v. *Lloyd*, (1903) 1 Ch. 385; 72 L.J. Ch. 78 (where the mortgagees never had in their hands the proceeds of the mortgaged property); but see *Mason* v. *Broadbent*, 33 Beav. 296; and *Stead's Estates*, *In re*, 2 Ch.D. 713; 45 L.J. Ch. 634.

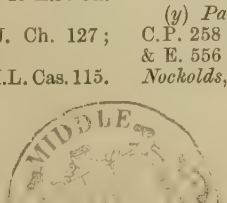
(*s*) *Round* v. *Bell*, 31 L.J. Ch. 127; 30 Beav. 221.

(*t*) *Chinnery* v. *Evans*, 11 H.L. Cas. 115.

(*u*) *Alison*, *In re*, 11 Ch.D. 284; *Sanders* v. *Sanders*, 19 Ch.D. 373; 51 L.J. Ch. 276.

(*x*) As to arrears of fee-farm rent or of rent-charge being recoverable only for six years, see *Humfrey* v. *Gery*, 7 C.B. 567; *Francis* v. *Grover*, 5 Hare, 39; 15 L.J. Ch. 99.

(*y*) *Paget* v. *Foley*, 3 Sc. 120; 5 L.J. C.P. 258; *Strachan* v. *Thomas*, 12 Ad. & E. 556; 9 L.J. Q.B. 397; *Hunter* v. *Nockolds*, 19 L.J. Ch. 177; 1 Mac. & G. 640.



twenty years' arrears might be recovered by action on the covenant under the 3 & 4 Will. 4, c. 42, s. 3, and that, if the heir of the mortgagor comes to redeem, the personal liability upon the covenant may be tacked on to the mortgage, and payment of all the arrears for twenty years be exacted as the price of the redemption (*z*). To bring a person rightfully entitled to a rent within the section so as to divest him of his rights, there must be a discontinuance of the receipt by him, either by not applying for payment, or by omitting to enforce his remedies with knowledge that the payment has not been made (*a*). An order of absolute foreclosure vests the *beneficial* title for the first time in the mortgagee, so that an action brought within twenty years was held to be in time, although more than twenty years had elapsed since the *legal* title was conveyed (*b*).

Limitation of actions for recovery of rent, and specialty and simple contract debts.—By 3 & 4 Will. 4, c. 42, s. 3, it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within TWENTY years after the cause of such actions or suits, but not after, except where the time for bringing the action is specially limited by statute; and by 21 Jac. 1, c. 16, s. 3, and 19 & 20 Vict. c. 97, s. 9, all actions of detinue, trover, and replevin, for taking away of goods or cattle; all actions of account and for not accounting (*c*), and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions upon the case; all actions of debt grounded upon any lending or contract without specialty (*d*); and all actions of debt for arrearages of rent (*e*), and upon an award, where the submission is not by deed (*f*), must be commenced and sued within six years next after the cause of such action or suit, and not afterwards; and no claim in respect

(*z*) *Elvy* v. *Norwood*, 21 L.J. Ch. 716; 5 De G. & S. 240.

(*a*) *Adnam* v. *Sandwich* (*Earl*), 2 Q.B.D. 485; 46 L.J. Q.B. 612.

(*b*) *Heath* v. *Pugh*, 6 Q.B.D. 345; 50 L.J. Q.B. 473; affirmed 7 App.Cas. 235; 51 L.J. Q.B. 367.

(*c*) Where the foundation of the action is an alleged *devastavit* by an executor, the claim is barred after six years: see *Thorne* v. *Kerr*, 2 Kay & J. 54; 25 L.J. Ch. 57; *Gale, In re, Blake* v. *Gale*, 22 Ch.D. 820; *Lacons* v. *Warmoll*, (1907) 2 K.B. 350; 76 L.J. K.B. 914.

(*d*) Money deposited with a banker in the ordinary way on current account is money lent: *Pott* v. *Clegg*, 16 M. & W. 321; 16 L.J. Ex. 210. The liability of a pauper lunatic for the cost of his maintenance is a debt in answer to which the statute may be pleaded: *Wandsworth Union* v. *Worthington*, (1906) 1 K.B. 420, 423; 75 L.J. K.B. 285.

(*e*) *Leigh* v. *Thornton*, 1 B. & Ald. 627. This applies only to rent reserved on a demise without deed: *Freeman* v. *Stacey*, Hutt. 109. Rents reserved upon a lease under seal, rent-charges founded upon a deed, or a reservation of rent upon a fee simple by deed, are not touched by this statute.

(*f*) 3 & 4 Will. 4, c. 42, s. 3.

of a matter which arose more than six years before the commencement of such action or suit is enforceable by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit (*g*). A simple contract debt, though secured by a charge on land, is also barred in six years by the statute (*h*).

What are specialty debts.—An action founded on the provisions of an Act of Parliament, such as an action for calls, is an action on a specialty (*i*). And undrawn dividends out of profits stand upon the same footing with unpaid returns of capital, the shareholders' claims depending in each case on rights arising out of the articles of association referred to in the certificates, under seal of the company, of their shares (*k*). But an action of debt for a penalty due under a bye-law founded on the charter of a chartered company is an action of debt grounded upon a contract without specialty, and is barred by the statute if not commenced within six years after the penalty becomes due, although the charter is under the great seal and is matter of record; for the liability springs out of the consent of the party to become a member of the company and obey the bye-laws, which is in effect a contract without specialty (*l*). If one party is indebted to another by simple contract, and the simple contract debt is recited or acknowledged in a deed, the debt does not become a specialty debt, unless the terms of the deed are such as to raise between the parties an implied covenant for the payment of the money (*m*). A bond executed in India cannot be treated as a simple contract (*n*).

Exception in favour of persons labouring under temporary disabilities.—If the person entitled to any such action is at the time the action accrues within the age of twenty-one years, or *feme covert*, or *non compos mentis*, such person is at liberty to bring the same actions so as they are commenced within the time of limitation prescribed by the respective Acts, after the coming to, or being of, full age, discovert, or of sound mind (*o*).

(*g*) The Statute of Limitations bars the remedy, not the debt; wherefore, a lien in respect of the debt is not destroyed: *Higgins* v. *Scott*, 2 B. & Ad. 413; 9 L.J. K.B. 262; *Spears* v. *Hartley*, 3 Esp. 81; *Carter*, *In re*, 55 L.J. Ch. 230; *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161; 68 L.J. Ch. 568.

(*h*) *Barnes* v. *Glenton*, (1899) 1 Q.B. 885; 68 L.J. Q.B. 502.

(*i*) *Cork & Bandon Ry.* v. *Goode*, 13 C.B. 826; 22 L.J. C.P. 198; *Shepherd* v. *Hills*, 11 Exch. 67; 25 L.J. Ex. 6.

(*k*) *Drogheda Steam Packet Co., In re*, (1903) 1 I.R. 512; *Artisans' Land and Mortgage Corporation, In re*, (1904) 1 Ch. 796; 73 L.J. Ch. 581.

(*l*) *Tobacco Pipe Makers* v. *Loder*, 29 L.J. Q.B. 414; 16 Q.B. 765.

(*m*) *Ivens* v. *Elwes*, 3 Drew. 25; 24 L.J. Ch. 249.

(*n*) *Alliance Bank of Simla* v. *Carey*, 5 C.P.D. 429; 49 L.J. C.P. 781.

(*o*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 42, s. 4. An action for unliquidated

By sect. 5 of the Real Property Limitation Act, 1874 (*p*), no person who at the time the right of action accrued was under disabilities, can bring an action except within thirty years, although he has remained under such disabilities, or although six years have not expired since he had ceased to be under disabilities (*q*).

With reference to married women, it should be observed that their separate property vested in trustees may be bound by their contracts, and the debts so created may be barred by analogy to the statute (*r*). But, on the other hand, it should seem that if a married woman having separate property acquires a right of action with respect to it under the Married Women's Property Act, 1882, the Statute of Limitations begins to run against her just as if she were a *feme sole* (*s*). Formerly, imprisonment or absence beyond seas had the effect of extending the period of limitation; but by 19 & 20 Vict. c. 97, s. 10, and 37 & 38 Vict. c. 57, s. 4, no person shall be entitled to any time within which to commence an action or suit beyond the periods fixed by the statutes, by reason only of his being absent beyond seas or in imprisonment at the time the cause of action or suit accrued (*t*). And now by sect. 4 of the Real Property Limitation Act, 1874 (*u*), "The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims." Formerly, the absence beyond seas of any of several joint defendants prevented the statute from running as against those who were resident in England; but this has been altered by 19 & 20 Vict. c. 97, s. 11. Where a cause of action has once accrued, and the statute has begun to run, there being then a capacity of suing and of being sued, the time of limitation continues to run, and

damages is within the saving clause in this section: *Piggott* v. *Rush*, 4 Ad. & E. 912.

(*p*) 37 & 38 Vict. c. 57, s. 5.

(*q*) *Hounsell* v. *Dunning*, (1902) 1 Ch. 512; 71 L.J. Ch. 259. As to the application of this exception to other persons immune from process, *e.g.*, ambassadors, see *Musurus Bey* v. *Gadban*, (1894) 2 Q.B. 352; 63 L.J. Q.B. 621.

(*r*) *Hastings* (*Lady*), *In re*, 35 Ch.D. 94; 55 L.J. Ch. 278; *Beck* v. *Pain*, 23 Q.B.D. 316; 58 L.J. Q.B. 516.

(*s*) 45 & 46 Vict. c. 75, s. 5. See *Lowe* v. *Fox*, 15 Q.B.D. 667; 54 L.J. Q.B. 561.

(*t*) This section is retrospective: *Pardo* v. *Bingham*, L.R. 4 Ch. 735; 39 L.J. Ch. 170, following *Cornill* v. *Hudson*, 8 E. & B. 429; 27 L.J. Q.B. 8. "Beyond seas" does not include either Ireland or the Channel Islands: 19 & 20 Vict. c. 97, s. 12. Absence beyond seas does not affect mortgagor redeeming: see *Kinsman* v. *Rouse*, 17 Ch.D. 104; 50 L.J. Ch. 486; nor do any of the other exceptions: see *Forster* v. *Patterson*, 17 Ch.D. 132; 50 L.J. Ch. 603.

(*u*) 37 & 38 Vict. c. 57, s. 4.

is not stopped by the circumstance of the death of one of the parties, and delay in taking out administration (*x*). Any portion of time in which the parties are under disabilities occurring after the time has begun to run must nevertheless form part of the period of limitation (*y*).

Commencement of time of limitation.—The time of limitation begins to run from the period of the breach of contract and the accrual of the cause of action, and not from the time of the making of the contract (*z*). If, therefore, a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action and no limitation of time until the event has happened (*a*). Where a bond is conditioned for the performance of acts to be done successively in a series of years, a new cause of action arises with each omission to do the act at the proper time; and, if the plaintiff can show any breach within twenty years, he is entitled to recover (*b*). If money has been paid under a mistake of fact, the statute will run from the date of payment and not from the date of the discovery of the mistake, nor from the date when the mistake might have been discovered by the exercise of reasonable diligence (*c*). In the case of a solicitor's bill for the costs of an action, the statute does not begin to run so long as the action is pending (*d*); and, although *primâ facie* the termination of a suit is when judgment is given in the court in which the action is commenced, yet, when an appeal is brought, and the same solicitor continues to conduct the suit on appeal, that is a continuation of the original suit, and what *primâ facie* was a termination of the contract ceases to be so (*e*). The cause of action in respect of work done by a solicitor arises upon the completion of the work, and the statute therefore runs from that time and not from the expiration of a month from the delivery of the bill of costs (*f*).

(*x*) *Penny* v. *Brice*, 18 C.B. N.S. 393.

(*y*) *Rhodes* v. *Smethurst*, 4 M. & W. 61; 7 L.J. Ex. 273; *Freake* v. *Cranefeldt*, 3 Myl. & Cr. 499; 8 L.J. Ch. 61; *Homfray* v. *Scroope*, 13 Q.B. 509, 512; *Garner* v. *Wingrove*, (1905) 2 Ch. 233; 74 L.J. Ch. 545; cp. *Seagram* v. *Knight*, L.R. 2 Ch. 628; 36 L.J. Ch. 918.

(*z*) *Wilkinson* v. *Verity*, L.R. 6 C.P. 206, 209; 40 L.J. C.P. 141; *Reeres* v. *Butcher*, (1891) 2 Q.B. 509; 60 L.J. Q.B. 619.

(*a*) *Savage* v. *Aldren*, 2 Stark. 232; *Fenton* v. *Emblers*, 1 W. Bl. 353; *Bill* v. *Lake*, Hetley, 138; *Shutford* v. *Borough*, Godb. 437; *Tuckey* v. *Hawkins*, 4 C.B. 664; 16 L.J. C.P. 201.

(*b*) *Amott* v. *Holden*, 22 L.J.Q.B. 19; 18 Q.B. 593; *Blair* v. *Ormond*, 20 L.J. Q.B. 444; 17 Q.B. 423; *White* v. *Corbett*, 1 E. & E. 692; 28 L.J. Q.B. 228; *Sanders* v. *Coward*, 15 M. & W. 48; 15 L.J. Ex. 97.

(*c*) *Baker* v. *Courage & Co.*, (1910) 1 K.B. 56; 79 L.J. K.B. 313.

(*d*) *Whitehead* v. *Lord*, 21 L.J. Ex. 239; 7 Exch. 691.

(*e*) *Harris* v. *Quine*, L.R. 4 Q.B. 653; 38 L.J. Q.B. 331. But where a solicitor acts for the same client in different matters, each of these will be on an independent footing: *Boswell, In re, Merritt* v. *Boswell*, (1906) 2 Ch. 359; 75 L.J. Ch. 234, 658.

(*f*) *Coburn* v. *Colledge*, (1897) 1 Q.B. 702; 66 L.J. Q.B. 462.

If a contract has been broken, and has given rise to a cause of action, which, however, has been suspended by a subsequent agreement between the parties, then, on breach of such subsequent agreement, the creditor will be remitted to his original right of action and the time of limitation will run from the accruing of the original cause of action (*g*), unless the effect of the agreement was to extinguish the cause of action arising from the breach of the original contract, in which case the time of limitation will run from the breach of the subsequent agreement (*h*). When a debt has been contracted on credit, no cause of action arises until the period of credit has expired (*i*). If a debt is to be paid by instalments, and it is provided that, in case default is made in payment of any one instalment when due, the whole debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom (*k*). If an action is brought for the recovery of the consideration paid for a void annuity, the time of limitation runs from the period when the grantee elected to treat the annuity as void, and not from the time of the payment of the consideration and the making of the grant (*l*). In the case of a trust fund or legacy, the statute begins to run from the moment when a present right to receive the fund or legacy shall have accrued to a person capable of giving a discharge for or release of the same (*m*). But where the person liable to pay and the person entitled to receive are the same, no question of limitation can arise (*n*).

It is a general rule that, where there has once been a complete cause of action, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. The time when any resulting or collateral damage occasioned by the breach of contract is sustained is therefore immaterial (*o*). Thus, in the case of a bill of exchange drawn at so many months after sight and refused acceptance, the

(*g*) *Reeves* v. *Hearne*, 1 M. & W. 323.

(*h*) *Irving* v. *Veitch*, 3 M. & W. 110; 7 L.J. Ex. 25; *Stock*, *In re*, 66 L.J. Q.B. 146.

(*i*) *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L.J. (O.S.) K.B. 258.

(*k*) *Hemp* v. *Garland*, 4 Q.B. 524; 12 L.J. Q.B. 134; *Reeves* v. *Butcher*, (1891) 2 Q.B. 509; 60 L.J. Q.B. 619; *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

(*l*) *Cowper* v. *Godmond*, 9 Bing. 753; 2 L.J. C.P. 162.

(*m*) *Pardoe*, *In re*, *M'Laughlin* v. *Penny*, (1906) 1 Ch. 265; 75 L.J. Ch. 161; reversed on other grounds, (1906) 2 Ch. 340; 75 L.J. Ch. 748. The period runs from the death of the testator, not from the expiration of one year after his death: *Waddell* v. *Harshaw*, (1905) 1 Ir.R. 416.

(*n*) *Binns* v. *Nichols*, L.R. 2 Eq. 256; 35 L.J. Ch. 635.

(*o*) *Battley* v. *Faulkner*, 3 B. & Ald. 288; *Short* v. *M'Carthy*, 3 B. & Ald. 626; *Violett* v. *Sympson*, 8 E. & B. 344; 27 L.J. Q.B. 138.

cause of action is complete, and the statute begins to run, upon the refusal of acceptance, and no new cause of action arises upon the refusal of payment. This rule, it is true, is not universal; for, in cases where a man undertakes to do an act upon a future day, and, before the day arrives, disables himself from performing the act, or absolutely refuses to perform his contract, and, so to speak, absolves the opposite party, it is in the option of such party at his election to treat that conduct as of itself a breach of the contract, or to insist upon holding the repudiating party liable, and to sue him for non-performance when the day arrives (*p*). The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the option of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter action (*q*). So, if a person entrusted with a thing for safe custody wrongfully parts with it, the owner may at his election either sue for the wrongful parting with the property, or he may wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor, agreeably to the maxim, "*Qui dolo desiit possidere pro possidente damnatur*" (*r*). It is, however, doubtful whether this doctrine is applicable to the case of a lease or other contract containing various stipulations, when the whole contract cannot be treated as concluded because of the wrongful repudiation by the promisor of one of the stipulations of the contract (*s*).

Contingent and conditional liabilities.—Where the liability of the defendant is dependent upon some contingency, the cause of action does not arise until the contingency has happened. So, if a man has promised to pay a sum of money as soon as his circumstances enable him to do so, the time of limitation runs from the period of his being able to pay (*t*). If a surety guarantees the payment of a debt by his principal, the time of limitation runs from the period of the principal's making default in payment (*u*). If a surety sues his principal upon the implied contract of the principal to indemnify the surety,

(*p*) See *ante*, p. 146.

(*q*) *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*r*) *Reeve* v. *Palmer*, 5 C.B. N.S. 84, 91; 27 L.J. C.P. 327; 28 *ib.* 168; *Wilkinson* v. *Verity*, L.R. 6 C.P. 206; 40 L.J. C.P. 141. See *Miller* v. *Dell*, (1891) 1 Q.B. 468; 60 L.J. Q.B. 404.

(*s*) *Johnstone* v. *Milling*, 16 Q.B.D. 460; 55 L.J. Q.B. 162.

(*t*) *Waters* v. *Thanet* (*Earl*), 2 Q.B. 757; 11 L.J. Q.B. 87; *Hammond* v. *Smith*, 33 Beav. 452.

(*u*) *Humphreys* v. *Jones*, 14 M. & W. 1; 14 L.J. Ex. 254.

the time allowed for bringing the action runs from the time that the surety actually paid what the principal was bound to pay, and not from the time when he became liable to pay (*x*). If one man agrees to indemnify another against costs, the cause of action accrues at the time the costs are actually paid by the party who is to be indemnified, and not at the time that the costs are incurred (*y*). In the case of co-sureties suing each other for contribution, the time of limitation runs from the period when the co-surety was called upon to pay more than his own share of the common liability, and not from the time that the principal for whom they became responsible made default. If, therefore, the co-surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the time of limitation will not run from the original payment by the co-surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the co-surety has paid more than his share, and has in consequence thereof a right of action for contribution (*z*).

When a demand of performance of a contract is a condition precedent to a right of action for non-performance, the time of limitation runs from the period of the making of the demand (*a*). But it is otherwise, if no demand is necessary to give rise to a right of action (*b*). When a bill of exchange or a promissory note has been made payable at sight, the time of limitation runs from the time when the bill or note is presented for payment (*c*). If a promissory note is made payable two years after demand of payment, the time of limitation begins to run two years after a demand has been proved to have been made (*d*). But, if the note is payable on demand simply, then, as no demand is necessary before bringing an action (the service of a writ upon the maker of the note being considered a sufficient demand), the time of limitation runs from the period of the making of the note (*e*). The same rule prevails with regard to

(*x*) *Reynolds* v. *Doyle*, 2 Sc. N.R. 46.

(*y*) *Collinge* v. *Heywood*, 9 Ad. & E. 633; 8 L.J. Q.B. 98.

(*z*) *Davies* v. *Humphreys*, 6 M. & W. 169; 9 L.J. Ex. 263; *Huntley* v. *Sanderson*, 1 Cr. & M. 480; 2 L.J. Ex. 204; see also *Snowdon, Ex parte*, 17 Ch.D. 44; 50 L.J. Ch. 540.

(*a*) *Buckler* v. *Moor*, 1 Mod. 89; *Topham* v. *Braddick*, 1 Taunt. 572; *Webb* v. *Martin*, 1 Lev. 48; *Mills* v. *Borthwick*, 35 L.J. Ch. 31.

(*b*) *Collins* v. *Benning*, 12 Mod. 444; *Emery* v. *Day*, 1 C. M. & R. 248; 3 L.J. Ex. 307.

(*c*) *Holmes* v. *Kerrison*, 2 Taunt. 323; *Boyse, In re, Crofton* v. *Crofton*, 33 Ch.D. 612; 56 L.J. Ch. 135.

(*d*) *Thorpe* v. *Booth*, Ry. & M. 388; *Rutherford, In re, Brown* v. *Rutherford*, 14 Ch.D. 687; 49 L.J. Ch. 345, 654.

(*e*) *Norton* v. *Ellam*, 2 M. & W. 461; 6 L.J. Ex. 121; *Waters* v. *Thanet (Earl)*, 2 Q.B. 769; 11 L.J. Q.B. 87; *Bethell, In re*, 34 Ch.D. 561; 56 L.J. Ch. 334; *George, In re, Francis* v. *Bruce*, 44 Ch.D. 627; 59 L.J. Ch. 709.

a loan of money payable on demand (*f*). But, where the plaintiff having agreed to lend the defendant a sum of money gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it, and the cheque was not paid by the plaintiff's bankers till some days later, it was held that, in an action for the money so lent, the statute only ran from the time of the payment of the cheque by the plaintiff's bankers (*g*). And, where a promissory note payable on demand was given to a banker to secure future advances, it was held that the statute did not begin to run until the account was closed and the credit determined (*h*).

Unknown and undiscovered breaches of contract.—When fraud is imputable to the person who sets up the statute or when any other equitable circumstance exists, the statute of limitations will not apply (*i*). But the general rule of law is that the time of limitation runs from the period when the contract was broken, and not from the time that knowledge of the breach of contract first came to the plaintiff, nor from the time that a particular or special damage may have accrued or been discovered (*k*), whether the breach of contract was patent and discoverable, or whether it was concealed and undiscoverable, and whether there had been laches or neglect on the part of the plaintiff in not finding out that the contract had been broken and that the cause of action had accrued (*l*), or whether it was physically impossible for the plaintiff to know of the breach until he had sustained the resulting damage. So, if a person professing to be skilled in the investment of money undertakes for hire to invest a sum of money on good security, and receives the money, and, acting with gross carelessness, invests it in bad security, but the worthlessness of the security is not known to the promisee for more than six years after the making of the promise, when the interest of the money ceases to be paid by some third party for the first time, the promisee is barred of all remedy by the statute (*m*). This con-

(*f*) *Jackson* v. *Ogg*, 1 Johns. 397 ; 5 Jur. N.S. 976.

(*g*) *Garden* v. *Bruce*, L.R. 3 C.P. 300 ; 37 L.J. C.P. 112.

(*h*) *Hartland* v. *Jukes*, 1 H. & C. 673 ; 32 L.J. Ex. 162.

(*i*) *Dean* v. *Thwaite*, 21 Beav. 622 ; *Trotter* v. *Maclean*, 13 Ch.D. 574 ; 49 L.J. Ch. 256 ; *Barton* v. *North Staffordshire Ry.*, 38 Ch.D. 458 ; 57 L.J. Ch. 800 ; *M'Cullum, In re, M'Callum* v. *M'Callum*, (1901) 1 Ch. 143 ; 70 L.J. Ch. 206 ; cp. *Charter* v. *Watson*, (1899) 1 Ch. 175 ; 68 L.J. Ch. 1 ; *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. 351 ; 68 L.J. P.C. 49.

(*k*) *Battley* v. *Faulkner*, 3 B. & Ald. 288 ; *Baker* v. *Courage & Co.*, (1910) 1 K.B. 56 ; 79 L.J. K.B. 313.

(*l*) *Granger* v. *George*, 5 B. & C. 152 ; 7 D. & R. 732 ; *Denys* v. *Shuckburgh*, 4 Y. & C. 42 ; 6 L.J. Ch. 330. See *Dalton* v. *Angus*, 6 App.Cas. 740 ; 50 L.J. Q.B. 689.

(*m*) *Howell* v. *Young*, 5 B. & C. 259 ; 4 L.J. (O.S.) K.B. 160 ; *Whitehead* v. *Howard*, 2 B. & B. 375 ; *Short* v. *McCarthy*, 3 B. & Ald. 626 ; *Sims* v. *Brutton*, 20 L.J. Ex. 41 ; 5 Exch. 802 ;

struction of the Statute of Limitations, which deprives a man of redress after the expiration of six years, when the act causing the damage was unknown to him, may seem to be harsh and contrary to the ordinary principles of law (*n*). Formerly the acceptance and receipt of money under the circumstances above mentioned, and its fraudulent misapplication, or its investment on bad security, through the gross carelessness of the receiver and undertaker of the duty, was, in most cases, held in equity to amount to a breach of trust (*o*). But it seemed open to doubt whether this construction would prevail (*p*). And it has now been held, following the decisions of the Court of Chancery for many years, that where in an action for damages for false representation the statute is set up as an answer, the plaintiff may reply that he did not discover and had not reasonable means of discovering the fraud within the six years (*q*).

Acknowledgments of deeds and specialties extending period of limitation.—By 3 & 4 Will. 4, c. 42, s. 5, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal sum or interest due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, or in case the person entitled to such action shall at the time of such acknowledgment be under disability (*r*), or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas: and the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute. Any acknowledgment amounting to a clear admission of the specialty debt will be a bar

Hughes v. *Twisden*, 55 L.J. Ch. 481; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 362; 60 L.J. Ch. 66.

(*n*) *Bonomi* v. *Backhouse*, E. B. & E. 639; 28 L.J. Q.B. 378.

(*o*) *Smith* v. *Pococke*, 2 Drew. 197; 23 L.J. Ch. 545; *Blair* v. *Bromley*, 5 Hare, 542; 16 L.J. Ch. 105, 495; *Moore* v. *Knight*, (1891) 1 Ch. 547.

(*p*) See the Judicature Act, 1873, s. 25 (2), by which the Statutes of Limitation are made inapplicable to an *express* trust. See *post*, p. 220.

(*q*) *Gibbs* v. *Guild*, 9 Q.B.D. 59; 51 L.J. Q.B. 313; overruling *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39; 23 L.J. Ex. 303; see *Betjemann* v. *Betjemann*, (1895) 2 Ch. 474; 64 L.J. Ch. 641; *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. 351; 68 L.J. P.C. 49.

(*r*) See 19 & 20 Vict. c. 97, s. 10, as to the person entitled being beyond the seas.

to the setting up of the statute (*s*). A recital in a deed of a prior mortgage deed assigning certain property as the security for the payment of a mortgage debt is not necessarily an acknowledgment of the mortgage debt within the meaning of the statute (*t*). But a recital in a mortgage deed of the payment of interest, up to the date thereof, made within twenty years of action brought, takes the case out of the statute (*u*).

Acknowledgments of simple contract debts.—By 9 Geo. 4, c. 14, s. 1, it is enacted that in actions of debt, or upon the case grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the Statute of Limitations; and that no person shall be deprived of the benefit of the Act, unless the acknowledgment or promise shall be made by a writing signed by the party chargeable thereby, or by his duly authorised agent (*x*); but nothing contained in the Act is to alter, take away, or lessen the effect of any payment of any principal or interest by any person whatever. There must, therefore, be either a written acknowledgment, signed as mentioned in the statute (*y*), or an act done which is equivalent, in contemplation of law, to part payment of principal, or interest (*z*). An infant is of sufficient capacity to make an acknowledgment in writing, under this statute, of a debt due for necessaries; and the acknowledgment will be evidence against him for six years after it has been made (*a*).

Form and requisites of acknowledgment.—Any writing signed by a defendant or his authorised agent, admitting that a sum of money is due upon a bond, or deed, or simple contract, at the time of the making of the admission, will revive the remedy upon the contract, although it contains, upon the face of it, no express promise to pay or to make satisfaction (*y*). But the acknowledgment must be such that a promise to pay may be inferred in fact (*b*). In the case of simple contract debts, it was at one time held that a "positive refusal to pay was an acknowledgment. The tide of authorities, however, changed: and the courts began to require the acknowledgment to be such

(*s*) *Moodie* v. *Bannister*, 28 L.J. Ch. 881; 4 Drew. 432.

(*t*) *Howcutt* v. *Bonser*, 3 Exch. 491; 18 L.J. Ex. 262.

(*u*) *Forsyth* v. *Bristowe*, 8 Exch. 716; 22 L.J. Ex. 255.

(*x*) 19 & 20 Vict. c. 97, s. 13.

(*y*) *Maniram* v. *Seth Rupchand*, 22 T.L.R. 619; *Emmett, In re, Jenkins* v. *Emmett*, 95 L.T. 755; *Cooper* v. *Kendall*, (1909) 1 K.B. 405; 78 L.J. K.B. 580.

(*z*) *Williams* v. *Griffiths*, 2 C. M. & R. 48; 4 L.J. Ex. 129.

(*a*) *Willins* v. *Smith*, 4 E. & B. 185; 24 L.J. Q.B. 62. See, however, 37 & 38 Vict. c. 62, *post*, p. 411.

(*b*) *Mitchell's case*, L.R. 6 Ch. 822, 828; *Green* v. *Humphreys*, 26 Ch.D. 474; 53 L.J. Ch. 625.

as to justify them in inferring therefrom a promise to pay" (*c*). The insertion of a debt, therefore, in a petition to the court of bankruptcy is no acknowledgment of the debt within the statute, as it rebuts the presumption of a promise to pay it (*d*). So the insertion of a debt in the schedule to a deed of inspectorship, executed for the purpose of administering the estate of a debtor, was not, although the schedule was verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the Statute of Limitations, so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy (*e*). If there is an acknowledgment of the debt, with a suggestion as to a possible mode of payment (*f*), or a mere acknowledgment without any accompanying observations, that will be sufficient; "because," observes Parke, B., "from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request" (*g*). But an admission which stops short of being an admission of a debt being due will not suffice (*h*): *e.g.*, a letter saying, "Doubtless I did owe the money; but I have already paid it" (*i*); or, "I admit the debt; but I have got a set-off;" or, "the debt is barred by the Statute of Limitations" (*k*). Asking for an account is equivalent to a promise to pay (*l*). If a man admits that a signature to an accountable receipt is his signature, but at the same time says it was never worth anything, this is no admission or acknowledgment (*m*). Whenever the acknowledgment is accompanied by a repudiation of liability, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails (*n*).

Where the defendant's promise to pay is conditional, the condition must be shown to be accomplished, and the promise to

(*c*) *Linley* v. *Bonsor*, 2 Sc. 404; 5 L.J. C.P. 40; *Cornforth* v. *Smithard*, 5 H. & N. 13; 29 L.J. Ex. 228; *Bethell*, *In re*, 34 Ch.D. 561; 56 L.J. Ch. 334.

(*d*) *Everett* v. *Robertson*, 1 E. & E. 19; 28 L.J. Q.B. 24.

(*e*) *Topping*, *Ex parte*, 34 L.J. Bk. 44; 4 De G. J. & S. 551; *Taylor* v. *Hollard*, (1902) 1 K.B. 676; 71 L.J. K.B. 278.

(*f*) *Evans* v. *Simon*, 9 Exch. 285; 23 L.J. Ex. 16; *Cooper* v. *Kendall*, (1909) 1 K.B. 405; 78 L.J. K.B. 580.

(*g*) *Smith* v. *Thorne*, 18 Q.B. 143; 21 L.J. Q.B. 201; *Dabbs* v. *Humphries*, 10 Bing. 449; 3 L.J. C.P. 139; *Holmes* v. *Mackrell*, 3 C.B.N.S. 794.

(*h*) *Collinson* v. *Margesson*, 27 L.J. Ex. 305.

(*i*) *Bryan* v. *Horseman*, 5 Esp. 81; *Birk* v. *Guy*, 4 *ib.* 184.

(*k*) *Swan* v. *Sowell*, 2 B. & Ald. 761; *Boydell* v. *Drummond*, 2 Campb. 161; *Francis* v. *Hawkesley*, 28 L.J. Q.B. 370; 1 E. & E. 1052.

(*l*) *Quincey* v. *Sharpe*, 1 Ex.D. 72; 45 L.J. Ex. 347; *Skeet* v. *Lindsay*, 2 Ex.D. 314; 46 L.J. Ex. 249; *Curwen* v. *Milburn*, 42 Ch.D. 424; *Langrish* v. *Watts*, (1903) 1 K.B. 636; 72 L.J. K.B. 435.

(*m*) *Rowcroft* v. *Lomas*, 4 M. & S. 459.

(*n*) *Tanner* v. *Smart*, 6 B. & C. 606; 5 L.J. (O.S.) K.B. 218; *Brigstocke* v. *Smith*, 1 Cr. & M. 485; 2 L.J. Ex. 187; *A'Court* v. *Cross*, 3 Bing. 329; 4 L.J. (O.S.) C.P. 79; *Rackham* v. *Marriott*, 2 H. & N. 196; 26 L.J. Ex. 315.

have become absolute (*o*). If the defendant has promised to pay as soon as he is able, or as soon as his circumstances will permit, his ability to pay must be shown before he can be made liable upon this promise (*p*). The amount of the debt may be shown by parol testimony, and need not appear upon the face of the writing (*q*); and, if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute (*r*). If, in an account rendered, there are two perfectly distinct items, not in any way connected together, a signed acknowledgment as to one of them will not take the other out of the operation of the statute (*s*).

Lost acknowledgments.—Where a written acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment, was permitted to be given (*t*).

Acknowledgment by one of several joint contractors.—Some doubt seems to have been entertained whether an acknowledgment in writing, signed by the defendant, of his liability upon a bill of exchange or promissory note will enure to the benefit of a subsequent indorsee or holder. It is apprehended that it would do so (*u*). But it is clear that an admission by the

(*o*) *Humphreys* v. *Jones*, 14 M. & W. 3 : 14 L.J. Ex. 254 ; *Waters* v. *Thanet*, (*Earl*), 2 Q.B. 759 ; 11 L.J. Q.B. 87.

(*p*) *Edmunds* v. *Downes*, 2 Cr. & M. 459 ; 3 L.J. Ex. 98 ; *Haydon* v. *Williams*, 7 Bing. 167 ; 9 L.J. (O.S.) C.P. 16 ; *Irving* v. *Veitch*, 3 M. & W. 112 ; 7 L.J. Ex. 25 ; *Meyerhoff* v. *Froehlich*, 4 C.P.D. 63 ; 48 L.J. C.P. 48.

(*q*) *Williams* v. *Griffith*, 3 Exch. 343 ; 18 L.J. Ex. 210.

(*r*) *Gardner* v. *M'Mahon*, 3 Q.B. 568 ; 11 L.J. Q.B. 297 ; *Cheslyn* v. *Dalby*, 4 Y. & C. 238. Instances of *insufficient* acknowledgments will be found in *Morrell* v. *Frith*, 3 M. & W. 403 ; 7 L.J. Ex. 172 ; *Poynder* v. *Bluck*, 5 Dowl. P.C. 570 ; *Hart* v. *Prendergast*, 14 M. & W. 741 ; 15 L.J. Ex. 223 ; *Edmonds* v. *Goater*, 21 L.J. Ch. 290 ; 15 Beav. 415 ; *Fearn* v. *Lewis*, 6 Bing. 349 ; 8 L.J. (O.S.) C.P. 95 ; *Routledge* v. *Ramsay*, 8 Ad. & E. 221 ; 7 L.J. Q.B. 156 ; *Whippy* v. *Hillary*, 3 B. & Ad. 400 ; 4 L.J. K.B. 178 ; *Spong* v. *Wright*, 9 M. & W. 629 ; 12 L.J. Ex. 144 ; *Martin* v. *Knowles*, 1 N. & M. 422 ; 2 L.J. K.B. 100 ; *Cawley* v. *Furnell*, 20 L.J. C.P. 197 ; 12 C.B. 291 ; *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461 ; 30 L.J. Ch. 508 ; *Richardson* v. *Barry*, 29 Beav. 22 ; *Hindmarsh*, *In re*, 1 Dr. & Sm. 129 ; *Buckmaster* v. *Russell*, 10 C.B. N.S. 745 ; *Cockrill* v. *Sparke*, 1 H. & C. 699 ; 32 L.J. Ex. 118 ; *Bush* v. *Martin*, 2 H. & C. 311 ; 33 L.J. Ex. 17 ; *Lowndes* v. *Garnett and Moseley Gold Mining Co.*, 33 L.J. Ch. 418 ; *Newbould* v. *Smith*, 33 Ch.D. 127 ; 55 L.J. Ch. 788 ; affirmed on different grounds, 14 App.Cas. 423. Instances of *sufficient* acknowledgments will be found in *Collis* v. *Stack*, 1 H. & N. 605 ; 26 L.J. Ex. 138 ; *Bird* v. *Gammon*, 3 Bing. N.C. 883 ; 6 L.J. C.P. 258 ; *Sidwell* v. *Mason*, 2 H. & N. 306 ; 26 L.J. Ex. 407 ; *Colledge* v. *Horne*, 3 Bing. 119 ; 3 L.J. (O.S.) C.P. 184 ; *Gardner* v. *M'Mahon*, *supra* ; *Dodson* v. *Mackey*, 8 Ad. & E. 225 ; *Lee* v. *Wilmot*, L.R. 1 Ex. 364 ; 35 L.J. Ex. 175 ; *Chasemore* v. *Turner*, 45 L.J. Q.B. 66 ; *Wilby* v. *Elgee*, L.R. 10 C.P. 497 ; 44 L.J. C.P. 254 ; *Powers*, *In re*, 30 Ch.D. 291.

(*s*) *Robarts* v. *Robarts*, 1 Moo. & P. 489 ; 6 L.J. (O.S.) C.P. 117 ; *Rothery* v. *Munnings*, 1 B. & Ad. 15 ; 8 L.J. (O.S.) K.B. 386 ; *Phillips* v. *Broadley*, 9 Q.B. 744 ; 16 L.J. Q.B. 72.

(*t*) *Haydon* v. *Williams*, 7 Bing. 163 ; 9 L.J. (O.S.) C.P. 16.

(*u*) *Gale* v. *Capern*, 1 Ad. & E. 104 ; 3 L.J. Q.B. 140 ; *Cripps* v. *Davis*, 12

debtor of his liability to a particular indorsee or holder of the bill may be made under circumstances which do not extend the benefit of the admission to any other party than the one to whom it is made (*x*). Formerly, an acknowledgment of a debt by one of several joint debtors operated as an acknowledgment by all, and was evidence of a promise on behalf of all; but such acknowledgments and promises do not now deprive the others, who are no parties to the acknowledgment or promise, of the benefit of the statute (*y*). If one of several joint debtors promises by writing, signed by him, to pay his proportion of the joint debt, this is an additional new contract; and, if the creditor sues him upon the original joint contract for the entire debt, and that action is defeated by a plea of the Statute of Limitations, he may then resort to the new contract for the recovery of the defendant's proportion of the joint debt (*z*).

Acknowledgment by executor or devisee for life.—An acknowledgment by an executor or devisee for life binds the testator's estate as against all parties interested in remainder (*a*).

Party to whom acknowledgment is to be made.—It has been held that it is not necessary, except in the case of actions on mortgage deeds or mortgage bonds (*b*), that the acknowledgment should be made to the creditor himself, or to his agent, but that a letter acknowledging the debt, addressed to a third party, or a signed acknowledgment in writing, not addressed to any one, will be sufficient (*c*). The acknowledgment must be shown to have been written or signed before the commencement of the action. Where it is not made until after the action is brought, it cannot prevent the operation of the statute (*d*). If there is no date to the writing, the date may be supplied by oral testimony (*e*).

Exemption of promise or acknowledgment from stamp duty.—Promises to pay debts barred by the Statute of Limitations may, by 9 Geo. 4, c. 14, s. 8, be given in evidence, unstamped, for the mere purpose of proving an acknowledgment of the debt, but not for the purpose of proving the debt itself, or the contract or promise which gives rise to the cause of action (*f*). The exemp-

M. & W. 165; 13 L.J. Ex. 217; *Bourdin* v. *Greenwood*, L.R. 13 Eq. 281; 41 L.J. Ch. 73.

(*x*) *Easterly* v. *Pullen*, 3 Stark. 186.

(*y*) 9 Geo. 4, c. 14, s. 1.

(*z*) *Lechmere* v. *Fletcher*, 1 Cr. & M. 636.

(*a*) *Hollingshead, In re*, 37 Ch.D. 651; 57 L.J. Ch. 400; *Macdonald, In re*, (1897) 2 Ch. 181; 66 L.J. Ch. 630; *Chant, In re*, *Bird* v. *Godfrey*, (1905) 2 Ch. 225; 74 L.J. Ch. 542; and see *post*, p. 218.

(*b*) *Forsyth* v. *Bristowe*, 8 Exch. 721; 22 L.J. Ex. 255.

(*c*) *Mountstephen* v. *Brooke*, 3 B. & Ald. 141; *Clark* v. *Hougham*, 2 B. & C. 149; 1 L.J. (O.S.) K.B. 249; *Halliday* v. *Ward*, 3 Campb. 32; *Clarke* v. *Hooper*, 4 Moo. & Sc. 353; 3 L.J. C.P. 159.

(*d*) *Bateman* v. *Pinder*, 3 Q.B. 576; 11 L.J. Q.B. 281.

(*e*) *Edmunds* v. *Downes*, 2 Cr. & M. 459; 3 L.J. Ex. 98.

(*f*) *Morris* v. *Dixon*, 4 Ad. & E. 845.

tion extends only to those written instruments which, but for the exemption, would require an agreement stamp. An unstamped or wrongly stamped promissory note cannot, consequently, be given in evidence to establish the promise or acknowledgment (*g*).

Part payment of principal debt, or payment of interest thereon.—The proviso in 9 Geo. 4, c. 14, s. 1, declaring that nothing contained in the Act is to alter, take away, or lessen the effect of any payment of principal or interest, takes the case of payment of principal or interest altogether out of the operation of that statute, so as to enable payment to be proved as before the statute was passed (*h*). In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it and treated it as a part payment only will not bring it within the statute (*i*). If it stands ambiguous whether the payment be a part payment of an existing debt, more being admitted to be due, or whether it was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation (*k*). If the payment is accompanied by declarations, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit (*l*). If there be two debts, one barred by the statute, and the other not barred, a general payment on account will not revive a debt barred by the statute, if it can be attributed to a debt that is not barred (*m*). *Primâ facie* it is to be taken as payment on account of the sum that is not barred (*n*). Part payment of a debt will not prevent the operation of the Statute of Limitations, unless made to the creditor or his agent (*o*).

(*g*) *Jones* v. *Ryder*, 4 M. & W. 35 ; 7 L.J. Ex. 216 ; *Ashling* v. *Boon*, (1891) 1 Ch. 568 ; 60 L.J. Ch. 306.

(*h*) *Cleave* v. *Jones*, 6 Exch. 578 ; 20 L.J. Ex. 238.

(*i*) *Foster* v. *Dawber*, 6 Exch. 853 : 20 L.J. Ex. 385 ; *Tippets* v. *Heane*, 1 C. M. & R. 252 ; 3 L.J. Ex. 281.

(*k*) *Waugh* v. *Cope*, 6 M. & W. 829 ; 10 L.J. Ex. 145 ; *Burkitt* v. *Blanshard*, 3 Exch. 89 ; 18 L.J. Ex. 34. See *Taylor* v. *Hollard*, (1902) 1 K.B. 676 ; 71 L.J. K.B. 278.

(*l*) *Wainman* v. *Kynman*, 1 Exch. 118 ; 16 L.J. Ex. 232 ; *Baildon* v. *Walton*, 1 Exch. 617 ; 17 L.J. Ex. 357.

(*m*) *Boswell, In re, Merritt* v. *Boswell*, (1906) 2 Ch. 359 ; 75 L.J. Ch. 658.

(*n*) *Nash* v. *Hodgson*, 25 L.J. Ch. 188 ; 6 De G. M. & G. 474 ; *Walker* v. *Butler*, 6 E. & B. 506 ; 25 L.J. Q.B. 377 ; *Burn* v. *Boulton*, 2 C.B. 476 ; 15 L.J. C.P. 97 ; *Mills* v. *Fowkes*, 7 Sc. 444 ; 8 L.J. C.P. 276.

(*o*) *Stamford Banking Co.* v. *Smith*, (1892) 1 Q. B. 765 ; 61 L.J. Q.B. 405 ; *Topping, Ex parte*, 34 L.J. Bk. 44 ; 4 De G. J. & S. 551.

Part payment by bill or note.—If a bill of exchange is delivered as a part payment under circumstances which show that more was admitted to be due, the part payment will operate and the Statute of Limitations as to the residue of the debt will run from the delivery of the bill, and not from the time of its payment whatever afterwards takes place as to the bill (*p*).

Part payment by performance of service or by delivery of goods.—The performance of any duty or service which the parties may agree to treat as a part payment will operate as such (*q*). Where goods were delivered and received by agreement of the parties in reduction of a debt, it was deemed to be a part payment within the proviso of the statute (*r*). But, if the delivery and acceptance are nothing more than the common case of two tradesmen, each selling goods to the other, without any agreement that the goods delivered on one side should be considered as payment for those delivered on the other, the transaction will not amount to a payment within the proviso (*s*).

Part payment by adjustment and settlement of accounts.—Where there are mutual accounts between parties, with items on both sides, and the parties go through such accounts, setting off one item due to one against another item due to another, and striking a balance, the party entitled to the balance will have six years from the period of the stating of the account for the recovery of such balance, the transaction amounting to a new contract between the parties, giving rise to a new cause of action, and not being a mere acknowledgment or admission of an existing debt. The plaintiff in such a case does not go upon the original debt at all (*t*). Entries made in a book, by direction of a deceased party, of payment of interest, are admissible in evidence for the purpose of repelling the operation of the Statute of Limitations, whenever the entries are against the interest of the party directing them to be made (*u*). A statement of account by a client to his attorney in his professional character, to enable the latter to lay a case before counsel, is a privileged communication, and cannot be used in evidence against the client (*x*).

(*p*) *Irving* v. *Veitch*, 3 M. & W. 90; 7 L.J. Ex. 25; *Gowan* v. *Forster*, 3 B. Ad. 507; *Turney* v. *Dodwell*, 3 E. & B. 136, 142; 23 L.J. Q.B. 137; *Marreco* v. *Richardson*, (1908) 2 K.B. 584; 77 L.J. K.B. 859.

(*q*) *Bodger* v. *Arch*, 10 Exch. 341; 24 L.J. Ex. 22.

(*r* *Hart* v. *Nash*, 2 C. M. & R. 337; *Hooper* v. *Stephens*, 4 Ad. & E. 71; 5 L.J. K.B. 4.

(*s*) *Cottam* v. *Partridge*, 4 Sc. N.R. 834.

(*t*) *Ashby* v. *James*, 11 M. & W. 542; 12 L.J. Ex. 295; *Smith* v. *Forty*, 4 C. & P. 126; *Holmes* v. *Mackrell*, 3 C.B. N.S. 789; *Amos* v. *Smith*, 1 H. & C. 238; 31 L.J. Ex. 423.

(*u*) *Bradley* v. *James*, 13 C.B. 822; 22 L.J. C.P. 193.

(*x*) *Cleave* v. *Jones*, 7 Ex. 421; 21 L.J. Ex. 105.

Payment of interest on a debt operates as an admission of the debt, and an extension of the period of limitation; and oral evidence is admissible to show on what account the money was paid (*y*). But the payment of interest, like part payment, must be such that a promise to pay the principal may be inferred in fact. Thus, where the maker of a note was sued for the interest then due upon it, and, judgment having been recovered against him, he paid the amount sued for, it was held that this payment of interest did not take the principal debt out of the operation of the statute (*z*). If, however, the defendant admits the debt, and pays interest thereon, and at the same time declares that he will pay nothing further, the jury may give effect to the admission and payment, and disregard the declaration; it is for a jury to say, from what was said and done in connection with the payment, whether it was a payment of interest on an admitted debt, or whether the debt was repudiated, and had no existence, at the time of payment (*a*). If the debt is secured, partly by bills and notes and simple contracts, and partly by bonds or mortgage deeds, and specialty securities, and interest is paid on the whole debt generally, the time of limitation will be extended as to all the securities (*b*). If a debtor pays a principal debt barred by the statute, and expressly refuses to pay interest, the payment of the principal will not revive the claim to the interest (*c*). Payment of interest on bills or notes is an admission of continued liability down to the period of such payment of interest, and causes the time of limitation to run therefrom (*d*). It is also evidence of a demand of payment of the note having been made, *i.e.*, of the debt being due; for interest is paid for forbearance of a debt (*e*). If indorsements on a bill or note of payment of interest or principal are put in evidence as an admission of the debt, they must be signed by the debtor, or have been made in his presence, or by his direction, or by some party who was acting as his agent in the matter (*f*). It is not essential that money should actually pass between the debtor and creditor to constitute a payment of interest. Where the debtor was about to pay the creditor, his

(*y*) *Waters* v. *Tompkins*, 2 C. M. & R. 727; *Bevan* v. *Gething*, 3 Q.B. 740; 12 L.J. Q.B. 297; *Burn* v. *Boulton*, 2 C.B. 484; 15 L.J. C.P. 97; *Evans* v. *Davies*, 4 Ad. & E. 840; 6 L.J. K.B. 268.

(*z*) *Morgan* v. *Rowlands*, L.R. 7 Q.B. 493; 41 L.J. Q.B. 187.

(*a*) *Wainman* v. *Kynman*, 1 Exch. 118; 26 L.J. Ex. 232; *Baildon* v. *Walton*, 1 Exch. 617; 17 L.J. Ex. 357.

(*b*) *Dowling* v. *Ford*, 11 M. & W. 329; 12 L.J. Ex. 342.

(*c*) *Collyer* v. *Willock*, 4 Bing. 313; 5 L.J. (O.S.) C.P. 181.

(*d*) *Bamfield* v. *Tupper*, 7 Exch. 27; 21 L.J. Ex. 6; *Bealy* v. *Greenslade*, 2 Cr. & J. 61.

(*e*) *Rutherford*, *In re*, 14 Ch.D. 687; 49 L.J. Ch. 654.

(*f*) 9 Geo. 4, c. 14, s. 3; *Briggs* v. *Wilson*, 17 Beav. 330; *Bradley* v. *James*, *ante*, p. 216.

father, the interest due, but the father stopped him, and, writing a receipt for the money, gave it to the son's wife, saying that he would make her a present of the money, it was held that there was a sufficient payment (*g*).

Part payment by one of several joint and several debtors or co-contractors.—Formerly, if one of several joint debtors, or one of several joint and several debtors or co-contractors, paid part of the debt due, or paid interest thereon, the payment was a payment by all, and extended the period of limitation as to all, although the payment was made by the one without the concurrence, or in fraud of the others. Now, by 19 & 20 Vict. c. 97, s. 14, it is enacted that two or more co-contractors or co-debtors, whether jointly or severally liable, or the executors or administrators of any contractor, shall not lose the benefit of the Statute of Limitations, and be rendered chargeable, by reason of payment of principal or interest, or other money, by another co-contractor or co-debtor, executor or administrator. A payment made before the passing of this statute was not operated upon by this section, which has no retrospective effect (*h*). The statute does not apply where the interest is paid by one co-debtor on behalf of the other at his request (*i*).

Payment by strangers and agents.—Where, before the Married Women's Property Act, 1882 (*k*), a married woman, after her marriage, paid interest without the knowledge of her husband on a promissory note given by her whilst she was a *feme sole*, it was held that the cause of action upon the note could not be kept alive by any act of the wife during coverture, done without the knowledge and sanction of the husband (*l*). Where a promissory note had been signed by the defendants as churchwardens or overseers of a parish, and interest had been regularly paid upon the note by the overseers of the parish for the time being, it was held that it was for a jury to say whether the defendants had not constituted the churchwardens and overseers for the time being their agents for the payment of the interest (*m*). An acknowledgment made by one of several executors as executor binds the testator's estate, notwithstanding the dissent of his co-executor or co-executors (*n*). No such right, however, exists in the case of

(*g*) *Maber* v. *Maber*, L.R. 2 Ex. 153; 36 L.J. Ex. 70; *Amos* v. *Smith*, 1 H. & C. 238; 31 L.J. Ex. 423.

(*h*) *Jackson* v. *Woolley*, 8 E. & B. 784; 27 L.J. Q.B. 448.

(*i*) *Tucker*, *In re*, (1894) 3 Ch. 429; 63 L.J. Ch. 737.

(*k*) 45 & 46 Vict. c. 75, ss. 13, 24.

(*l*) *Neve* v. *Holland*, 21 L.J. Q.B. 289; *Pittan* v. *Foster*, 1 B. & C. 250; 1 L.J. (O.S.) K.B. 81.

(*m*) *Jones* v. *Hughes*, 5 Exch. 104; 19 L.J. Ex. 200; *Rew* v. *Pettet*, 1 Ad. & E. 200.

(*n*) *Macdonald*, *In re*, (1897) 2 Ch. 181; 66 L.J. Ch. 630; *Scholey* v. *Walton*

trustees, all of whom must concur in the exercise of the powers conferred on them with reference to the trust estate (*o*). So, payment of interest by the devisees in trust of the real estate of a deceased covenantor does not bind the equitable tenant for life (*p*). But payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which was not subject to the mortgage (*q*).

Payment to strangers and agents.—A payment to a third person by direction of the creditor is a payment to the creditor himself (*r*); and, if money is lent by a trustee acting on behalf of the *cestui que trust*, a payment to the latter is equivalent to a payment to the trustee (*s*). Payment to a husband of interest which had accrued due upon the wife's *chose in action* was, before the Married Women's Property Act, 1882 (*t*), held to be equivalent to payment to the wife (*u*); and a payment to a person supposed by the debtor to be duly authorised to receive the money, but who had no authority to receive it, may be made as good a payment and acknowledgment under the statute as if the money had been paid to the party rightfully entitled (*x*).

Limitation of actions in respect of contracts made abroad.—Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title or cause of action itself, and declares it a nullity after the lapse of the prescribed period, such law may be set up in any other country to which the parties may remove, as an absolute bar, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy (*y*).

12 M. & W. 510; 13 L.J. Ex. 122; *Read* v. *Price*, (1909) 2 K.B. 724; 78 L.J. K.B. 1137.

(*o*) *Astbury* v. *Astbury*, (1898) 2 Ch. 111; 67 L.J. Ch. 111.

(*p*) *Coope* v. *Cresswell*, L.R. 2 Ch. 112; 36 L.J. Ch. 114; and see *Pears* v. *Laing*, L. R. 12 Eq. 41; 40 L.J. Ch. 225.

(*q*) *Roddam* v. *Morley*, 1 De G. & J. 1; 26 L.J. Ch. 438; *Dibb* v. *Walker*, (1893) 2 Ch. 429; 62 L.J. Ch. 536; *Chant, In re, Bird* v. *Godfrey*, (1905) 2 Ch. 225; 74 L.J. Ch. 542; *Lacey, In re, Howard* v. *Lightfoot*, (1907) 1 Ch. 330; 76 L.J. Ch. 316.

(*r*) *Worthington* v. *Grimsditch*, 7 Q.B. 484; 15 L.J. Q.B. 52.

(*s*) *Megginson* v. *Harper*, 2 C. & M. 322; 3 L.J. Ex. 50.

(*t*) 45 & 46 Vict. c. 75.

(*u*) *Hart* v. *Stephens*, 6 Q.B. 937; 14 L.J. Q.B. 148.

(*x*) *Clark* v. *Hooper*, 10 Bing. 480; 3 L.J. C.P. 159; *Stamford Banking Co.* v. *Smith*, (1891) 1 Q.B. 765; 61 L.J. Q.B. 405.

(*y*) *Huber* v. *Steiner*, 2 Sc. 326; 2 Bing. N.C. 202; *British Linen Co.* v. *Drummond*, 10 B. & C. 903; 9 L.J. (O.S.) K.B. 213; *Leroux* v. *Brown*, 12 C.B. 801; 22 L.J. C.P. 1; *Ruckmaboye* v. *Mottichund*, 8 Moo. P.C. 4; *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5; *Harris* v. *Quine*, L.R. 4 Q.B. 653; 38 L.J. Q.B. 331.

A judgment of a foreign court in favour of the defendant upon a plea setting up a law of limitation, which bars the remedy, but not the debt, is no bar to an action for the debt in the courts of this country (*z*).

Suspension of statute.—When a debtor takes out administration to his creditor, the running of the statute is suspended during the administration (*a*).

No limitation in cases of express trust.—By sect. 25, subsect. 2, of the Judicature Act, 1873 (*b*), no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations (*c*).

(*z*) *Harris* v. *Quine*, L.R. 4 Q.B. 653; 38 L.J. Q.B. 331.

(*a*) *Seagram* v. *Knight*, L.R. 2 Ch. 628; 36 L.J. Ch. 918.

(*b*) 36 & 37 Vict. c. 66.

(*c*) See *Burdick* v. *Garrick*, L.R. 5 Ch. 233; 39 L.J. Ch. 369; *Knox* v. *Gye*, L.R. 6 H.L. 656; 42 L.J. Ch. 234; *Stone* v. *Stone*, L.R. 5 Ch. 74; 39 L.J. Ch. 196; *Bell, In re*, 34 Ch.D. 462; 56 L.J. Ch. 367; *North American Land and Timber Co.* v. *Watkins*, (1904) 2 Ch. 233; 73 L.J. Ch. 626. But the statute will run where the trustee gets money not belonging to the *cestui que trust*, but which he can claim on the ground that the receipt of it by the trustee was a fraud upon him: *Metropolitan Bank* v. *Heiron*, 5 Ex.D. 319; *Lister* v. *Stubbs*, 45 Ch.D. 1; 59 L.J. Ch. 570; and see now, 51 & 52 Vict. c. 59, s. 8.

CHAPTER V.

THE TRANSFER OF CONTRACTS.

SECTION I.

TRANSFER BY ASSIGNMENT.

Assignment of personal contracts.—The common law in times past discountenanced the assignment of rights and causes of action, as tending to increase maintenance and litigation, and would not, consequently, suffer the right to the fulfilment of a contract of a personal nature to be transferred from hand to hand. The performance of a contract for work might be delegated to a subordinate agent or servant, but not the right to sue upon the contract (*a*). But in cases where assignment was allowed by the law of some foreign jurisdiction the assignees were allowed to sue in this country in their own names (*b*), and a corporate body which had issued assignable debentures purporting to have been executed pursuant to statutory powers was held estopped from alleging against an innocent assignee for value that the debentures had been issued illegally and in contravention of the statutory powers (*c*). So, too, exceptions existed in the cases of assignments by the Crown (*d*), of assignments of covenants relating to land (*e*), of assignments by way of novation (*f*), and of assignments of negotiable instruments (*g*). And, in equity the assignment of a *chose in action* after notice to the debtor had always been held to be perfectly valid, so as to pass the beneficial interest (*h*); and latterly the

(*a*) *Schmaling* v. *Thomlinson*, 6 Taunt. 147; *Jones* v. *Carter*, 8 Q.B. 134; 15 L.J. Q.B. 96; *Boulton* v. *Jones*, 2 H. & N. 564; 27 L.J. Ex. 117; *Hardman* v. *Booth*, 1 H. & C. 803; 32 L.J. Ex. 105.

(*b*) *Innes* v. *Dunlop*, 8 T.R. 595; *O'Callaghan* v. *Thomond*, 3 Taunt. 82.

(*c*) *Webb* v. *Herne Bay Commissioners*, L.R. 5 Q.B. 642; 39 L.J. Q.B. 221; *Romford Canal Co., In re*, 24 Ch. D. 85; 52 L.J. Ch. 729.

(*d*) Per Buller, J., in *Master* v. *Miller*, 4 T.R. 320, 340; *Stafford* (*Earl*) v. *Buckley*, 2 Ves. Sen. 171, 181; *Miles* v. *Williams*, 1 P.Wms. 249, 252.

(*e*) See *post*, p. 227.

(*f*) See *ante*, p. 179.

(*g*) Per Blackburn, J., in *Crouch* v. *Crédit Foncier*, L.R. 8 Q.B. 374, 380.

(*h*) *Row* v. *Dawson*, 1 Ves. Sen. 331; *Hammond* v. *Messenger*, 9 Sim. 327; and see notes to *Forth* v. *Stanton*, 1 Wms. Saund. 210.

ancient rule of the common law had evaporated to a mere shadow. It no longer prevented the assignee from suing, but regulated merely the form of his action; he could not sue in his own name, but he was in general permitted to bring his action and to recover in the name of the assignor, the party to the original contract (*i*).

In modern times, too, the legislature sanctioned the assignment of certain bonds and contracts, and authorised the assignees to sue upon them in their own names, such as bail bonds (*k*), replevin bonds (*l*), India bonds (*m*), railway bonds (*n*), Exchequer bonds (*n*), administration bonds (*o*), bills of lading (*p*), policies of marine (*q*) and life (*r*) assurance, shares in companies (*s*), and bills of exchange (*t*). The legislature had also authorised the assignee of the *choses in action* of a joint-stock company in liquidation (*u*), and the assignee of the book-debts of a bankrupt (*x*), to bring actions for such *choses in action* or book-debts in his own name.

Now, by sect. 25 (6) of the Judicature Act, 1873 (*y*), any debt or other *chose in action* (*z*) may be assigned absolutely by writing under the hand of the assignor; and such assignment, after express notice in writing has been given to the debtor, will be effectual in law (subject to all equities which would have been entitled to priority over the assignee if that Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies

(*i*) *Master* v. *Miller*, 4 T.R. 320, 340; *Legh* v. *Legh*, 1 B. & P. 447; *Alner* v. *George*, 1 Campb. 392; *Brandt* v. *Heatig*, 2 Moore, 184; *Pickford* v. *Ewington*, 4 Dowl. P.C. 453; *Morrison* v. *Parsons*, 2 Taunt. 407.

(*k*) 4 & 5 Anne, c. 3, s. 20 (repealed, 34 & 35 Vict. c. 116; see now Bail Bonds Act, 1808, 48 Geo. 3, c. 58, s. 3).

(*l*) 11 Geo. 2, c. 19, s. 23 (repealed, 44 & 45 Vict. c. 59); *Thompson* v. *Farden*, 1 M. & Gr. 535; 9 L.J. C.P. 284; *Dias* v. *Freeman*, 5 T.R. 195.

(*m*) East India Company Bonds Act, 1811, 51 Geo. 3, c. 64, s. 4; *Glynn* v. *Baker*, 13 East, 509.

(*n*) *Glynn* v. *Baker*, 13 East, 509; *Vertue* v. *East Angl. Ry.*, 5 Exch. 280; 19 L.J. Ex. 235.

(*o*) Court of Probate Act, 1857, 20 & 21 Vict. c. 77, ss. 81, 83.

(*p*) Bills of Lading Act, 1855, 18 & 19 Vict. c. 111, s. 1.

(*q*) Marine Insurance Act, 1906, 6 Edw. 7, c. 41, s. 50; as to set off of premiums, see *Pellas* v. *Neptune Co.*, 5 C.P.D. 34.

(*r*) Policies of Assurance Act, 1867, 30 & 31 Vict. c. 144; *Haycock's Policy*, *In re*, 1 Ch. D. 611; 45 L.J. 247.

(*s*) Companies Consolidation Act, 1908, 8 Edw. 7, c. 69, ss. 22 (1), 37 (2); cp. National Debt Act. 1870, 33 & 34 Vict. c. 71, ss. 22—25.

(*t*) Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61.

(*u*) 25 & 26 Vict. c. 89, ss. 95, 157.

(*x*) 32 & 33 Vice. c. 71, s. 111 (repealed).

(*y*) 36 & 37 Vict. c. 66. As to the assignment forming part of the cause of action, see *Read* v. *Brown*, 22 Q.B.D. 128; 58 L.J. Q.B. 120. As to what is a good assignment, see *Marchant* v. *Morton*, 70 L.J. K.B. 820; *Torkington* v. *Magee*, (1902) 2 K.B. 427; 71 L.J. K.B. 712; reversed on facts, (1903) 1 K.B. 644; 72 L.J. K.B. 336.

(*z*) A claim for damages in respect of a tortious act is a legal *chose in action* within the meaning of this section: *Dawson* v. *Great Northern and City Ry.*, (1905) 1 K.B. 260; 74 L.J. K.B. 190. An ascertained part of an existing debt can be assigned: *Skipper* v. *Holloway*, 79 L.J. K.B. 41; reversed in C.A. on the facts, (1910) 2 K.B. 635 n; 79 L.J. K.B. 496.

for the same, and the power to give a good discharge for the same without the concurrence of the assignor (*a*). Previously to the passing of this Act the general rule of the Court of Equity was that the assignee of a *chose in action* took it subject to all the equities between the original parties to the contract (*b*), that is, to all the equities subsisting at the date of the assignment (*c*), and this still prevails as the general rule; but the parties to the original contract may, by express stipulation or by implication arising from their conduct, agree that the *chose in action* may be assigned free from such equities; and in that case an assignee will take the *chose in action* discharged from such equities accordingly (*d*), or he may be released therefrom by the conduct of the debtor after the assignment (*e*). Where there is a distinct promise held out by a company informing all the world that they will pay to the order of a person named, it is not competent for that company afterwards to set up equities of their own, and say that, because the person who makes the order is indebted to them, they will not pay (*f*). And a debenture, made payable to order or bearer, is such a promise (*g*). When the assignor of a debt has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties (*h*). But where debts have been assigned after proof of them in a bankruptcy has been allowed, the trustee has no authority to pay dividends to the assignee (*i*).

Moneys due and to become due under a contract, even under a contract for personal service (*k*), which class of contracts is not assignable (*l*), may be assigned, and, if paid over *bonâ*

(*a*) The section relates to procedure only, and does not enlarge the class of *choses in action* the assignability of which was previously recognised either at law or in equity: *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900); (1903) A.C. 414, 424; 72 L.J. K.B. 834. An assigned debt may be set off, *Bennett* v. *White*, (1910) 2 K.B. 643; 79 L.J. K.B. 1133.

(*b*) *Natal Investment Co., In re*, L.R. 3 Ch. 355; 37 L.J. Ch. 362; *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 38 L.J. P.C. 30. The last case has been dissented from on the ground that the title in that case was not to a *chose in action*, but to a legal right of ownership; *Leask* v. *Scott*, 2 Q.B.D. 376; 46 L.J. Q.B. 576.

(*c*) *China Steamship Co., In re*, L.R. 7 Eq. 240; 38 L.J. Ch. 199.

(*d*) *Asiatic Banking Corp., Ex parte, Agra and Masterman's Bank, In re*, L.R. 2 Ch. 391; 36 L.J. Ch. 222; *Blakely Ordnance Co., In re*, L.R. 3 Ch. 154; 37 L.J. Ch. 418; *City Bank, Ex parte*, L.R. 3 Ch. 758; *Northern Assam Tea Co., In re*, L.R. 10 Eq. 458; 39 L.J. Ch. 829: *Dickson* v. *Swansea Vale Ry.*, L.R. 4 Q.B. 44; 38 L.J. Q.B. 17.

(*e*) *Higgs* v. *Northern Assam Tea Co.*, L.R. 4 Ex. 387; 38 L.J. Ex. 233; *Brunton, Ex parte*, L.R. 19 Eq. 302; 44 L.J. Ch. 450.

(*f*) *City Bank, Ex parte, supra.*

(*g*) *Imperial Land Co. of Marseilles, In re, Colborne & Strawbridge, Ex parte*, L.R. 11 Eq. 478; 40 L.J. Ch. 93.

(*h*) Story's Eq. Jur. § 1047 a.

(*i*) *Frost, In re*, (1899) 2 Q.B. 50; 68 L.J. Q.B. 663.

(*k*) *Russell & Co.* v. *Austin Fryers*, 25 T.L.R. 414.

(*l*) *Stevens* v. *Benning*, 6 De G. M. & G. 223; 24 L.J. Ch. 153; *Davies* v. *Davies*, 36 Ch.D. 359, 394; 56 L.J. Ch. 962; *Griffith* v. *Tower Publishing Co.*, (1897) 1 Ch. 21; 66 L.J. Ch. 12; *Kemp*

fide to the original debtor, may be recovered by the assignee(*m*). But such an assignment is inoperative against the title of a trustee in bankruptcy as regards receipts accruing after the commencement of the bankruptcy (*n*); nor can the contract be assigned where the result will be to impose on one of the contracting parties a greater liability than he ever intended to assume (*o*). An author can assign the copyright of a book not yet in existence (*p*).

What is an assignment.—Sect. 25 (6) of the Judicature Act, 1873, does not make anything an assignment which was not an assignment before (*q*). An assignment of moneys not yet due may be an "absolute assignment" (*r*). So is a mortgage of debts in the ordinary form (*s*). But there cannot be an absolute assignment of an unascertained portion of a debt (*t*). An expectancy may be assigned for value (*u*), though not by a mere volunteer, even under seal (*x*). A deed or writing is not required to constitute a valid equitable assignment (*y*), nor is any particular form of words necessary (*z*); as a general rule, anything written, said, or done, in pursuance of an agreement, and for valuable consideration, with the intention of placing a *chose in action* out of the control of the creditor, and appropriating it in favour of another person, is a good equitable assignment (*a*). Thus an order given by a debtor to his creditor upon a person owing money to such debtor, directing such person to pay the creditor out of such money, will, on communication of such

v. *Baerselman*, (1906) 2 K.B. 604; 75 L.J. K.B. 873; *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1903) A.C. 414, 417; 72 L.J. K.B. 834.

(*m*) *Brice* v. *Bannister*, 3 Q.B.D. 569; 47 L.J. Q.B. 722; *Hall, Ex parte, Whitting, In re*, 10 Ch.D. 615; 48 L.J. Bank. 79; *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271; 61 L.J. Ch. 244.

(*n*) *Nichols, Ex parte*, 22 Ch.D. 783; 52 L.J. Ch. 635; see *Davis & Co., In re, Rawlings, Ex parte*, 22 Q.B.D. 193.

(*o*) *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1903) A.C. 414, 423; 72 L.J. K.B. 834; see *Dawson* v. *Great Northern and City Ry.*, (1905) 1 K.B. 260, 272; 74 L.J. K.B. 190.

(*p*) *Ward, Lock & Co.* v. *Long*, (1906) 2 Ch. 550; 75 L.J. Ch. 732.

(*q*) *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511; 53 L.J. Q.B. 280; *Schroeder* v. *Central Bank of London*, 24 W.R. 710; *Haycock's Policy, In re*, 1 Ch.D. 611; 45 L.J. Ch. 247; *Culley, Ex parte*, 9 Ch.D. 307; 47 L.J. Bankr. 97.

(*r*) *Brice* v. *Bannister*, 3 Q.B.D. 569; 47 L.J. Q.B. 722. See *Durham* v. *Robertson*, (1898) 1 Q.B. 765; 67 L.J. Q.B. 484.

(*s*) *Tancred* v. *Delagoa Bay Ry.*, 23 Q.B.D. 239; 58 L.J. Q.B. 459.

(*t*) *Jones* v. *Humphreys*, (1902) 1 K.B. 10; 71 L.J. K.B. 23; nor of a definite portion, *Forster* v. *Baker* (1910) 2 K.B. 636; 79 L.J. K.B. 664.

(*u*) *Tailby* v. *Official Receiver*, 13 A.C. 523, 543; 58 L.J. Q.B. 75.

(*x*) *Meek* v. *Kettlewell*, 1 Hare, 464; 1 Ph. 342; *Ellenborough, In re, Towry Law* v. *Burne*, (1903) 1 Ch. 697; 72 L.J. Ch. 218.

(*y*) *Howell* v. *MacIvers*, 4 T.R. 690; *Heath* v. *Hall*, 4 Taunt. 326; *Lett* v. *Morris*, 4 Sim. 607; 1 L.J. Ch. 17; *Tibbits* v. *George*, 5 A. & E. 107, 115; 6 L.J. K.B. 255; *Lambe* v. *Orton*, 1 Drew. & Sm. 125; 29 L.J. Ch. 319.

(*z*) *Chowne* v. *Baylis*, 31 Beav. 351, 360; 31 L.J. Ch. 757; *Gorringe* v. *Irwell Indiarubber and Guttapercha Works*, 34 Ch.D. 128, 134; 56 L.J. Ch. 85; *Griffin, In re*, (1899) 1 Ch. 408, 412; 68 L.J. Ch. 220.

(*a*) Spence's Eq. Jur. vol. 2, pp. 855, 860, 861, 907; *Chowne* v. *Baylis*, 31 Beav. 351; 31 L.J. Ch. 757; *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, (1905) A.C. 454; 74 L.J. K.B. 898.

order to such person, amount to an irrevocable assignment of the money, or a sufficient part thereof (*b*); and, if such money is handed over to the assignor by the person so ordered to pay, he will be made to pay it over again to the assignee (*c*). But a promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person (*d*). And a cheque is not an equitable assignment of the drawer's balance at his banker's (*e*). Where S. insured his life for the purpose, as he told the company, of giving C. a security for his debt, and sent the policies to C. with a letter, asking C. to get his solicitor to prepare an assignment, but none was ever made; and C., on S.'s death, gave notice to the company, which the company acknowledged, it was held that there was no equitable assignment (*f*). And an agreement in writing to execute, on request, an effectual mortgage of a policy deposited as security for a loan, is not an assignment (*g*). An assignment coming within the Statute of Frauds, for example, an assignment of an interest in land, must be in writing (*h*).

Notice of assignment.—When a *chose in action* has been assigned, notice must be given to the debtor in order to perfect the interest of the assignee, and secure him against any claims by subsequent assignees (*i*). It is not necessary that notice should be given in the lifetime of the assignor (*k*), or, under sect. 25 (6) of the Judicature Act, 1873, in the lifetime of the assignee (*l*); but an assignment without notice is good as against a subsequent judgment creditor of the assignor (*m*). If no notice has been given to the debtor, payment by him to the assignor is a good discharge; and a subsequent assignee, who first gives

(*b*) *Row* v. *Dawson*, 1 Ves. Sen. 331; *Yeates* v. *Groves*, 1 Ves. 280; *Lett* v. *Morris*, 4 Sim. 607; 1 L.J. Ch. 17; *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702; 9 L.J. Ch. 65; *Hall, Ex parte, Whitting, In re*, 10 Ch.D. 615; 48 L.J. Bk. 79; *Webb* v. *Smith*, 30 Ch.D. 192; *Alexander* v. *Steinhardt*, (1903) 2 K.B. 208; 72 L.J. K.B. 490; *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, (1905) A.C. 454; 74 L.J. K.B. 898.

(*c*) *Jones* v. *Farrell*, 1 De G. & J. 208.

(*d*) *Field* v. *Megaw*, L.R. 4 C.P. 660.

(*e*) *Hopkinson* v. *Forster*, L.R. 19 Eq. 74

(*f*) *Crossley* v. *City of Glasgow Ins. Soc.*, 4 Ch.D. 421; 46 L.J. Ch. 65.

(*g*) *Spencer* v. *Clarke*, 9 Ch.D. 137; 47 L.J. Ch. 692; as to what is an "absolute assignment," see *Burlinson* v. *Hall*, 12 Q.B.D. 347; 53 L.J. Q.B. 222; *Comfort* v. *Betts*, (1891) 1 Q.B. 737; 60 L.J. Q.B. 656; *Mercantile Bank of London* v. *Evans*, (1899) 2 Q.B. 613; 68 L.J. Q.B. 921; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K.B. 190; 71 L.J. K.B. 630; *Fitzroy* v. *Cave*, (1905) 2 K.B. 364; 74 L.J. K.B. 829.

(*h*) *Hall, Ex parte, Whitting, In re*, 10 Ch.D. 615; 48 L. J. Bk. 79.

(*i*) See sect. 25 (6) of Jud. Act, 1873, *supra*.

(*k*) *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511; 53 L.J. Q.B. 280.

(*l*) *Bateman* v. *Hunt*, (1904) 2 K.B. 530; 73 L.J. K.B. 782.

(*m*) *Bevan* v. *Oxford* (*Lord*), 6 De G. M. & G. 492; 25 L.J. Ch. 299, which is to be preferred to *Watts* v. *Porter*, 3 E. & B. 743; 23 L.J. Q.B. 345, where the contrary was held: see *Pickering* v. *Ilfracombe Ry.*, L.R. 3 C.P. 235; 37 L.J. C.P. 118; and *Crow* v. *Robinson*, L.R. 3 C.P. 264; 36 L.J. C.P. 124.

notice to the debtor, will be preferred to a prior assignee who has not given notice (*n*). The principle applies where the second assignee of an interest in a trust fund has taken his assignment from the legal personal representative of the assignor, and not from the assignor himself (*o*). It is sufficient, however, if the assignee of such an interest give notice to all the trustees in existence at the time of the assignment to him, and he will get priority over a subsequent assignee who has given notice to a fresh set of trustees appointed after the first assignment (*p*). The assignment will be binding from the posting of the letter communicating the same and will be unaffected by the supervening bankruptcy of the assignor (*q*); but notice not given until after the bankruptcy of the assignor will be insufficient to take a trade debt out of the order and disposition of the bankrupt (*r*). And it is immaterial that the notice was given by the assignee to the debtor before the latter had notice of the bankruptcy (*s*). It is sufficient, if the notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable, or is merely charged with the duty of making the payment (*t*). Sect. 25 (6) of the Judicature Act, 1873 (*u*), requires, in order that the legal estate may pass, that the notice should be in writing; but a notice by word of mouth is sufficient to effect an equitable assignment (*x*). Where the debt is due from a company in course of winding up, notice to the official liquidator is sufficient (*y*). By an assignment of a bond, policy of insurance, or other instrument of contract, the right of property in the instrument itself passes to the assignee, so that an action is maintainable for the recovery of possession of the document (*z*). If the notice states that the assignment was made upon a specified date, upon which in fact no such assignment took place, the notice does not comply with the requirements of the section and is therefore invalid (*a*). Notice, however, to a debtor, who has given a negotiable instru-

(*n*) *Dearle* v. *Hall*, 3 Russ. 1; 2 L.J. (O.S.) Ch. 62; *Loveridge* v. *Cooper*, 3 Russ. 1, 30; 2 L.J. (O.S.) Ch. 75; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Ward* v. *Duncombe*, (1893) A. C. 369; 62 L.J. Ch. 881; *Marchant* v. *Morton*, (1901) 2 K.B. 829; 70 L.J. K.B. 820. The rule does not apply to shares in a company: *Société Générale de Paris* v. *Walker*, 11 App.Cas. 20; 55 L.J. Q.B. 569.

(*o*) *Freshfield's Trust, In re*, 11 Ch.D. 198; *Montefiore* v. *Guedella* (No. 1), (1903) 2 Ch. 26; 72 L.J. Ch. 442.

(*p*) *Wasdale, In re, Brittin* v. *Partridge*, (1899) 1 Ch. 163; 68 L.J. Ch. 117.

(*q*) *Alexander* v. *Steinhardt*, (1903) 2 K.B. 208; 72 L.J. K.B. 490.

(*r*) *Webb, In re*, 36 L.J. Ch. 341; *Barnes* v. *Pinkney*, 36 L.J. Ch. 815.

(*s*) *Tichener, In re*, 35 Beav. 317.

(*t*) *Addison* v. *Cox*, L.R. 8 Ch. 76; 42 L.J. Ch. 291.

(*u*) 36 & 37 Vict. c. 66, s. 25 (6).

(*x*) *Tichener, In re supra*.

(*y*) *Wragge's case*, L.R. 5 Eq. 284.

(*z*) *Watson* v. *McLean*, 1 E. B. & E. 77.

(*a*) *Stanley* v. *English Fibres Industries*, 68 L.J. Q.B 839.

ment in payment of his debt, that the debt has been assigned, does not cast on the debtor any obligation not to pay the negotiable instrument, even although it is presented by the creditor who has assigned the debt (*b*). The question whether an assignment of a *chose in action* is valid will be determined by the law of the place where it is executed (*c*).

When assignment of a chose in action *may be made foundation of new contract.*—When the assignment of a personal contract is defective in form merely, any promise, by the person liable upon the contract, to pay the demand or satisfy the claim, in consideration that the assignee will give him time for payment, or forbear for a particular period to sue him, will enable the assignee to maintain an action in his own name upon such new contract or promise (*d*).

Sub-section I.

COVENANTS RUNNING WITH THE LAND.

Covenants running with land are transferable; they pass from hand to hand with the interest in the realty to which they are annexed, and are called "real contracts." To enable a covenant to run with the land, it is not necessary that the covenantor should be possessed of any estate in the land; but the covenantee must be clothed with some transferable interest therein, to which the covenant can be attached; for otherwise the covenant is a mere personal covenant (*e*). If, therefore, the covenantee is a mortgagor in fee, or a *cestui que trust*, the covenants are personal covenants, and do not run with the land, as the covenantee has no estate recognised by law in the land to which the covenants can be annexed (*f*). A covenant cannot run with a ship or any personal perishable chattel (*g*).

Privity of estate and privity of contract.—Covenants entered into by owners of real property, who transfer their entire interest to the covenantee, are annexed to the estate so transferred, and pass to the assignee of that estate, so as to give him an action upon them against the covenantor and his real and

(*b*) *Bence* v. *Shearman*, (1898) 2 Ch. 582; 67 L.J. Ch. 513.

(*c*) Cp. *Lee* v. *Abdy*, 17 Q.B.D. 309; *Queensland Mercantile and Agency Co., In re*, (1902) 1 Ch. 219; 61 L.J. Ch. 145; and *Kelly* v. *Selwyn*, (1905) 2 Ch. 117; 74 L.J. Ch. 567, per Warrington, J.

(*d*) *Morton* v. *Burn*, 7 Ad. & E. 19; 7 L.J. Q.B. 104; *Forth* v. *Stanton*, 1 Saund. 210, n. 1 a; *Jeffs* v. *Day*, L.R. 1 Q.B. 372; 35 L.J. Q.B. 99.

(*e*) Co. Litt. 385 a; *Spencer's case*, 5 Co. Rep. 16; 1 Smith, L.C. (11th ed.) 55.

(*f*) *Webb* v. *Russell*, 3 T.R. 393; *Whitton* v. *Peacock*, 2 Bing. N.C. 411; 5 L.J. C.P. 124.

(*g*) *Splidt* v. *Bowles*, 10 East, 279; *De Mattos* v. *Gibson*, 4 De G. & J. 276; 28 L.J. Ch. 502.

personal representatives. Thus, if A., seised of lands in fee, conveys his estate and interest by deed to B., and covenants with B. to make further assurance, and B. then conveys to C., who conveys to D., D. may require A. to make further assurance to him of the lands according to the covenant, and on his refusal may maintain an action against him (*h*). So, if two coparceners make partition of lands, and the one covenants with the other and her heirs to acquit her and her heirs of a certain suit issuing out of the lands, the assignee of the estate of the covenantee will have an action upon the covenant (*i*); and the same transfer of the right of action upon the covenant prevails, whether the interest conveyed by the covenantor be an estate of inheritance in the land, or a chattel real only (*k*). If a man, too, purports to grant lands to another in fee, and covenants that he is seised in fee, and hath good right to convey, and it subsequently appears that at the time of the conveyance he was not seised in fee, and had not a right to convey, and no fee in the lands passed to the covenantee, yet the assignee of the covenantee, who would have had the benefit of the covenant if it had been fulfilled, will have an action upon it against the covenantor, to recover damages for the breach (*l*).

But covenants entered into by the owners of land with persons who have no estate or interest at all in the land are not, it seems, annexed to the estate of the covenantor, and do not run with the land, so as to charge the assignees of the covenantor with the performance of them (*m*). If the owner of an estate of inheritance in land, for example, covenants with a stranger who has no interest at all in the soil, that the land shall never be built upon, or never planted or inclosed, or that it shall only be used or enjoyed by the covenantor in some particular manner, it is a mere personal covenant (*n*).

As a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, to use the property for a particular purpose, the acquirer shall not, to the material damage of the third person, in opposition to the contract, use the property in a manner not allowable to the giver or seller (*o*). If, therefore, a party buys an estate, and

(*h*) *Middlemore* v. *Goodale*, Cro. Car. 503. 505.

(*i*) Co. Litt. 385 a.

(*k*) *Lewis* v. *Campbell*, 3 Moore, 35; affirmed in err. *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Simpson* v. *Clayton*, 4 Bing. N.C. 758; 8 L.J. C.P. 59.

(*l*) *Jones* v. *King*, 4 M. & S. 188.

(*m*) *Austerberry* v. *Oldham Corporation*, 29 Ch.D. 751; 55 L.J. Ch. 633; *Formby* v. *Barker*, (1903) 2 Ch. 539; 72 L.J. Ch. 716.

(*n*) *Keppell* v. *Bailey*, 2 Myl. & K. 517, 538; *Ackroyd* v. *Smith*, 10 C.B. 164; 19 L.J. C.P. 315.

(*o*) *De Mattos* v. *Gibson*, 4 De G. & J. 276, 282; 28 L.J. Ch. 502.

accepts a conveyance with full knowledge of the existence of a restrictive covenant or agreement, he may be compelled to fulfil it (*p*). And, as a purchaser or lessee who does not inquire into his vendor's or lessor's title is affected with notice of what appears upon it, he may be bound by a covenant of this description, even without knowledge of its existence (*q*). Where a purchaser or lessee has notice of a deed, he has constructive notice of its contents, and is not protected by an express representation that such deed contains no restrictive covenants, nor anything affecting the title (*r*). But the covenant must be one that is capable of running with the land and a restrictive covenant will not be enforced by injunction against the assignee of a purchaser who has purchased the whole of an estate in land at the instance of a plaintiff having no land retained by the vendor (*s*). It is important in this connection to consider whether the covenant affects the nature, quality, or value of the land, or whether it is simply a collateral or personal covenant (*t*). Where neither the original conveyance nor a subsequent assignment to the landlord of the defendant, contained any reference to a separate covenant entered into between the original grantor and grantee, and the landlord falsely stated that he was not aware of the existence of the covenant, it was held that no relief could be had against the tenant; and it was remarked that the doctrine of constructive notice had already been carried far enough (*u*). A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion (*x*).

Covenants between landlord and tenant, or reversioner and lessee, affecting the nature, value or enjoyment of the property by the lessee during the term, are annexed to the estate granted,

(*p*) *Tulk* v. *Moxhay*, 2 Ph. 774; *Western* v. *M'Dermott*, L.R. 2 Ch. 72; 36 L.J. Ch. 76; *Jay* v. *Richardson*, 30 Beav. 563; 31 L.J. Ch. 398; *Catt* v. *Tourle*, L.R. 4 Ch. 656; 38 L.J. Ch. 665; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174; *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *Andrew* v. *Aitken*, 22 Ch.D. 218; 52 L.J. Ch. 294. As to what points must be established when seeking to enforce restrictive covenants made for the benefit of a building scheme, see *Renals* v. *Cowlishaw*, 11 Ch.D. 866; 48 L.J. Ch. 830; *Spicer* v. *Martin*, 14 A.C. 12; 58 L.J. Ch. 309; *Elliston* v. *Reacher*, (1908) 2 Ch. 374, 665; 77 L.J. Ch. 567.

(*q*) *Wilson* v. *Hart*, L.R. 1 Ch. 463; 35 L.J. Ch. 569; *Fielden* v. *Slater*, L.R. 7 Eq. 523; 38 L.J. Ch. 379; *Jones* v. *Bone*, L.R. 9 Eq. 674; 39 L.J. Ch. 405; *Keates* v. *Lyon*, L.R. 4 Ch. 222; 38 L.J. Ch. 357; *Thornewell* v. *Johnson*, 50 L.J. Ch. 641; *Nottingham Tile Co.* v. *Butler*, 16 Q.B.D. 778; 55 L.J. Q.B. 280; *Collins* v. *Castle*, 36 Ch.D. 243; 57 L.J. Ch. 76; *Holloway Bros.* v. *Hill*, (1902) 2 Ch. 612; 71 L.J. Ch. 818.

(*r*) *Patman* v. *Harland*, 17 Ch.D. 353; 50 L.J. Ch. 642; and this is so notwithstanding 37 & 38 Vict. c. 78, s. 2.

(*s*) *Formby* v. *Barker*, (1903) 2 Ch. 539; 72 L.J. Ch. 716.

(*t*) *Dyson* v. *Forster*, (1909) A.C. 98, 102; 78 L.J. Ch. 246.

(*u*) *Carter* v. *Williams*, L.R. 9 Eq. 678; 39 L.J. Ch. 560.

(*x*) *Clements* v. *Welles*, L.R. 1 Eq. 200; 35 L.J. Ch. 265.

and run with the land as long as that estate continues; and the right of action upon them in case of breach vests in the assignee of the term (*y*). Such are covenants by the lessor to repair, or to grant estovers for the repair and maintenance of the demised tenements, or for burning within the house during the term (*z*); to cleanse and repair water-courses (*a*); to supply the demised premises with water (*b*); to acquit the land of certain suits and charges (*c*); also covenants for renewal, and provisoes for re-entry or defeasance of the estate granted (*d*); covenants for quiet enjoyment (*e*); and all the usual covenants for title. "And of these covenants assignees in deed or in law, and assignees of assignees *in infinitum*, shall take advantage; also assignees of executors or administrators, tenants by statute or *elegit*, or after a sale upon a *fieri facias*, or a husband in right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named therein, yet may he take advantage thereof" (*f*). By the Conveyancing Act, 1881, the obligations of a lessor's covenants are to run with the reversion, notwithstanding severance, as to leases made after 31st December, 1881 (*g*); but this provision has not altered the old law as to the class of covenants, the burden of which will run with the reversion (*h*).

If, now, a lessee who has entered into covenants of the above character with the lessor assigns over his estate, the assignee will be responsible for all breaches of covenants during the time the term or estate is vested in him (*i*), although the covenant wants the word "assigns," and although he has never entered and taken possession of the land (*k*); for by taking the estate he makes himself subject to the covenants, *quia transit terra cum onere* (*l*). But this liability is extinguished as soon as the privity of estate is destroyed; and the assignee, consequently, may get rid of the burden of the performance of the covenant, and escape from all responsibility in respect of breaches afterwards accruing, by simply assigning over his

(*y*) *Spencer's case*, 5 Co. Rep. 16; 1 Smith, L.C. (11th ed.) 55; see also *Dyson* v. *Forster*, (1909) A.C. 98, 102; 78 L.J. Ch. 246.

(*z*) *Spencer's case*, 5 Co. Rep. 16, 17, b; 1 Smith, L.C. (11th ed.) 55.

(*a*) *Holmes* v. *Buckley*, Prec. Ch. 39.

(*b*) *Jourdain* v. *Wilson*, 4 B. & Ald. 266.

(*c*) *Spencer's case*, 5 Co. Rep. 16, 18, a.

(*d*) *Roe* v. *Hayley*, 12 East, 468.

(*e*) *Williams* v. *Burrell*, 1 C.B. 429.

(*f*) Shep. Touch. ch. 7. As to the case of an underlease, see *South of England Dairies* v. *Baker*, (1906) 2 Ch. 631; 76 L.J. Ch. 78.

(*g*) 44 & 45 Vict. c. 41, s. 11.

(*h*) *Davis* v. *Town Properties, &c., Corporation*, (1903) 1 Ch. 797; 72. L.J. Ch. 389.

(*i*) *Harley* v. *King*, 2 C. M. & R. 18; 4 L.J. Ex. 144.

(*k*) *Williams* v. *Bosanquet*, 3 Moore, 500.

(*l*) *Bally* v. *Wells*, 3 Wils. 29; *Tatem* v. *Chaplin*, 2 H. Bl. 133.

estate, even though his assignee be a mere pauper or an insolvent (*m*). This, however, is not the case with the original lessee; the latter remains liable upon the covenants he himself has expressly entered into with the lessor; for the privity of contract, as between him and the lessor, is held to remain, although the privity of estate has been destroyed by the assignment of the estate (*n*); and he and his personal representatives (*post*, Section II.) may consequently be sued upon the covenants by the lessor; for, "though the assignee becomes liable to the lessor for the performance of all the covenants which run with the land, yet the lessee is also liable, in the nature of a surety, for the performance of the same covenants" (*o*); and if, by reason of the non-performance of the covenants by the assignee for the time being during the continuance of his interest in the premises, the burden of the fulfilment of them is thrown upon the lessee, the latter may maintain an action against the assignee to recover the amount paid to the lessor, and all the costs and damages he has been put to by reason of the non-fulfilment of the covenant on the part of the assignee (*p*). And this appears to be so even where the breach of covenant took place before the assignment (*q*). But, in order to render the assignee liable upon the covenants, he must be clothed with the same estate as that which the lessee had in the land at the time the covenants were entered into. An underlessee, therefore, is not responsible upon the covenants, inasmuch as he is not possessed of the estate to which they are annexed (*r*). By sect. 10 of the Conveyancing Act, 1881, the rent and benefits of the lessee's covenants are to run with the reversion, notwithstanding severance, in respect of leases made after December 31st, 1881 (*s*). The mortgagor of the reversion is entitled under this section to sue in his own name for the breach of a covenant to repair in a lease granted before the mortgage (*t*).

Covenants real annexed to reversionary estates.—Covenants, however, were held at common law to run with the estate of the lessee only, not with the estate of the reversioner. Conse-

(*m*) *Leheux* v. *Nash*, Str. 1221; *Taylor* v. *Shum*, 1 B. & P. 21; *Onslow* v. *Corrie*, 2 Madd. 330; *Valliant* v. *Dodemede*, 2 Atk. 546; *Paul* v. *Nurse*, 8 B. & C. 486; 7 L.J. (O.S.) K.B. 12; *Hopkinson* v. *Lorering*, 11 Q.B.D. 92; 52 L.J. Q.B. 391.

(*n*) *Barnard* v. *Godscall*. Cro. Jac. 309.

(*o*) Parke, B., *Humble* v. *Langston*, 7 M. & W. 530; 10 L.J. Ex. 442; *Bickford* v. *Parson*, 5 C.B. 929; 17 L.J. C.P. 192.

(*p*) *Burnett* v. *Lynch*, 5 B. & C. 602; 4 L.J. (O.S.) K.B. 274; *Moule* v. *Garrett*, L.R. 7 Ex. 101; 41 L.J Ex. 62.

(*q*) *Gooch* v. *Clutterbuck*, (1899) 2 Q.B. 148; 68 L.J. Q.B. 108.

(*r*) *Holford* v. *Hatch*, 1 Doug. 186; *Derby (Earl)* v. *Taylor*, 1 East, 502; *Bonner* v. *Tottenham Building Society*, (1899) 1 Q.B. 161; 68 L.J. Q.B. 114.

(*s*) 44 & 45 Vict c. 41, s. 10.

(*t*) *Turner* v. *Walsh*, (1909) 2 K.B. 484; 78 L.J. K.B. 753.

quently, although the assignee of the lessee was held to be entitled to sue upon them, yet the assignee of the reversion had no such remedy, and could not maintain an action upon any express covenants made between the lessor and the lessee in respect of the land. This inconvenience led to the passing of 32 Hen. 8, c. 34, which places the assignee of the reversion and the lessee and his assignees upon the same footing with respect to each other as that on which the lessor and the lessee and his assignees previously stood at common law, and gives them the same mutual remedies against one another as those previously existing between the lessor and the lessee and his assignees (*u*). The assignee of the reversion may consequently sue the lessee or his assignees upon the covenants entered into by the lessee with the lessor (*x*); and he may himself be sued by the lessee or his assignees upon the covenants entered into by the lessor with the lessee (*y*). But in every case the express covenants entered into by the lessor with the lessee, or by the lessee with the lessor, remain unaffected by the assignment, the enactment not releasing the parties from their express covenants (*z*). And both the lease and the assignment must be under seal, or the benefit and the burden of the covenants will not run with the land (*a*). The assignee, may, however, if there is a lease by simple contract for a term not exceeding three years in duration, maintain an action for use and occupation against the lessee or his assignee (*b*). If a tenant holds on under an assignee of the reversion, and continues in the enjoyment of all the benefits secured to him by his original lease, he may be presumed to have agreed with the assignee to hold upon the same terms as he held under the original lessor (*c*).

The statute 32 Hen. 8, c. 34, extends to the assignee of a reversion expectant upon the determination of an incorporeal right, such as a right to dig for and carry away clay granted for a term of years (*d*), or a right to kill and take game (*e*);

(*u*) See also Conveyancing Act, 1881, 44 & 45 Vict. c. 41, ss. 10—12.

(*x*) *Brett* v. *Cumberland*, Cro. Jac. 522.

(*y*) *Palmer* v. *Edwards*, 1 Doug. 186; *Thursby* v. *Plant*, 1 Wms. Saund. 240; *Jourdain* v. *Wilson*, 4 B. & Ald. 266.

(*z*) *Per* Lord Macnaghten in *Eccles* v. *Mills*, (1898) A.C. 360, 371; 67 L.J. P.C. 25, 31; approved and followed in *Stuart* v. *Joy*, (1904) 1 K.B. 362; 73 L.J. K.B. 97. But there is no liability for wrongful or negligent acts of the assignee which have not been authorised: *Sanderson* v. *Berwick-upon-Tweed Corporation*, 13 Q.B.D. 547; 53 L.J. Q.B. 559; *Williams* v. *Gabriel*, (1906) 1 K.B. 155; 75 L.J. K.B. 149.

(*a*) *Beely* v. *Parry*, 3 Lev. 154; *Elliott* v. *Johnson*, L.R. 2 Q.B. 120; 36 L.J. Q.B. 44.

(*b*) *Standen* v. *Chrismas*, 10 Q.B. 142; 16 L.J. Q.B. 265; *Bickford* v. *Parson*, 5 C.B. 929; 17 L.J. C.P. 192.

(*c*) *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 269.

(*d*) *Martyn* v. *Williams*, 1 H. & N. 817; 26 L.J. Ex. 117.

(*e*) *Hooper* v. *Clark*, L.R. 2 Q.B. 200; 36 L.J. Q.B. 79.

also to the assignee of the reversion of copyhold tenements (*f*); to the assignee of the reversion of a lease for life as well as for years (*g*); to the assignee of part of the reversion in all the land (*h*); and to the assignee of the reversion as to part of the land, though the assignee has not the whole interest in the covenant (*i*); and, where a tenant for life makes a lease in pursuance of a leasing power, the remainderman is considered to be an assignee of the reversion within the statute (*k*). But, to enable the assignee of the reversion to avail himself of the statute, it was held that there should be a privity of estate between him and the party sought to be charged with the performance of the covenants, *i.e.*, the assignee of the reversion and the party sought to be charged must have been respectively possessed of the estates which the covenantor and the covenantee had in the land at the time the covenants were entered into. So where a lessee for a term of ninety-nine years created out of his estate an under-lease for eleven years, leaving in himself the immediate reversion for the remainder of the term, and obtained from the under-lessee covenants to pay rent and repair, and then assigned his immediate reversion to A., who subsequently acquired the ultimate reversion in fee, wherein the reversion for the term became merged, it was held that A., after this merger, could no longer maintain an action upon the covenants, as the estate to which they were annexed, the reversion for the term immediately expectant upon the determination of the under-lease, no longer existed, and that, as the assignee was no longer in possession of the reversion which the covenantee had in the land, the privity of estate was gone, and with it the right of action upon the covenants (*l*). A covenant by a lessor with his lessee that if he should obtain from his superior landlord an extension of his term he would grant the lessee a new lease, is not a covenant running with the land, under 32 Hen. 8, c. 34, s. 2 (*m*); neither is a covenant by a lessor granting his lessee an option of purchase within that statute (*n*). But by the Real Property Amendment Act, 1845 (*o*), it is enacted (sect. 9) that, when the reversion expec-

(*f*) *Glover* v. *Cope*, 3 Lev. 326; Carth. 205.

(*g*) *Lewes* v. *Ridge*, Cro. Eliz. 863; *Matures* v. *Westwood*, *ib.* 617.

(*h*) *Wright* v. *Burroughes*, 3 C.B. 685; 16 L.J. C.P. 6.

(*i*) *Twynam* v. *Pickard*, 2 B. & Ald. 105; Co. Litt. 215, a; *Badeley* v. *Vigurs*, 4 E. & B. 85; 23 L.J. Q.B. 377; *Swansea* (*Mayor*) v. *Thomas*, 10 Q.B.D. 48; 52 L.J. Q.B. 340.

(*k*) *Isherwood* v. *Oldknow*, 3 M. & S. 382; *Yellowly* v. *Gower*, 11 Exch. 274; 24 L.J. Ex. 297.

(*l*) *Webb* v. *Russell*, 3 T.R. 393.

(*m*) *Muller* v. *Trafford*, (1901) 1 Ch. 54; 70 L.J. Ch. 72.

(*n*) *Woodall* v. *Clifton*, (1905) 2 Ch. 657; 74 L.J. Ch. 555.

(*o*) 8 & 9 Vict. c. 106, repealing 7 & 8 Vict. c. 76.

tant on a lease shall be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements, &c., shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

The assignee must also be the assignee of the legal estate in the land; and, whenever it appears upon the face of the deed containing the covenants that the lessor was clothed only with the equitable interest, the benefit and burden of the covenant do not pass to the assignee (*p*); "for there is no estate in law to sustain and carry the covenant; and, if one having no estate at all in the land grants a lease to A., who assigns to B., with a covenant for quiet enjoyment, and B. assigns over to C., no action lies for C. against A., because nothing passed but by estoppel (*q*). But, whenever an estate by estoppel becomes an estate in interest by the lessor's subsequent acquisition of the estate, the lessor and lessee, and their respective assignees, are clothed with the same rights and liabilities as if the estate had *ab initio* been an estate in interest" (*r*). And if a lease be made by indenture in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest, there seems to be no sound reason why the assignee should not establish his title by way of estoppel (*s*).

Assignees of grantees of a licence to take a profit from the soil of the grantor are as much bound by a covenant respecting the enjoyment of the licence or the making of compensation for injury done to other land not included in the licence as a lessee and his assignees (*t*).

Requisites of covenant.—Where "assigns" are not named in the covenant and the thing was not *in esse* at the time of the making of the covenant, there is no presumption that the covenant should run with the land; but where the covenant is inherent in, or touches and concerns the land (*u*), that is, where the performance or non-performance of it must affect

(*p*) *Pargeter* v. *Harris*, 7 Q.B. 708; 15 L.J. Q.B. 113.

(*q*) *Noke* v. *Awder*, Cro. Eliz. 436; *Whitton* v. *Peacock*, 2 Bing. N.C. 411; 5 L.J. C.P. 124.

(*r*) *Walton* v. *Waterhouse*, 2 Wms. Saund. 418 n, e.

(*s*) *Spencer's case*, 5 Co. Rep. 16; 1 Smith's L.C. (11th ed.) 55; *Webb* v. *Austin*, 8 Sc. N.R. 419; 13 L.J. C.P. 203; *Sturgeon* v. *Wingfield*, 15 M. & W. 228; 15 L.J. Ex. 212; *Rennie* v. *Robinson*, 7 Moore, 539; 1 L.J. (O.S.) C.P. 30.

(*t*) *Norval* v. *Pascoe*, 34 L.J. Ch. 82.

(*u*) *Clegg* v. *Hands*, 45 Ch. D. 502; 59 L.J. Ch. 477; *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L.J. Ch. 387; *Chapman* v. *Smith*, (1907) 2 Ch. 97; 76 L.J. Ch. 394.

the nature, quality, or value of the thing demised, and its mode of enjoyment, it will run with the land even though assigns be not named (*x*). Merely collateral or personal covenants do not run with the land (*y*). A covenant by the lessee of a house to account and pay so much for every tun of wine sold in the house is a collateral and mere personal covenant (*z*); so is a covenant by a lessee with his lessors, who are brewers, to take all his beer of such lessors or their successors in their trade (*a*). So a proviso for re-entry in case of a conviction under the game laws does not entitle the assignee of the lessor to re-enter upon such conviction (*b*); nor does a covenant not to build a public-house within half a mile of the demised premises run with the land (*c*). But all covenants relating to the cultivation of the demised premises (*d*); to conduct the business of a beer-house in an orderly manner (*e*); to buy wines from the lessor, his successors or assigns (*f*); to pay rent, or render suits or services (*g*); not to assign or underlet or otherwise part with the possession of the demised premises, without first obtaining the consent in writing of the lessor (*h*); to renew the lease (*i*); to dwell in and upon the demised farm and lands (*k*); to insure premises situate within the weekly bills of mortality (*l*); or not to exercise thereon certain specific trades (*m*); have been held to run with the land: as also covenants to repair the buildings, and to repair, renew, and replace tenants' fixtures and machinery fixed to the premises (*n*); to discharge the land from all taxes, burdens, &c. (*o*); to make good damage done by the exercise of a right granted for a term of years to dig for and carry away clay or minerals (*p*); to make a periodical payment in respect of coals carried by virtue of a wayleave over

(*x*) *Minshull* v. *Oakes*, 2 H. & N. 809; 27 L.J. Ex. 194; *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L.J. Ch. 59; see 44 & 45 Vict. c. 41, s. 58, *post*, p. 236.

(*y*) *Congleton Corporation* v. *Pattison*, 10 East, 130; see *Dyson* v. *Forster*, (1909) A.C. 98, 102; 78 L.J. K.B. 246.

(*z*) Godb. pl. 140; *Canham* v. *Rust*, 8 Taunt. 227; 2 Moore, 164.

(*a*) Bayley, J., *Doe* v. *Reid*, 10 B. & C. 857; 8 L.J. (O.S.) K.B. 328; but see *Clegg* v. *Hands*, *supra*; *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 609; 70 L.J. Ch. 814.

(*b*) *Stevens* v. *Copp*, L.R. 4 Ex. 20; 38 L.J. Ex. 31.

(*c*) *Thomas* v. *Hayward*, L.R. 4 Ex. 311; 38 L.J. Ex. 175.

(*d*) *Cockson* v. *Cock*, Cro. Jac. 125.

(*e*) *Fleetwood* v. *Hull*, 23 Q.B.D. 35; 58 L.J. Q.B. 141.

(*f*) *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L.J. Ch. 387.

(*g*) *Stevenson* v. *Lambard*, 2 East, 575; see *Swansea* (*Mayor*) v. *Thomas*, 10 Q.B.D. 48; 52 L.J. Q.B. 340.

(*h*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*i*) *Roe* v. *Hayley*, 12 East, 469.

(*k*) *Tatem* v. *Chaplin*, 2 H. Bl. 133.

(*l*) *Vernon* v. *Smith*, 5 B. & Ald. 1.

(*m*) *Doe* v. *Keeling*, 1 M. & S. 95; *Hodgson* v. *Coppard*, 30 L.J. Ch. 20; 20 Beav. 4.

(*n*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*o*) *Windsor* (*Dean*) *case*, 5 Co. Rep. 24 b; *Martyn* v. *Clue*, 18 Q.B. 681; 22 L.J. Q.B. 147.

(*p*) *Martyn* v. *Williams*, 1 H. & N. 828; 26 L.J. Ex. 122; *Norval* v. *Pascoe*, 34 L.J. Ch. 82.

part of the lessor's land (*q*); and to keep on the land a certain quantity of game (*r*). A proviso for re-entry in case of liquidation or bankruptcy runs with the land (*s*). Where a lessee covenanted to grind at the lessor's mill all the corn that should grow on the demised lands, it was held that this was a covenant which ran with the land, and passed to the assignee of the reversion as long as the ownership of the lands and the mill remained in the same individual (*t*). So, where a lessor demised a house, excepting two rooms and a free passage thereto, it was held that the exception amounted to an express covenant or grant of a free passage or right of way by the lessee, and would bind the assignees of the term (*u*). And, if the lessee covenants not to erect buildings on the land demised so as to obstruct the lessor's light, or destroy his prospect, or impede the air, this is a covenant which runs with the land, and binds all the assignees of the term (*x*). But a covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beershop, does not run with the land (*y*). If the lessee covenants to build a wall, or an outhouse, or to erect a mill, or construct dwelling-houses on some part of the demised land, then, although the covenant extends to a thing to be newly made, yet, as it is to be made upon the thing demised, the assignee takes the benefit of it, if he be named (*z*). But, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the covenants shall not extend to the assignee, "as if the lessee covenants, for himself and his assigns, to build a house upon land of the lessor which is no parcel of the demise" (*a*); or to repair, renew, and replace mere utensils or movable chattels used in the business carried on in the demised premises, and being there at the time of the demise (*b*). By the Conveyancing Act, 1881, a covenant relating to land of inheritance or devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his heirs and

(*q*) *Hastings* (*Lord*) v. *N. E. Ry.*, (1898) 2 Ch. 674; 67 L.J. Ch. 590.

(*r*) *Hooper* v. *Clark*, L.R. 2 Q.B. 200; 36 L.J. Q.B. 79.

(*s*) *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743.

(*t*) *Vyryan* v. *Arthur*, 1 B. & C. 415; 1 L.J. (O.S.) K.B. 138.

(*u*) *Cole's case*, 1 Salk. 196; *Bush* v. *Calis*, 1 Show. 389; Carth. 232.

(*x*) *Bachelor* v. *Gage*, Cro. Car. 188.

(*y*) *Wilson* v. *Hart*, L.R. 1 Ch. 463; 35 L.J. Ch. 569.

(*z*) *Smith* v. *Arnold*, 3 Salk. 4; *Anon.*, Moore, 159, pl. 300; *Sampson* v. *Easterby*, 9 B. & C. 505; 5 L.J. (O.S.) K.B. 291; *Easterby* v. *Sampson*, 6 Bing. 645.

(*a*) *Spencer's case*, 5 Co. Rep. 16, a; 1 Smith's L.C. (11th ed.) 55; *Doughty* v. *Bowman*, 11 Q.B. 454; 7 L.J. Q.B. 111; qualified and explained, *Minshull* v. *Oakes*, 2 H. & N. 809; 27 L.J. Ex. 194. See *ante*, p. 235, note (*x*).

(*b*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231; *Dewar* v. *Goodman*, (1909) A.C. 72; 78 L.J. K.B. 209.

assigns, and shall have effect as if so expressed, and when not so relating or devolving to be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if so expressed (*c*). A covenant and a contract, a bond or obligation under seal, though not expressed to bind the heirs, is to bind them and the real estate as well as the executors and personal estate, except where the contrary is expressed (*d*). A covenant, &c., with two or more jointly, implies, unless otherwise expressed, an obligation to the survivor, and to any person on whom the right to sue devolves (*e*); and where in a mortgage or an obligation money is advanced by more than one person, or a mortgage or obligation is made to more than one person, the mortgage money is deemed to be money belonging to those persons on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representatives is a discharge notwithstanding any notice of severance (*f*).

Parties entitled to sue.—Continuing breaches.—Lastly, although the covenant is transferred with the land by assignment, as appurtenant to the estate, yet an existing breach of such covenant is not transferred (*g*). Thus, where rent covenanted to be paid was in arrear, and after the arrearages incurred, and before action brought, the plaintiff assigned his reversion, it was held that the right to the arrearages was "a right vested in the plaintiff before the assignment, the which he should not lose by the assignment" (*h*); for, although the covenant had been transferred with the estate to the assignee, yet it was not so with respect to the right of action which had previously accrued. But, as regards what are termed continuing breaches, the assignee may maintain an action as soon as he becomes seised or possessed of the estate to which the covenant running with the land is annexed; as where, in breach of a covenant to repair, the premises are left out of repair at the time of the assignment, and come so to the hands of the assignee, and remain so afterwards, the covenant is then broken again in the time of the assignee, by reason of the acts to be done upon the land remaining unperformed (*i*). But, if the covenant is broken, and the lease expires, and then the premises

(*c*) 44 & 45 Vict. c. 41, s. 58.

(*d*) Sect. 59; this extends to implied covenants under the Act, and only to covenants, &c., made since the Act.

(*e*) Sect. 60; the section only applies to covenants, &c., after the Act.

(*f*) Sect. 61, unless otherwise provided in the mortgage, &c. The section only applies to mortgages, &c., after the Act.

(*g*) *Lewes* v. *Ridge*, Cro. Eliz. 863.

(*h*) *Anon.*, Skin. 367; *Midgley* v. *Lorelace*, Carth. 289; 12 Mod. 46.

(*i*) *Mascal's case*, 1 Leon. 62; *Vivian* v. *Champion*, 1 Salk. 141; 2 Ld. Raym. 1125.

are assigned, the assignee can maintain no action upon the covenant; for the ultimate damage had accrued before the time of the assignee. A breach of a covenant for title is in the nature of a continuing breach, as long as the party entitled to the benefit of the covenant is in possession of the land under a defective title; for it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require" (*k*).

Implied covenants arising from the word "demise" in a lease under seal run with the estate or term of years created in the land, so that the assignee of the lessee, if evicted, has an action thereon against the original lessor. But the law raises no implied covenant from a person who has not the legal estate in the land, *e.g.*, from a mortgagor who has joined a mortgagee in making a lease (*l*), and from whom no legal interest passes. By the Real Property Amendment Act, 1845 (*m*), s. 4, it is enacted that the word "give" or "grant," in a deed executed after the 1st of October, 1845, shall not imply any covenant in law; but from the word "demise" there is still an absolute covenant for quiet enjoyment (*n*). As to whether a covenant for title or quiet enjoyment is implied from the mere relation of landlord and tenant (*o*), see *post*, pp. 449, 667.

Covenants annexed to estate of joint tenants and tenants in common.—If the assignees have a joint interest in, and are jointly entitled to, the estate to which the covenants are annexed, they have a joint interest in the covenants; and separate interests when they have several estates, and a separate and distinct damage will accrue to each from a breach of the covenants. When a reversion expectant upon the determination of a lease for years, upon which a rent has been reserved, comes to tenants in common, these have, it seems, a joint or separate interest in the rent, at their election (*p*). But, in covenants running with the land, and coming to either tenants in common or joint tenants, the interest is joint or several, according as the duties are joint in favour of all, or separate to each (*q*). The benefit of a covenant to repair in a joint

(*k*) Shep. Touch. 170.

(*l*) *Spencer's case*, 5 Co. Rep. 16 a; *Noke's case*, 4 Co. Rep. 80 b; *Smith* v. *Pocklington*, 1 C. & J. 445.

(*m*) 8 & 9 Vict. c. 106.

(*n*) See Conveyancing Act, 1881, 44 & 45 Vict. c. 41, ss. 7, 49.

(*o*) See *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787; *Jones* v. *Lavington*, (1903) 1 K.B. 253; 72 L.J. K.B. 98.

(*p*) *Martin* v. *Crompe*, 1 Ld. Raym. 341; *Harrison* v. *Barnby*, 5 T.R. 246.

(*q*) *Kitchen* v. *Buckly*, 1 Lev. 109; *Magnay* v. *Edwards*, 22 L.J. C.P. 170; 13 C.B. 479; *Simpson* v. *Clayton*, 4 Bing N.C. 758; 8 L.J. C.P. 59.

demise by tenants in common runs with the entire reversion only; and, therefore, the representatives of all the tenants in common on a lease so jointly made by them have a joint interest in the damages arising from a breach of such covenant (*r*). If the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place affecting the value of the entire reversion, each of the parties interested has a separate right of action; and the damages will be assessed and apportioned according to their several shares and interests in the subject-matter of the covenant (*s*).

Assignment of rent and annuities.—The grant of a sum of money to issue out of the land of the grantor, and to be paid at fixed consecutive periods, for a term of years, for life, or in fee, is in strictness of law a rent. When it is granted to be paid by the grantor and his representatives only, then it is an annuity. As, however, both the land and the personalty are generally made liable to the payment of the money, the term "annuity" has been indiscriminately used to signify both the charge on the person and the charge on the land, which, as the rights and properties by law incident to the one and the other are altogether different, is apt to create some misconception concerning them (*t*). A rent or sum of money, issuing out of land, is a direct interest in realty in possession, and was assignable by the common law; but an annuity or sum of money granted to be paid by the grantor and his representatives only, issuing therefore out of personalty, or, as it has been said, "the coffers of the grantor," and not charged upon or issuing out of the land, was a mere personal contract or *chose in action*, and could not, therefore, be assigned so as to give the assignee a right of action for it in his own name (*u*). When both the person and the land of the grantor were made liable to the payment of the money, the grantee had an election, either to bring a writ of annuity, and, charging the person, to make the grant personal only, or by distraining on the land to make it real; but he could not have both the one and the other; for, the writ of annuity having been once brought, the land was thenceforth discharged. Before election, however, the rent passed with all its legal incidents to the assignee, who, standing in the shoes of the grantee, had the same right of election as

(*r*) *Thompson* v. *Hakewell*, 19 C.B. N.S. 713; 35 L.J. C.P. 18.

(*s*) *Roberts* v. *Holland*, (1893) 1 Q.B. 665; 62 L.J. Q.B. 621.

(*t*) Doct. & Stud. Dial. 1, c. 30.

(*u*) Co. Litt. 144 a, 144 b; *Maund's case*, 7 Co. 28 b; *Gerrard* v. *Boden*, Hetley, 80; *Baker* v. *Brook*, 1 Dy. 65 a.

between the land and the person (*x*). As, however, no personal action other than the writ of annuity could be maintained in respect of a rent granted for life or in fee, so long as the estate of freehold had continuance (*y*), there being remedies of a higher and more summary nature by way of distress and assize, no right of action could be transferred to the assignee of a freehold rent; but, when the rent was granted for a term of years, then, as an action of debt might be maintained for the recovery of such rent, such right of action would pass to the assignee as incident to the interest in the land granted (*z*).

Rent reserved on a lease for years might at common law be severed from the reversion, and assigned so as to give the assignee an action of debt for the arrears (*a*). Thus, where premises were demised for a term of years by an indenture of lease containing covenants by the lessee for the payment of rent, and subsequently the rent, and the counterpart of the lease, and the benefit of the covenants, were assigned, it was held that the assignee might maintain debt against the lessee for the recovery of the rent (*b*). But nothing in the shape of contract passes by such an assignment, and the assignee has no remedy upon any covenant or stipulation made concerning the land, or for better securing the payment of the rent; for a covenant cannot run with a RENT. Thus, where the defendant covenanted with B. to pay him, his heirs and assigns, a certain rent to be issuing out of the land of the defendant, and covenanted to build one or more messuages on the land for better securing the rent, it was held that this covenant was a mere personal covenant, operative only between the immediate parties thereto and their privies, and that the assignee of the rent had no title to maintain an action upon the covenant, either for the non-payment of the rent, or for not building the messuages (*c*), or for non-repair (*d*).

(*x*) Bac. Abr. Rent (K), 2; Co. Litt. 144 b.

(*y*) *Webb* v. *Jiggs*, 4 M. & S. 113; *Randall* v. *Rigby*, 4 M. & W. 130; 7 L.J. Ex. 240.

(*z*) *Browne* v. *Pendlebury*, Cro. Eliz. 268; Gilbert's Rents, 93.

(*a*) *Newcomb* v. *Harrey*, Carth. 161; *Wilston* v. *Pilkney*, 2 Lev. 80; Ventr. 242; *Cartwright* v. *Pilkney*, Ventr. 272; *Ards* v. *Watkin*, Cro. Eliz. 637.

(*b*) *Allen* v. *Bryan*, 5 B. & C. 512; 4 L.J. (O.S.) K.B. 210; *Williams* v. *Hayward*, 28 L.J. Q.B. 374; 1 E. & E. 1040.

(*c*) *Milnes* v. *Branch*, 5 M. & S. 411; *Brewster* v. *Kitchin*, 1 Ld. Raym. 318; *Spencer's case*, 1 Smith's L.C. (ed. 11) 55.

(*d*) *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73.

SECTION II.

TRANSFER BY DEATH.

Transfer of real estate.—Since the date of the commencement of the Land Transfer Act, 1897 (*e*), in the case of the death of any person in whom real estate is vested, without a right in any other person, such as a co-trustee, to take by survivorship, the real estate devolves upon and becomes vested in the personal representatives of the deceased (*f*) and not in the heir-at-law. Such personal representatives are to hold the real estate as trustees for the persons beneficially entitled thereto, and may convey it to the heir or devisee either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without such charge, and on the assent by the personal representatives to any devise of real estate contained in the will, or on such conveyance by them to the heir or devisee as before mentioned, all liabilities of the personal representative in respect of the land shall cease, except as to any acts done or contracts entered into by them, before such assent or conveyance (*g*). Nothing then vests in a devisee under a devise or in an heir-at-law in case of an intestacy without the assent, express or implied, of the personal representatives (*h*) or a transfer to him by them of the estate of the ancestor (*i*).

Descent of real and personal covenants and simple contracts entered into with an ancestor.—Real contracts, or covenants running with the land, annexed to an estate of inheritance, descend with the land (*k*); and such personal covenants as relate to the freehold, and affect the value of the inheritance, similarly descend. Thus, if the covenant was with another and his heirs to enfeoff that other and his heirs of the manor of D., and he to whom the covenant is made die before perform-

(*e*) 60 & 61 Vict. c. 65; Jan. 1st, 1898.

(*f*) Where special executors of property in Australia are appointed and also general executors, the latter alone are "personal representatives," within sects. 1 and 2 (sub-sect. 2) of the Act: *Cohen's Executors and London County Council, In re*, (1902) 1 Ch. 187; 71 L.J. Ch. 164.

(*g*) Sect. 3, sub-s. 1. The Act has not the effect of causing the costs of an administration action to be borne by the real estate and the personal estate proportionately to their respective values, and these costs, so far as they have been increased by the administration of real estate, will be borne by the real estate: *Middleton, In re, Thompson* v. *Harris*, 19 Ch. D. 552; 51 L.J. Ch. 273; *Jones, In re, Elgood* v. *Jones*, (1902) 1 Ch. 92; 71 L.J. Ch. 6.

(*h*) *Culverhouse, In re, Cook* v. *Culverhouse*, (1896) 2 Ch. 251; 65 L.J. Ch. 484.

(*i*) See Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 16; *Brooke and Fremlin's Contract, In re*, (1898) 1 Ch. 647; 67 L.J. Ch. 272; *Howgate and Osborn's Contract, In re*, (1902) 1 Ch. 451; 71 L.J. Ch. 279.

(*k*) *Lougher* v. *Williams*, 2 Lev. 92.

ance, the right of action upon the deed will survive (*l*). So, whenever the representatives would have had the benefit of whatever would have accrued from the performance of a covenant, they will have the damages that accrue from the non-performance. Thus, where a contract for the purchase of land is entered into between an intestate and another person, and it has not been completed at the intestate's death, but is capable of being enforced, the money and the land are to go as if the contract had been actually carried into execution, and the representatives are entitled to have either the land or the money which would have been applied in the purchase of the land under the intestate's contract (*m*). And, where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held that the house should be finished at the expense of the personal estate (*n*). Where there is a contract enforceable against an heir or devisee for sale of a freehold interest descendible to heirs general, the deceased's personal representatives have power to convey the land, but such conveyance is not to affect the beneficial rights of any person (*o*).

Right of action in respect of breach of covenant.—When a real contract or covenant running with the land has been broken in the lifetime of the ancestor, and the breach is a continuing one, the personal representative of the ancestor will be liable in respect thereof to the extent of the assets (*p*), and with respect to breaches of real contracts not in the nature of continuing breaches, the covenant having been broken once for all and the entire and ultimate damage having accrued, such damage will survive to the personal representatives (*q*). Where a vendor of land executed a conveyance, professing to convey an estate in fee in the land, and covenanted with the vendee and his heirs for further assurance on request, and a request was made by the vendee in his lifetime to have a fine levied by the vendor for better assuring the estate granted, but no fine was levied, in consequence whereof the heir-at-law of the vendee, after the death of the latter, who quietly enjoyed the estate during his life, was evicted, it was held that the heir-at-law could maintain an action for the damages conse-

(*l*) Fitz. N.B. 145 c; Touch. 175; *Wotton* v. *Cook*, Dy. 337 b.

(*m*) *Hudson* v. *Cook*, L.R. 13 Eq. 417; 41 L.J. Ch. 306.

(*n*) *Cooper* v. *Jarman*, L.R. 3 Eq. 98; 36 L.J. Ch. 85; *Day, In re*, (1898) 2 Ch. 510; 67 L.J. Ch. 619.

(*o*) Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 4 (1), (2).

(*p*) See *Cyhil* v. *Freelove*, 3 Mod. 326; *Rendall* v. *Andreæ*, 61 L.J. Q.B. 630.

(*q*) *Ricketts* v. *Weaver*, 12 M. & W. 718; 13 L.J. Ex. 195.

quent on the eviction (*r*); and where the ancestor was himself evicted, it was held that the executors, though not named in the covenant, might sue (*s*). So, an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage (*t*).

If a man covenants not to cut down certain trees growing on the land of the covenantee, and afterwards fells them in the lifetime of the latter, the personal representative is the proper party to maintain an action for the breach, as the entire damage has accrued, and the covenant has been broken, "once for all," before the time of the heir-at-law. There can be no continuing breach of such a covenant; and the right of action, therefore, remains with the personal representative as part of the personal estate (*u*). And, if a man enters into a covenant with the testator to discharge the testator's land from incumbrances, the executor is the proper party to maintain an action to recover damages for whatever breaches are committed in the lifetime of the testator, such breaches constituting separate and distinct causes of action, and operating as a direct injury to the personal estate (*x*). So, with regard to the breach of a covenant to pay rent, although the covenant when annexed to an estate of inheritance descends with the land, yet all the arrearages that have accrued up to the death of the ancestor belong to the personal estate. In these cases each breach is entire, giving a separate and distinct right of action; and, although the covenant is transferred with the estate, yet it is not so with the breaches and consequent right of action that have previously accrued (*y*).

Transfer of trust and mortgage estates on death.—By sect. 30 of the Conveyancing Act, 1881 (*z*), provision is made for the devolution (notwithstanding any devise to the contrary) of trust and mortgage estates upon the personal representatives of the deceased with all the consequences of such devolution.

Transfer of covenants annexed to estates pur autre vie.—In the case of an estate holden during the life of another, the grantee or assignee of which has died in the lifetime of the *cestui que vie*, the estate would at common law pass to the heir-at-law of the personal representatives of the grantee *pur autre vie*, according as he or they may or may not have been

(*r*) *Jones* v. *King*, 4 M. & S. 188.
(*s*) *Lucy* v. *Levington*, 2 Lev. 26; 1 Ventr. 175.
(*t*) *Raymond* v. *Fitch*, 2 C. M. & R. 588; 5 L.J. Ex. 45; *Morley* v. *Polhill*, 2 Ventr. 56.
(*u*) *Raymond* v. *Fitch*, 2 C. M. & R. 588; 5 L.J. Ex. 45.
(*x*) *Smith* v. *Simonds*, Comb. 64.
(*y*) *Midgley* v. *Lovelace*, Carth. 289.
(*z*) 44 & 45 Vict. c. 41.

named in the deed or instrument of conveyance (*a*). If the estate *pur autre vie* was limited to the grantee or lessee and his heirs, the heir would take as special occupant on the death of the grantee, because included by name in the grant; if, on the other hand, the estate was limited to the grantee and his executors, or was conferred without any words of limitation, the personal representative would take (*b*). So, if the owner of an estate *pur autre vie* granted to him, his heirs and assigns, bequeathed the estate to A. and his assigns, and A. died intestate in the lifetime of the *cestui que vie*, the premises would pass to A.'s personal representative (*c*). Now, whether the estate *pur autre vie* be limited to A., his heirs and assigns, or to A. simply, or to A., his executors, administrators, and assigns, it will devolve upon the executor or administrator of the deceased tenant, to be applied by him like personal estate vesting in him as legal assets (*d*).

Transfer of covenants annexed to leasehold estates and interests.—No mere words of limitation can vary the course of succession of a chattel interest. All real contracts or covenants running with the land, annexed to reversions for terms of years, leases, and chattel interests in land, pass, together with the estates to which they are annexed, to the personal representatives of the deceased covenantee (*e*). No estate of freehold can be created out of a term of years. If, therefore, a lessee for years makes a lease for life, it is a chattel interest (*f*). If a person holds lands as tenant by statute merchant, statute staple, or *elegit*, he also has a chattel interest only, which passes to his personal representative (*g*). Whatever covenants, therefore, are annexed to such estates and interest in the land pass to the personal representative as the assignee in law of the covenantee; and he alone can maintain an action upon them.

Bonds and personal covenants and simple contracts.—The executor or administrator is the person entitled to sue upon

(*a*) *Northern* v. *Carnegie*, 4 Drew. 587, 590; *Ripley* v. *Waterworth*, 7 Ves. 425, 438; *Michell, In re, Moore* v. *Moore*, (1892) 2 Ch. 87, 96; 61 L.J. Ch. 326.

(*b*) *Doe* v. *Robinson*, 8 B. & C. 296; 6 L.J. (O.S.) K.B. 273; Bac. Abr. Estates for life and occupancy, B. 3; *Carpenter* v. *Dunsmure*, 3 E. & B. 918. General occupancy, by the first person who entered into possession, was abolished by the Statute of Frauds, 29 Car. 2, c. 3, s. 12; amended by 14 Geo. 2, c. 20, s. 9. See also Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, s. 6.

(*c*) *Doe* v. *Lewis*, 9 M. & W. 662; 11 L.J. Ex. 305.

(*d*) Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, s. 6; *Christy* v. *Courtenay*, 26 Beav. 140; *Reynolds* v. *Wright*, 2 De G. F. & J. 590; 30 L.J. Ch. 381; *Inman, In re, Inman* v. *Inman*, (1903) 1 Ch. 241; 72 L.J. Ch. 120.

(*e*) Co. Litt. 46 b, 388 a; *Leonard Lovie's case*, 10 Co. 87 b.; *Lerenthorpe* v. *Ashbre*, 1 Roll. Abr. 611; *Howley* v. *Knight*, 14 Q.B. 240; 19 L.J. Q.B. 3.

(*f*) *Butt's case*, 7 Co. 23 a.

(*g*) Co. Litt. 42 a; 2 Saund. 68; 2 Inst. 396.

all bonds and personal covenants and simple contracts entered into with the testator or intestate, and to recover debts of record, such as judgments, statutes, or recognizances, or debts due on specialties (*h*). So completely does the executor or administrator represent the testator or intestate, in respect of his personal contracts, that, where a bond or other personal obligation under seal is made to a man and his heirs, the executor or administrator is nevertheless the only party who can maintain an action upon the instrument (*i*); but, if a bond is conditioned to pay money to such person as the testator shall by will appoint, and the testator makes no appointment, the representative has no claim to the money, as he is not the appointee contemplated by the bond (*k*). The right of action upon all simple or parol contracts entered into with the testator or intestate, whether they be or be not made concerning land, is transferred to the executor or administrator (*l*); and so also is the right of action upon all bills of exchange, promissory notes, and negotiable securities payable to the testator or intestate (*m*). The executor is entitled to indorse and negotiate all notes payable to the order of the testator; and, if the testator has indorsed such a note in his lifetime for a valuable consideration, but has neglected to deliver it to the indorsee, the latter is entitled to call upon the personal representative for an indorsement of the note (*n*). Where a passenger on a railway is injured by an accident and after an interval dies in consequence, his executor may recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business (*o*), but the executor cannot recover such expenses where the action is founded in tort (*p*).

Executory contracts of a deceased person.—The personal representative is entitled to the benefit of all such of the executory contracts of the deceased as he can fairly and efficiently fulfil; and, therefore, if a man builds half a house, or makes half a pair of shoes, and dies, the executors may

(*h*) Com. Dig. Administration (B.13); Vin. Abr. Executors.

(*i*) *Devon* v. *Paulett*, 11 Vin. Abr. 133, pl. 27.

(*k*) *Pease* v. *Mead*, Hob. 9.

(*l*) *Orme* v. *Broughton*, 10 Bing. 533; 3 L.J. C.P. 208; *Knights* v. *Quarles*, 4 Moore, 532; *Bishop* v. *Curtis*, 18 Q.B. 878; 21 L.J. Q.B. 391.

(*m*) *Timmis* v. *Platt*, 2 M. & W. 720; 6 L.J. Ex. 183; *Murray* v. *E. I. Co.*, 5 B. & Ald. 216.

(*n*) *Watkins* v. *Maule*, 2 Jac. & Walk. 243.

(*o*) *Bradshaw* v. *Lancashire & Yorkshire Ry.*, L.R. 10 C.P. 189; 44 L.J. C.P. 148; *Leggott* v. *G. N. Ry.*, 1 Q.B.D. 599; 45 L.J. Q.B. 557.

(*p*) *Pulling* v. *G. E. Ry.*, 9 Q.B.D. 110; 51 L.J. Q.B. 543; Addison on Torts, 61 (ed. 8).

complete the contract, and sue either for work and labour done, or for goods sold and delivered by them as executors (*q*). When, however, the contract is founded upon the known skill of the deceased, or his peculiar intellectual acquirements, as where a publisher, for example, has agreed to pay some celebrated author a fixed sum of money for a treatise, it is absolutely determined by the death, although, if some portion of the work has been completed and accepted or used, the publisher will be liable upon an implied promise in respect of the benefit received (*r*). But, although determined, the contract is not rescinded so as to take away a right of action already vested; and, therefore, where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of 500*l*., by equal quarterly instalments, and shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and that his administrator was therefore entitled to recover them, and not merely to sue upon a *quantum meruit* for the value of the amount of the work actually done (*s*). Contracts of apprenticeship, founded upon personal instruction on the one side and the rendering of work and service on the other, have been held to be discharged and put an end to by the death of either party (*t*); but most contracts of apprenticeship are regulated by statute, or by the custom of trade in particular districts; and the executors, in some places, are bound to assign the apprentice to another master. If the master has covenanted, in the usual way, to find the apprentice in meat, drink, and other necessaries during the term of apprenticeship, the death of the master is no discharge of this covenant, but the personal representatives are bound to perform it, so far as they have assets (*u*).

Liability of real estate for debts of deceased.—The legislature has by various statutes made all the real estate of every debtor assets for the payment of every kind of debt (*x*). The

(*q*) *Werner* v. *Humphreys*, 2 M. & Gr. 853; 3 Sc. N.R. 226; *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; 9 L.J. (O.S.) Ex. 105; *Collinson* v. *Lister*, 7 De G. M. & G. 634; 25 L.J. Ch. 38.

(*r*) *Marshall* v. *Broadhurst*, 1 Tyrw. 349; 9 L.J. (O.S.) Ex. 105; *Siboni* v. *Kirkman*, 1 M. & W. 423; 5 L.J. Ex. 212; *Stubbs* v. *Holywell Ry.*, L.R. 2 Ex. 311; 36 L.J. Ex. 166.

(*s*) *Stubbs* v. *Holywell Ry.*, L.R. 2 Ex. 311; 36 L.J. Ex. 166.

(*t*) *Baxter* v. *Burfield*, 2 Str. 1266.

(*u*) *Wadsworth* v. *Guy*, 1 Sid. 216; *R.* v. *Peek*, 1 Salk. 65; *Walker* v. *Hull*, 1 Lev. 177.

(*x*) *Fleming* v. *Buchanan*, 22 L.J. Ch. 886; 3 De G. M. & G. 976; *Hamer*,

paramount trust imposed by the law on the personal representative is that of paying the debts of the deceased, and until this trust has been fulfilled the personal representative is not concerned with the directions of the deceased as to the disposition of his estate. If lands have been sold or conveyed away before the commencement of the action, they cannot be charged in the hands of a *bonâ fide* alienee (*y*), but the personal representative is, nevertheless, responsible to the extent of the full value of such lands (*z*). As to the order of application of assets in payment of debts, the rules of law in force at the passing of the Land Transfer Act, 1897 (*a*), are by section 2 (3) expressly retained, and while an express charge of debts on real estate is now unnecessary, the doctrine of marshalling in favour of pecuniary legatees is still applicable where land is devised subject to an express charge of debts and the personalty is exhausted in paying debts (*b*). Where a testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate (*c*); but where the direction is that the debts shall be paid by the executor, then the presumption is that the testator intended the debts to be paid primarily out of the property which passes to the executor (*d*).

Liability of personal representative on covenant for payment of rent.—The personal representative of a deceased lessee or termor is, in contemplation of law, the assignee of the term, and is liable, as such, upon all covenants running with the land annexed to leases and chattel interests (*e*), to the extent of the assets in his hands, although he does not enter upon, or take possession of, the demised premises (*f*). If he enters and takes possession, he then becomes *primâ facie* chargeable *de bonis propriis* for the full amount of the rent; if, however, the annual value of the property is less than the rent, he is then personally responsible only to the extent of the actual annual value; but he continues liable, in his representative

Ex parte, 21 L.J. Ch. 832; 4 De G. M. & G. 866; 3 & 4 Will. 4, c. 104; 32 & 33 Vict. c. 46.

(*y*) *British Mutual Investment Co.* v. *Smart*, L.R. 10 Ch. 567; 44 L.J. Ch. 695.

(*z*) 11 Geo. 4 & 1 Will. 4, c. 47, ss. 3, 4, 6; *Farley* v. *Briant*, 3 Ad. & E. 846; 5 L.J. K.B. 132.

(*a*) 60 & 61 Vict. c. 65.

(*b*) *Kempster, In re, Kempster* v. *Kempster*, (1906) 1 Ch. 446; 75 L.J. Ch. 286.

(*c*) Per Lord Romilly, *Cook* v. *Dawson*, 29 Beav. 123, 126; 30 L.J. Ch. 311; *Shalleross* v. *Finden*, 3 Ves. 738; *Graves* v. *Graves*, 8 Sim. 43; 5 L.J. Ch. 270; *Sult, In re, Brothwood* v. *Keeling*, (1895) 2 Ch. 203; 64 L.J. Ch. 494; *Roberts, In re, Roberts* v. *Roberts*, (1902) 2 Ch. 834; 72 L.J. Ch. 38.

(*d*) *Cook* v. *Dawson*, *supra*; cp. *Powell* v. *Robins*, 7 Ves. 209.

(*e*) *Spencer's case*, 5 Co. 17 b; *ante*, p. 229.

(*f*) *Howse* v. *Webster*, Yelv. 103; but see *Rendall* v. *Andreæ*, 61 L.J. Q.B. 630.

character, to the extent of the assets in his hands, for the proportion of the rent which exceeds the annual profits, or what the land is worth to let (*g*). If the rent is of less value than the lands, which the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and no other payment out of the profits can be justified till the rent is answered. On the other hand, if the rent is more than the land is worth, the profits must be appropriated to its discharge as far as they will go (*h*). The personal representatives cannot rely on any deterioration in value which has resulted from non-performance of covenants which ought to have been fulfilled by them (*i*). An administrator appointed *ad colligenda bona* who enters upon demised premises is liable for rent and mesne profits from the date of his appointment up to the date of his giving up possession (*k*).

Covenants to repair.—If the personal representative has entered and taken possession of leasehold premises, he is personally responsible, *de bonis propriis*, to the extent of the entire damage resulting from the breach of a covenant to repair, whether the profits derived from the premises are or are not adequate to meet the costs of repairing (*l*).

Effect of assignment of lease.—After an assignment of the term, whether by the lessee or by his personal representative, the personal representative cannot be charged upon the covenants of the lease as assignee of the estate; but he still remains liable upon the privity of contract (*ante*, p. 227) (*m*). If he has himself assigned the lease, he is chargeable as assignee, in respect of breaches of covenants that accrued during the time the term was vested in him, but not for breaches committed afterwards. And he is always liable, in his representative character, to the extent of the assets in his hands, and may be sued as personal representative upon the covenants in the lease, notwithstanding the assignment of the term; and, if the lessor has assigned his reversion, the action may be brought against him by the assignee of the reversion; "for, by the express words of 32 Hen. 8, c. 34, such remedy as the lessor

(*g*) *Rubery* v. *Stevens*, 4 B. & Ad. 241; 2 L.J. K.B. 46; *Wollaston* v. *Hakewill*, 3 Man. & G. 297; 10 L.J. C.P. 303; *Hopwood* v. *Whaley*, 6 C.B. 744; 18 L.J. C.P. 43; *Bowes, In re, Strathmore* v. *Vane*, 37 Ch. D. 128. 131; 57 L.J. Ch. 455; *Rendall* v. *Andreæ*, 61 L.J. Q.B. 630.

(*h*) *Buckley* v. *Pirk*, 1 Salk. 316; 1 Wms. Saund. 112, n. (c); *Jevens* v. *Harridge*, 1 Saund. 1, n. (1).

(*i*) *Hornidge* v. *Wilson*, 11 Ad. & E. 645; 9 L.J. Q.B. 72.

(*k*) *Whitehead* v. *Palmer*, (1908) 1 K.B. 151; 77 L.J. K.B. 60.

(*l*) *Tremeere* v. *Morison*, 1 Bing. N.C. 89; 3 L.J. C.P. 260; *Sleap* v. *Newman*, 12 C.B. N.S. 116; *Rendall* v. *Andreæ*, 61 L.J. Q.B. 630.

(*m*) *Helier* v. *Casebert*, 1 Lev. 127; *Coghil* v. *Freelove*, 3 Mod. 326.

might have had against the lessee or his executors, such remedy the assignee of the lessor shall have against them" (*n*). Hence the personal representative of a lessee, who has contracted to sell the lease, is entitled to, and ought to obtain, from the purchaser, an indemnity against the payment of rent and performance of covenants (*o*). But, as we have already seen, the assignee of a lease may get rid of his liability upon the covenants by simply assigning his estate; and the same power of release is naturally possessed by his personal representative (*p*). The personal representative of an assignee of a lease, who has covenanted to indemnify the assignor for breaches of the covenants of the lease, is not bound to retain the proceeds of a sale of the lease to form a fund for indemnification in respect of some possible breach of the covenant by the deceased person (*q*).

Liabilities of personal representatives upon personal contracts.—The personal representatives are responsible, to the extent of the assets which come into their hands, upon all the contracts of the deceased person, whether they are by deed or by record or simple contracts, and whether the "executors or administrators" are or are not named in the contract, and whether the breach has been incurred in the lifetime of the testator or intestate, or after his decease. They are liable even where the heir is named, and the executors are not named, in the contract. They are liable to pay calls and subscriptions upon covenants and subscription contracts made by the deceased person, so long, at all events, as they are in possession of the shares held by him (*r*); but they are not bound to reserve funds for the payment of calls that may or may not be made.

Administration of assets.—Sect. 27 of the Law of Property Amendment Act, 1859 (*s*), which is retrospective in its operation (*t*), contains provisions limiting the liability of executors and administrators upon covenants or agreements contained in any lease or agreement for a lease after an assignment thereof, and for a distribution of assets after setting aside a certain fund to answer claims on such covenants. And an executor who has distributed the assets of his testator after

(*n*) *Brett* v. *Cumberland*, Cro. Jac. 521, 523.

(*o*) *Staines* v. *Morris*, 1 Ves. & B. 8.

(*p*) *Rowley* v. *Adams*, 4 Myl. & Cr. 542; 9 L.J. Ch. 34.

(*q*) *Collins* v. *Crouch*, 13 Q.B. 542; 18 L.J. Q.B. 209; and see further, as to the liability of executors and administrators upon covenants in leases, Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 27, *infra*.

(*r*) *Wills* v. *Murray*, 4 Exch. 863; 19 L.J. Ex. 209; *Birkenhead, &c. Ry.* v. *Cotesworth*, 5 Exch. 226; 19 L.J. Ex. 240; *Heward* v. *Wheatley*, 3 De G. M. & G. 628; 22 L.J. Ch. 435.

(*s*) 22 & 23 Vict. c. 35.

(*t*) *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; 30 L.J. Ch. 799.

taking the steps pointed out by the Act, will have the same protection as if he had administered the estate under a decree of court (*u*). Formerly the assets must have been applied first in satisfaction of the judgment creditors of the testator or intestate, and then in payment of debts due from him on contracts of record and contracts under seal, and debts due for rent, whether reserved by deed or by simple contract, and, lastly, in satisfaction and discharge of simple contract debts (*x*). But now, by the Administration of Estates Act, 1869 (*y*), it is provided that in the administration of the estate of every person who shall die on or after the first day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: provided always that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt (*z*). Rent is a specialty debt within the Act and ranks with simple contract debts (*a*). If the liability upon a covenant is contingent, and may or may not come into existence, the personal representative cannot reserve funds to meet the possible liability, but must pay the specialty or simple contract debts which have actually accrued (*b*). When a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to that executor, the real estate so devised is charged with the debts (*c*); and where a testator has given an express direction charging his real estate with payment of his debts, and the free personalty has been exhausted in paying the debts, the Court will give effect to the testator's

(*u*) *Clegg* v. *Rowland*, L.R. 3 Eq. 368; 36 L.J. Ch. 137. See *Nixon, In re, Gray* v. *Bell*, (1904) 1 Ch. 638; 73 L.J. Ch. 446; *King, In re, Mellor* v. *South Australian Land, &c. Co.*, (1907) 1 Ch. 72; 76 L.J. Ch. 44.

(*x*) Williams, EXECUTORS, 869 (ed. 9); *Vincent* v. *Godson*, 4 De G. M. & G. 546; 24 L.J. Ch. 121.

(*y*) 32 & 33 Vict. c. 46.

(*z*) As to the construction of this Act, see *Samson, In re, Robbins* v. *Alexander*, (1906) 2 Ch. 584; 76 L.J. Ch. 21.

(*a*) *Hastings, In re, Shirreff* v. *Hastings*, 6 Ch.D. 610; 47 L.J. Ch. 137.

(*b*) *Henderson* v. *Gilchrist*, 22 L.J. Ch. 970. As to distribution of the estate among the residuary legatees without retention of assets to meet contingent liabilities, see *Nixon, In re, Gray* v. *Bell*, (1904) 1 Ch. 638; 73 L.J. Ch. 446; *King, In re, Mellor* v. *South Australian Land, &c. Co.*, (1907) 1 Ch. 72; 76 L.J. Ch. 44.

(*c*) *Harris* v. *Watkins*, 23 L.J. Ch. 540; Kay, 438; *Wrigley* v. *Sykes*, 25 L.J. Ch. 458; 21 Beav. 337.

direction at the instance of pecuniary legatees so far as may be necessary to enable the pecuniary legacies to be satisfied (*d*). If the executor pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer the superior debt out of his own estate, if he had notice of the existence of the last-named debt at the time he made the payment (*e*); but, if he had no notice of its existence, he cannot then be charged *de bonis propriis;* for it is the creditor's own fault not to have made a prompt application to the executor for payment (*f*). It must be observed, however, that the personal representative has notice of all judgment debts recovered against himself, and will pay debts of inferior degree at his own peril (*g*); but as regards judgment debts recovered against the testator or intestate, and of which he may have had no notice, these must be docketed or registered pursuant to the statutes in that behalf (*h*), before he can be made liable for a *devastavit* in paying simple contract debts before them. Where the executors of a shareholder in a company, which was a going concern at the time of the testator's death, paid a legacy under his will without leaving assets to meet any liability in respect of shares which they retained unsold, they were held liable as contributories to the amount of the legacy (*i*).

It may here be observed that personal representatives who act honestly and reasonably in the administration of the estate will be entitled to the protection afforded by sect. 3 (1) of the Judicial Trustees Act, 1896 (*k*), to all trustees who may have rendered themselves liable for breach of trust. At the same time, a prudent and reasonable trustee ought to advertise for creditors as soon as possible after the death of the person whose estate he administers, and when he has notice of any claim,

(*d*) *Roberts, In re, Roberts* v. *Roberts* (1902), 2 Ch. 834; 72 L.J. Ch. 38; *Kempster, In re, Kempster* v. *Kempster*, (1906) 1 Ch. 446; 75 L.J. Ch. 286.

(*e*) 2 Bla. Com. (ed. 10), p. 511.

(*f*) *Harman* v. *Harman*, 2 Show. 492; *Rock* v. *Leighton*, 1 Salk. 310; *Britton* v. *Bathurst*, 3 Lev. 114; 1 Saund. 333, a. n.; *Davies* v. *Monkhouse*, Fitzgib. 76; *Sawyer* v. *Mercer*, 1 T. R. 690; *Fludyer, In re, Wingfield* v. *Erskine*, (1898) 2 Ch. 562; 67 L.J. Ch. 620. And see 22 & 23 Vict. c. 35, s. 29.

(*g*) *Littleton* v. *Hibbins*, Cro. Eliz. 793.

(*h*) 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112; Williams, EXECUTORS, 859 (ed. 9); *Gaunt* v. *Taylor*, 3 M. & Gr. 886; 11 L.J. C.P. 68; *Jennings* v. *Rigby*, 33 Beav. 198; 33 L.J. Ch. 149; *Williams, In re*, L.R. 15 Eq. 270; 42 L.J. Ch. 158.

(*i*) *Taylor* v. *Taylor*, L.R. 10 Eq. 477; 39 L.J. Ch. 676.

(*k*) 59 & 60 Vict. c. 35, s. 1 (2). See *Kay, In re, Mosley* v. *Kay*, (1897) 2 Ch. 518; 66 L.J. Ch. 759; *De Clifford (Lord), In re Clifford (Lord de)* v. *Quilter*, (1900) 2 Ch. 707; 69 L.J. Ch. 828. As to what circumstances will excuse, see *Turner, In re, Barker* v. *Ivimey*, (1897) 1 Ch. 536; 66 L.J. Ch. 282; *Second East Dulwich, &c. Society, In re*, 68 L.J. Ch. 196; *Chapman* v. *Browne*, (1902) 1 Ch. 785; 71 L.J. Ch. 465; *Houghton, In re, Hawley* v. *Blake*, (1904) 1 Ch. 622; 73 L.J. Ch. 317; *National Trustees' Co. of Australasia* v. *General Finance Co.*, (1905) A. C. 373; 74 L.J. P.C. 73.

primâ facie, he ought not to proceed to pay the legatees without making due provision for all claims of which he has had notice (*l*).

The personal representative has a right to pay creditors of equal degree in any order he may think fit, and to sell or mortgage the assets for that purpose (*m*); and he may, therefore, pay simple contract creditors in full, leaving specialty creditors unpaid (*n*). He has a right to retain for his own debt in preference to all other debts of equal degree (*o*); and if there is a debt due by a legatee or one of the next of kin, the remedy for which is barred by the Statute of Limitations, he may retain funds in respect of that debt although so barred (*p*). So, too, he may, after actions are commenced against him by a creditor on simple contract, confess a judgment in favour of another creditor of equal degree, and give the latter a preference (*q*). He may also compromise a claim against the estate of the deceased person, even where the person making the claim is a co-executor, but this power should in general only be exercised with the sanction of the Court (*r*). If the personal representative sets up the defence of *plene administravit*, the question will be whether or not there are assets in his hands available for the payment of the creditor (*s*), but if he neither pleads *plene administravit*, nor sets up his retainer, and the creditor recovers judgment, the personal representative cannot in an action brought to administer the estate set up his right of retainer against the judgment creditor (*t*). If, however, in the distribution of assets, a creditor misleads an executor or administrator either by *laches* or by express authority, so as to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*u*). If two actions have

(*l*) Per Romer, J., *Kay, In re, Mosley* v. *Kay*, (1897) 2 Ch. 518; 66 L.J. Ch. 759.

(*m*) *Vane (Earl)* v. *Rigden*, L.R. 5 Ch. 663; 39 L.J. Ch. 797.

(*n*) *Samson, In re, Robbins* v. *Alexander*, (1906) 2 Ch. 584; 76 L.J. Ch. 21; overruling *Hankey, In re, Cunliffe Smith* v. *Hankey*, (1899) 1 Ch. 541; 68 L.J. Ch. 242.

(*o*) See *Taaffe* v. *Taaffe*, (1902) 1 Ir. R. 148; *Williams, In re, Holder* v. *Williams*, (1904) 1 Ch. 52; 73 L.J. Ch. 82; *Ambler, In re, Woodhead* v. *Ambler*, (1905) 1 Ch. 697; 74 L.J. Ch. 367; *Benett, In re, Ward* v. *Benett*, (1906) 1 Ch. 216, 227; 75 L.J. Ch. 122; *Abrahams, In re, Abrahams* v. *Abrahams*, (1908) 2 Ch. 69; 77 L.J. Ch. 578; *Wilson* v. *Wilson*, (1911) 1 K.B. 327; 80 L.J. K.B. 296.

(*p*) *Akerman, In re*, (1891) 3 Ch. 212; 61 L.J. Ch. 34; *Wheeler, In re, Hankinson* v. *Hayter*, (1904) 2 Ch. 66; 73 L.J. Ch. 576.

(*q*) *Lyttleton* v. *Cross*, 3 B. & C. 322; 3 L.J. (O.S.) K.B. 2; *Cockroft* v. *Black*, 2 P. Wms. 298; *Tolputt* v. *Wells*, 1 M. & S. 404; *Wynch* v. *Grant*, 24 L.J. Ch. 6; 2 Drew. 312; *Vibart* v. *Coles*, 24 Q.B.D. 364; 59 L.J. Q.B. 152.

(*r*) *Houghton, In re, Hawley* v. *Blake*, (1904) 1 Ch. 622; 73 L.J. Ch. 317.

(*s*) *Cooper* v. *Taylor*, 6 M. & G. 989; 13 L.J. C.P. 92.

(*t*) *Marvin, In re, Crawter* v. *Marvin*, (1905) 2 Ch. 490; 74 L.J. Ch. 699.

(*u*) *Richards* v. *Browne*, 3 Bing. N.C. 493; 6 L.J. C.P. 95.

been brought against the personal representative by two several creditors standing in the same degree, and the personal representative has pleaded *plene administravit præter* a certain sum to one action, he may plead in bar to the action by the other creditor *plene administravit præter* the same sum, and as to that sum that he has confessed it in another action; and the plaintiff in the second action can then only obtain judgment of assets *quando acciderint* (*x*). The personal representative of a deceased incumbent is by custom bound to discharge all the debts, both specialty and simple contract, of the deceased, before he satisfies claims for dilapidations (*y*). The effect of 34 & 35 Vict. c. 43, s. 36, which makes the claim for dilapidations as ascertained by that Act a debt due from the late incumbent, his executors or administrators, to the new incumbent, has been to place claims for dilapidations on an equal footing with simple contract debts, a position which they seem to have previously held in the administration of equitable assets by the Court of Chancery (*z*).

Liability of personal representatives on executory contracts of deceased.—If a purchaser who has ordered goods dies before the time of delivery, his executor or administrator must receive them and pay for them, or make good the damage sustained by his refusal to accept, to the extent of the assets in his hands (*a*). If a testator has agreed to build a house by such a day, or to pay a certain sum as liquidated damages for the default, his executor is bound either to build the house or to pay the money (*b*). Where the deceased had entered into a contract for the sale of a leasehold hotel, subject to the consent of the lessor to the assignment of the lease, and the purchaser lost his bargain through the personal representative having induced the lessor to refuse his consent, it was held that the purchaser was entitled not only to a return of his deposit with interest and costs of investigating title but also to damages in respect of the omission to obtain the lessor's consent (*c*). The personal representatives of a deceased promisor are not, however, liable in an action for breach of promise of marriage where no special damage is alleged (*d*). The special damage which would keep

(*x*) *Waters* v. *Ogden*, 2 Doug. 455.

(*y*) *Bryan* v. *Clay*, 1 E. & B. 38; 22 L.J. Q.B. 23.

(*z*) *Bissett* v. *Burgess*, 23 Beav. 278; 26 L.J. Ch. 697; *Monk, In re*, 35 Ch. D. 583; 56 L.J. Ch. 809.

(*a*) *Wentworth* v. *Cock*, 10 Ad. & E. 42; 8 L.J. Q.B. 230; *Cooper* v. *Jarman*, L.R. 3 Eq. 98, 100; 36 L.J. Ch. 85.

(*b*) 15 H. 7, f. 13; *Quick* v. *Ludburrow*, 3 Bulstr. 30.

(*c*) *Day* v. *Singleton*, (1899) 2 Ch. 320; 68 L.J. Ch. 593; cp. *Pease* v. *Courtney*, (1904) 2 Ch. 503; 73 L.J. Ch. 760.

(*d*) *Finlay* v. *Chirney*, 20 Q. B.D. 494; 57 L.J. Q.B. 247

the right of action alive must be damage to the property and not to the person of the promisee, and must have been within the contemplation of both parties at the time of the promise(*e*). But where the estate of the deceased has been benefited by a wrong done by the deceased, the amount or value of such benefit may be recovered from the personal representative out of the estate (*f*).

Joint liability of executors and administrators.—If there are several executors or administrators, they are jointly liable, in case they have all proved the will or administered (*g*). And, when one of several executors to whom probate has been granted is an infant, he is liable in his representative character, and may be sued jointly with the adult executors upon the contracts of the testator (*h*). One of several joint executors or administrators may make a good title to any part of the personal estate of the deceased person without the concurrence of his fellow-executors or administrators (*i*).

Executor de son tort.—If one who is neither executor nor administrator intermeddles with the goods of the deceased, and does acts appertaining to the office of an executor, he makes himself what is called in law an executor *de son tort*, or an executor of his own wrong, and becomes clothed with all the liabilities that appertain to the office of an executor, and may be sued as executor by the creditors of the deceased, although there is a lawful executor (*j*); but a person does not make himself an executor *de son tort* by taking possession of property of a deceased person situate abroad (*k*). There are many acts, nevertheless, which a stranger may do without incurring the liability of an executor *de son tort*, such as giving directions for the funeral of the deceased, making an inventory of his effects, providing necessaries for his children, and the performance of such deeds of charity and kindness as are due from one neighbour or friend to another. The intermeddling must be an uncalled-for and officious intermeddling with the estate of the deceased. The nature of the acts and the degree of interference which will constitute a party executor of his own

(*e*) *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q. B. 247.

(*f*) *Phillips* v. *Homfray*, 24 Ch. D. 439; 52 L.J. Ch. 833; *Duncan, In re, Terry* v. *Sweeting*, (1899) 1 Ch. 387; 68 L.J. Ch. 253.

(*g*) Com. Dig. Administration, B. 12; Pleader, 2, D. 6; Abatement, F. 10; *Swallow* v. *Emberson*, 1 Lev. 161.

(*h*) *Frescobaldi* v. *Kinaston*, 2 Str. 784.

(*i*) Dyer, 23 b; *Simpson* v. *Gutteridge*, 1 Madd. 609, 617; *Willand* v. *Fenn*, cited 2 Ves. 267; *Jacomb* v. *Harwood*, 2 Ves. 267; *Ingham, In re, Jones* v. *Ingham*, (1893) 1 Ch. 352; 62 L.J. Ch. 100.

(*j*) *Read's case*, 5 Co. 33 b; *Carmichael* v. *Carmichael*, 2 Ph. 101; *Edwards* v. *Harben*, 2 T.R. 597; *Doyle* v. *Foley* (1903), 2 I. R. 95.

(*k*) *Bearan* v. *Hastings* (*Lord*), 2 Kay & J. 724.

wrong are questions of law for the court; but it is a question of fact whether the acts creating the liability have been done by the party sought to be charged (*l*). The executor *de son tort* and the lawful executor may be joined as defendants in the same action, or they may be sued separately; but a wrongful executor and rightful administrator cannot be made joint defendants (*m*). The executor *de son tort* may be made responsible upon the contracts of the deceased to the extent of the assets which have come to his hands, but no further (*n*). The executor of an executor *de son tort* is not liable for a breach of contract by the person with whose property the executor *de son tort* has intermeddled (*o*).

A person who takes property under an executor *de son tort* does not himself become an executor *de son tort* by so doing, unless, before action, he has handed in or paid over the property to the rightful representative (*p*). Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards the defendant, her son-in-law, took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term, it was held that, there being no assignment in writing, he could not be considered an assignee; for, though the widow might have been chargeable as executrix *de son tort*, the defendant had not made himself executor *de son tort* by taking the premises after her (*q*).

Feme covert *executrix*.—A married woman may be appointed executrix; and, by the Married Women's Property Act, 1882 (*r*), she is clothed with all the powers of a *feme sole*. She may, accordingly, now act as executrix or administratrix without reference to her husband, and he does not become liable unless he acts or intermeddles in the administration (*s*). Formerly he had to sue jointly with her, as in the case of *choses in action* vested in the wife in her own right (*t*); and he was liable for a *devastavit*, unless the money was properly administered (*u*). But a *feme covert* executrix might by will appoint her executor, so as to continue the chain of representation (*x*); and a *feme covert* executrix who survived her husband was liable

(*l*) *Padget* v. *Priest*, 2 T.R. 97.

(*m*) Com. Dig. Administrator, C. 3; 1 W. Saund. 264, c. n. (2).

(*n*) Dyer, 166 b; 1 Saund. 265.

(*o*) *Wilson* v. *Hodson*, L.R. 7 Ex. 84; 41 L.J. Ex. 49.

(*p*) *Hill* v. *Curtis*, L.R. 1 Eq. 90, 100; 35 L.J. Ch. 133.

(*q*) *Paull* v. *Simpson*, 9 Q.B. 365; 15 L.J. Q.B. 382; see, however, *Williams* v. *Heales*, L.R. 9 C.P. 177; 43 L.J. C.P. 80.

(*r*) 45 & 46 Vict. c. 75.

(*s*) 45 & 46 Vict. c. 75, ss. 18, 24.

(*t*) *Tirrell* v. *Bennett*, 1 Sid. 299.

(*u*) *Ankerstein* v. *Clarke*, 4 T.R. 616; *Yard* v. *Ellard*, 1 Ld. Raym. 368; 1 Salk. 117.

(*x*) *Scammell* v. *Wilkinson*, 2 East, 551; *Barr* v. *Carter*, 2 Cox, 429

for a *devastavit* committed by the husband during their joint lives (*y*).

Death of personal representative.—Continuation of chain of representation.—On the death of one of several executors, either before or after probate, the entire right of representation survives to the others. When the surviving executor, or when a sole executor, dies after probate, his executor, and the executor of such executor, is in law the executor of the first testator. But, if one of two executors makes his will, appoints his executor, and dies, and then the other dies intestate, the executor of him who died first cannot be executor to the first testator, but administration of the goods of the first testator with the will annexed must be taken out. So when the sole or surviving executor dies before probate, his executor cannot be made executor to the first testator, inasmuch as he cannot prove the will of the first testator, and is consequently incapable of recovering his debts (*z*). Administration of the goods and chattels of the first testator with the will annexed must in these cases be taken out. An administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; for such an administrator stands *in loco executoris* (*a*). At one time the renunciation of one executor was, during the life-time of his co-executor, a nullity. Notwithstanding his renunciation, the right of representation survived to him on the death of the co-executor (*b*); but now, by the Court of Probate Act, 1857 (*c*), s. 79, where any person renounces probate of a will of which he is appointed executor, or one of the executors, his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall, without any further renunciation, devolve as if such person had not been appointed executor. The court may, however, allow the renunciation to be retracted in a proper case (*d*).

Administration de bonis non.—On the death of an administrator, or of a sole or surviving executor after probate intestate, no interest or right of representation is transmitted to his administrator; but administration *de bonis non* must be taken

(*y*) *Soady* v. *Turnbull*, L.R. 1 Ch. 494; 35 L.J. Ch. 784.

(*z*) *Wankford* v. *Wankford*, 1 Salk. 308.

(*a*) *Anon.*, 1 Freem. 288, pl. 335.

(*b*) *House* v. *Petre* (*Lord*), 1 Salk. 311; *Arnold* v. *Blencowe*, 1 Cox, 226.

(*c*) 20 & 21 Vict. c. 77.

(*d*) *Whitham* (*In goods of*), L.R. 1 P. & D. 303; 36 L.J. P. 26; *Gill*, *In re*, L.R. 3 P. & D. 113; *Stiles* (*In goods of*), (1898) P. 12; 67 L.J. P. 23. As to the case of an executor not expressly renouncing, but refraining from all interference, see Court of Probate Act, 1858, 21 & 22 Vict. c. 95, s. 16; *Lorimer* (*In goods of*), 2 Sw. & Tr. 471; 31 L.J. P. 189; *Crawford* v. *Forshaw*, (1891) 2 Ch. 261; 60 L.J. Ch. 683.

out (*e*). By the grant of such administration, the administrator *de bonis non* becomes the only personal representative of the original deceased, and is clothed with all the legal rights which belonged to the former executor or administrator in his representative character (*f*). If, however, the administrator should take a bond or other obligation under seal, payable to himself personally, this would be an absolute conversion to his own use of the property, and his own personal representative, and not the administrator *de bonis non*, would be entitled to the legal interest in the new security (*g*). Where an administrator being possessed of a term for ninety-nine years in his representative capacity, made an under-lease, reserving rent to himself individually, which the under-lessee covenanted to pay to him, his executors, &c., it was held that the executor of the administrator, and not the administrator *de bonis non*, was the proper party to maintain an action upon the covenant (*h*). So, in an old case, it was held that, where an administrator received part of a debt, and took a promissory note payable to himself for the residue, this was such an alteration of the property as vested it in the administrator himself, and, on his death, in his personal representative, and not in the administrator *de bonis non* (*i*). Consistently with more recent decisions, however, it could now hardly be held that the taking of such a note by a man in his character of administrator, as a further security for a debt due to the estate of the intestate, would be a conversion of the debt to his own use, so as to render him liable for a *devastavit;* and, if not, the note so received would still be assets in his hands, and consequently go to the administrator *de bonis non*, and not to his own executor or administrator (*k*). When administration has been granted to two persons, and one dies, the survivor will be sole administrator (*l*); and, as the administrator has no interest or right of representation but what he derives from the act of the ordinary, he can in no case continue the trust reposed in him to his own executor.

Survivorship of liability.—On the death of one of several executors or administrators, the survivors become liable upon all contracts made by the testator or intestate in his lifetime; and, on the death of the surviving executor, the personal repre-

(*e*) *Tingrey* v. *Brown*, 1 Bos. & P. 310; *Elliott* v. *Kemp*, 7 M. & W. 311; 10 L.J. Ex. 321; *Moseley* v. *Rendell*, L.R. 6 Q.B. 338; 40 L.J. Q.B. 111.

(*f*) *Hirst* v. *Smith*, 7 T.R. 182; *Suwerkrop* v. *Day*, 8 Ad. & E. 624; 7 L.J. Q.B. 261.

(*g*) *Norden* v. *Levit*, 2 Lev. 189.

(*h*) *Drew* v. *Bayly*, 3 Keb. 298, 427, 495, 548; 2 Lev. 100.

(*i*) *Barker* v. *Talcot*, 1 Vern. 474.

(*k*) *Catherwood* v. *Chaband*, 1 B. & C. 150; 1 L.J. (O.S.) K.B. 66.

(*l*) *Adams* v. *Buckland*, 2 Vern. 514.

sentative of such survivor (*m*). If the surviving executor dies intestate, the administrator *de bonis non* of the original testator is the party liable; and so he is also on the death of the administrator of the original testator.

Appointment of debtor as executor or administrator.—It was a doctrine of the common law that, if a creditor made his debtor his executor, the right of action for the debt was discharged; but this was really only an objection to the form of the action; for the debt was assets, and the executor was answerable for the amount (*n*). So, if a person dies intestate, and administration is granted to a debtor of the deceased, the debt is not thereby extinguished; for he comes into the administration by the act of the law, whereas the other is the act of the party (*o*). He is, moreover, clothed with a mere authority; and his interest is less than that of an executor. Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action against the executor of the obligor for the recovery of the debt (*p*).

Appointment of creditor as executor.—If a debtor makes his creditor his executor, the action for the debt is not released, unless the latter thinks fit to act, and to take upon himself the burden of the administration of the estate (*q*); and, if he does act, the right of action for his debt is not discharged, unless he has legal assets in his hands sufficient to satisfy the debt, in which case he may pay himself out of such assets (*r*), without reference to the Statute of Limitations (*s*). If one of two joint and several debtors makes the common creditor his executor and dies, and the executor has no assets of the deceased wherewith to satisfy the debt due to him, he may sue the surviving debtor; but not if he has assets out of which he may retain the debt; for the having assets amounts to payment (*t*). So, if the debtor appoints his creditor to be one of several executors, and there

(*m*) Com. Dig. Abatement, F. 10; *Flanders* v. *Clarke*, 3 Atk. 510; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 121; *Ingham, In re, Jones* v. *Ingham*, (1893) 1 Ch. 352; 62 L.J. Ch. 100.

(*n*) *Wankford* v. *Wankford*, 1 Salk. 306; *Brown* v. *Selwyn*, Cas. temp. Talbot, 241; 3 Bro. P.C. 607; *Rawlinson* v. *Shaw*, 3 T.R. 559; *Flud* v. *Rumcey*, Yelv. 160; 1 Rolle, Abr. 920, pl. 12, 13; *Phillips* v. *Phillips*, 2 Freem. 11; 1 Ch.C. 292; *Simmons* v. *Gutteridge*, 13 Ves. 262; *Carey* v. *Goodinge*, 3 Bro. Ch.C. 110.

(*o*) Bac. Abr. EXECUTORS, A. 10.

(*p*) *Hudson* v. *Hudson*, 1 Atk. 460; *Lockier* v. *Smith*, 1 Sid. 79; 1 Keb. 313; pl. 33.

(*q*) *Rawlinson* v. *Shaw*, 3 T.R. 559.

(*r*) *Lowe* v. *Peskett*, 16 C.B. 511; 24 L.J. C.P. 196; Powys, J., *Wankford* v. *Wankford*, 1 Salk. 304; Holt, C.J., *ib.* 305; *Ashby* v. *Child*, 1 Rolle, Abr. 940.

(*s*) *Hill* v. *Walker*, 32 L.T. 71; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415. See *Midgley* v. *Midgley*, (1893) 3 Ch. 282, 297; 62 L.J. Ch. 905; *Trevor* v. *Hutchins*, (1896) 1 Ch. 844, 848; 65 L.J. Ch. 738.

(*t*) *Cock* v. *Cross*, 2 Lev. 73; *Anon.*, 1 Freem. 49.

are no assets, or the creditor executor neither proves the will nor acts, he or his personal representative is not prevented from suing his co-executor (*u*). A creditor executor is in all cases entitled to retain the amount of his debt out of the assets that come to his hands to be administered (*x*), also a debt due from the testator to the wife of such executor before her marriage (*y*). An executor whose debt largely exceeds the value of the testator's estate may retain the entire assets *in specie* without first realising them (*z*). An executor *de son tort* has no right to retain (*a*).

Civil death.—Where a person has been outlawed, he is civilly dead, and is incapable of enforcing any contract he may have entered into, although he is liable to be sued thereon (*b*). If he is outlawed for a capital offence, he forfeits all his lands and tenements; and in all cases, after outlawry, he forfeits his goods and chattels, debts, and *choses in action*. All these vest in the crown; and the king or his grantee may maintain an action upon them in his own name (*c*). The forfeiture extends to equitable as well as to legal rights, for example, to a bond taken in another's name, or a lease granted to another in trust for him (*d*). The removal of the disability by reversal of the outlawry does not enable the party restored to his civil rights to sue upon any of the bonds, covenants, or personal contracts which have become vested in the crown. But, inasmuch as freehold land is not divested and transferred to the crown until office found (*e*), he has a right to sue the lessees and tenants of such property upon covenants for the payment of rent, to repair, and other real contracts connected with such estates, unless the crown interferes to prevent him. He may also grant leases, and deal generally with the property subject to the paramount title of the crown (*f*). The outlaw may, however, sue in *autre droit*, as, for instance, in his character of executor; and a mayor and commonalty may sue, although the mayor himself has been outlawed (*g*).

Felons.—The law was formerly the same with respect to

(*u*) *Dorchester* v. *Webb*, W. Jones, 345.

(*x*) *Morris's Estate, In re, Morris* v. *Morris*, L.R. 10 Ch. 68; 44 L.J. Ch. 178.

(*y*) *Woodward* v. *D'Arcy* (*Lord*), Plowd. 185 a; *Boyd* v. *Brooks*, 34 Beav. 7; 34 L.J. Ch. 605.

(*z*) *Gilbert, In re*, (1898) 1 Q.B. 282; 67 L.J. Q.B. 229.

(*a*) *Curtis* v. *Vernon*, 3 T.R. 587.

(*b*) Hawk. P. C. lib. 2, c. 49, s. 9; *Macdonald* v. *Ramsey*, Foster, 61; Sid. 60; Cro. Jac. 426. Outlawry in criminal cases, though not abolished, has passed into disuse. It has been expressly abolished in civil proceedings (Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, s. 3).

(*c*) Com. Dig. Forfeiture, B. 2; *Slade's case*, 4 Co. 95 a; *Ford's case*, 12 Co. 2; *Bullock* v. *Dodds*, 2 B. & Ald. 276; *Roberts* v. *Walker*, 1 Russ. & M. 753.

(*d*) Hawk. P. C. lib. 2, c. 49, s. 10; *Earl of Somerset's case*, Hob. 214.

(*e*) *Doe* v. *Evans*, 5 B. & C. 587; 4 L.J. (O.S.) K.B. 322.

(*f*) *Doe* v. *Pritchard*, 5 B. & Ad. 765; 3 L.J. K.B. 11; *Clerke* v. *Scroggs*, 2 Lutw. 1513

(*g*) Co. Litt. 128 a.

felons; but a considerable change was effected by the Forfeiture Act, 1870 (*h*), by which forfeiture or escheat for felony, with its consequences, is abolished. But the *choses in action* to which a convict, that is a person against whom, after the passing of that Act, judgment of death or of penal servitude has been pronounced, was, at the time of his conviction, or may thereafter, until he has suffered his punishment or received a pardon, become entitled, pass to the administrator or *interim curator* appointed under that Act, who may cause payment or satisfaction to be made out of the convict's property of any debt or liability of the convict (*i*). And, so long as the convict is subject to the operation of the Act, he is incapable of alienating or charging any property, or of making any contract, or of bringing any action for the recovery of any property, debt, or damage whatsoever (*k*).

Survivorship of joint contractors.—At common law, when several persons took a joint interest in, and had a joint right of action upon, a contract, and one of them died, the action must have been brought in the name of the survivors (*l*); and the personal representative of the deceased could not be joined (*m*); nor could he sue separately (*n*). If a sum of money was invested in the funds in the joint names of two persons, the survivor took the whole at law, although he might be accountable in equity as a trustee of the money (*o*). If two persons advanced a sum of money by way of mortgage, and took the mortgage to them jointly, and one died, the whole interest and right of action at law went to the survivor; but, in equity, the representative of him who was dead had his proportion (*p*). It followed, therefore, that, if all the parties jointly interested in a contract died, the right of action vested in the personal representative of the one who survived the others, and that the executors or administrators of those who died previously could not be joined. On the other hand, where one of several joint promisers dies, the liability devolves upon the survivors, the representatives of the deceased promiser being under no liability (*q*). But if several

(*h*) 33 & 34 Vict. c. 23.

(*i*) 33 & 34 Vict. c. 23, ss. 10, 12, 13, 14, 24. As to the powers of an administrator, see *Carr* v. *Anderson*, (1903) 2 Ch. 279; 72 L.J. Ch. 534; *Gaskell and Walters' Contract, In re*, (1906) 1 Ch. 440; 2 Ch. 1; 75 L.J. Ch. 503.

(*k*) 33 & 34 Vict. c. 23, s. 8. The conviction of a person under sixteen is not to be regarded as a conviction for felony for the purposes of any disqualification attaching to felony (Children Act, 1908, 8 Edw. 7, c. 67, ss. 100, 131).

(*l*) *Anderson* v. *Martindale*, 1 East, 497; *Jell* v. *Douglas*, 4 B. & Ald. 374; *Rose* v. *Poulton*, 2 B. & Ad. 822.

(*m*) *Bellingham* v. *Clark*, 1 B. & S. 332.

(*n*) *Anderson* v. *Martindale*, 1 East, 497; *Bradburne* v. *Botfield*, 14 M. & W. 571; 14 L.J. Ex. 830; *Rolls* v. *Yate*, Yelv. 177.

(*o*) *Crossfield* v. *Such*, 8 Exch. 825; 22 L.J. Ex. 325.

(*p*) *Petty* v. *Styward*, 1 Ch. Rep. 31.

(*q*) *Richards* v. *Heather*, 1 B. & Ald.

persons jointly contract for the building of a ship, or the furnishing a house, for the common benefit of all, for a certain sum, and it is expressly agreed that, if any of the parties dies before the completion of the work, his executors should stand in his place, there, though the legal remedy of the party employed would have been solely against the survivors, yet the law would certainly imply a contract on the part of the deceased, that his executors should pay their proportion of the contract price (*r*).

SECTION III.

TRANSFER BY MARRIAGE.

Rights of husband upon wife's contracts before marriage at common law.—At common law the husband by the marriage acquired a qualified property in the wife's *choses in action;* qualified,—for, until he had reduced them into his possession, they remained the property of the wife; and, if the husband omitted to reduce them into his possession in his lifetime, they survived to the wife, who alone was entitled to the benefit of them (*s*). As the husband had the power of immediately enforcing a claim of the wife, forbearance by him from so doing was a sufficient consideration to support a promise made to him alone (*t*).

The husband was alone entitled during the coverture to the benefit of covenants running with the wife's land, and might sue alone even after the wife's death for all breaches not in the nature of continuing breaches, where the ultimate damage had accrued during the coverture, or he might sue jointly with the wife in her lifetime (*u*). The husband was also entitled to the benefit of all bills of exchange and promissory notes payable to the wife not indorsed by her before marriage (*x*). In the exercise of his marital rights, he might at once indorse them, the wife's power of indorsement over them being superseded by the marriage, and vested in the

29; *Calder* v. *Rutherford*, 3 Brod. & Bing. 302; *Ashbee* v. *Pidduck and Neame*, 1 M. & W. 564; *Clarke* v. *Bickers*, 14 Sim. 639; *Beckett* v. *Addyman*, 9 Q.B.D. 783; 51 L.J. Q.B. 597; *White* v. *Tyndall*, 13 App.Cas. 263.

(*r*) *Prior* v. *Hembrow*, 8 M. & W. 889; 10 L.J. Ex. 371.

(*s*) *Milner* v. *Milnes*, 3 T.R. 631; *Sherrington* v. *Yates*, 12 M. & W. 865; 13 L.J. Ex. 249.

(*t*) *Rumsey* v. *George*, 1 M. & S. 180.

(*u*) *Aleberry* v. *Walby*, 1 Str. 229; *Dunstan* v. *Burwell*, 1 Wils. 224; Bro. Abr. Covenant, p. 110; *Brett* v. *Cumberland*, 3 Bulst. 163; Cro. Jac. 399; *Nurse* v. *Wills*, 4 B. & Ad. 739; *Middlemore* v. *Goodale*, 1 Roll. Ab. 348.

(*x*) *M'Neilage* v. *Holloway*, 1 B. & Ald. 221; see per Parke, B., *Gaters* v. *Madeley*, 6 M. & W. 427; 9 L.J. Ex. 173.

husband (*y*). If the husband did not reduce *choses in action* of this nature into his possession in his lifetime, they survived to the wife (*z*).

Rights of husband upon wife's contracts by statute.—The Married Women's Property Act, 1870 (*a*), and still more the Married Women's Property Act, 1882 (*b*), have largely modified the common law right of the husband to his wife's property, and to her *choses in action*. By sect. 2 of the earlier Act, deposits in savings banks and annuities granted by the Commissioners for the Reduction of the National Debt in the name of a woman who may afterwards marry, are to be deemed to be the separate property of such woman, and are to be accounted for and paid to her as if she were an unmarried woman. And a woman, married after the passing of that Act, will be solely entitled to the benefit of covenants running with any freehold, copyhold, or customary land which may descend to her as heiress of an intestate (*c*).

By sect. 2 of the Act of 1882, every woman who marries after January 1st, 1883, shall be entitled to hold as her separate property all real and personal property, including *choses in action* (*d*), which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage; and by sect. 5, every woman married before that date shall be entitled to hold as her separate property all real and personal property, including *choses in action* (*d*), her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after that date (*e*). By sect. 1, a married woman is made capable of disposing of her separate property as if she were a *feme sole* (*f*). Further, by the Married Women's Property Act, 1907 (*g*), a married woman can, without her husband, dispose of real or personal property held by her as trustee or personal representative.

By sect. 6 of the Act of 1882, all deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt, or by any other person, and all sums forming

(*y*) *Mason* v. *Morgan*, 2 Ad. & E. 30; 4 L.J. K.B. 12; *Connor* v. *Martin*, cited 3 Wils. 5.

(*z*) *Hart* v. *Stephens*, 6 Q.B. 937; 14 L.J. Q.B. 148.

(*a*) 33 & 34 Vict. c. 93.

(*b*) 45 & 46 Vict. c. 75.

(*c*) Sect. 8; see *Voss, In re*, 13 Ch.D. 504.

(*d*) Sect. 24.

(*e*) As to the interpretation of this section, see *Tucker, In re*, 54 L.J. Ch. 874; *Hobson, In re*, *Webster* v. *Rickards*, 55 L.J. Ch. 300; *Reid* v. *Reid*, 31 Ch.D. 402; *Parsons, In re*, *Stockley* v. *Parsons*, 45 Ch.D. 51.

(*f*) As to the effect of this section on previous agreements to settle future-acquired property, see sect. 19, and *Stonor's Trusts, In re*, 24 Ch.D. 195; 52 L.J. Ch. 776.

(*g*) 7 Edw. 7, c. 18.

part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, which on January 1st, 1883, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock or other interests of or in any corporation, company or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building or loan society which at that date were standing in her name, are to be deemed, unless and until the contrary is shown, to be the separate property of such married woman. And by sect. 7, all stocks or funds, &c., mentioned in the previous section, which after January 1st, 1883, shall be allotted to, or placed, registered, or transferred in, or unto, or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which her separate estate alone shall be liable. By sect. 8, these provisions are extended to the case of investments standing in the name of a married woman jointly with any person other than her husband; and by sect. 9, in such a case there is no need for the husband of any such married woman in respect of her interest to join in the transfer of such investments.

Liability of husband upon wife's contracts made before coverture.—At common law, if a *feme sole* executed a bond, or made a promissory note, or accepted a bill of exchange, and then married, the husband and wife were jointly liable (*h*); and, if judgment was recovered against them both in the wife's lifetime, execution might be issued against the husband, who might thus be compelled to fulfil his wife's contract made before marriage, or to discharge and satisfy the wife's debt (*i*). If these debts were not recovered against the husband and wife in the lifetime of the wife, the husband could not be charged with them. And, if the wife died during the pendency of the action, and before a joint judgment had been obtained against them both, the husband was discharged (*k*); whereas, if she died after judgment, the husband remained liable. If no action was brought during the coverture, and the wife survived, she continued to be liable for the debt (*l*); but, if an

(*h*) *Drue* v. *Thorne*, Aleyn, 72; *Hayward* v. *Williams*, Sty. 280; *Haydon* v. *Miller*, 2 Rolle, 53; *Milner* v. *Milnes*, 3 T.R. 631; *Mitchinson* v. *Hewson*, 7 T.R. 348.

(*i*) *Eyres* v. *Coward*, 1 Sid. 337; *O'Brian* v. *Ram*, 3 Mod. 186; Bac. Abr. Baron and Feme, (F).

(*k*) 1 Rolle Abr. 351, G. pl. 2; *Heard* v. *Stamford*, 3 P. Wms. 411.

(*l*) *Woodman* v. *Chapman*, 1 Campb. 188.

action was brought and judgment recovered against husband and wife during the coverture, and if the husband became bankrupt, and obtained his discharge, the liability of both was gone at law (*m*), although her property settled to her separate use at the time of the marriage remained liable (*n*).

This liability of the husband was affected by the Married Women's Property Act, 1870 (*o*), which provided (sect. 12) that a husband should not, by reason of any marriage that might take place after the coming into operation of the Act (*p*), be liable for the debts of his wife contracted before marriage; but she was liable to be sued for, and any property belonging to her for her separate use was liable to satisfy, such debts as if she had continued unmarried. Under this section, where a wife's property had been settled on her marriage to her separate use without power of anticipation, it was held that the plaintiffs might recover against her estate not only the amount of their judgment against the wife but also the costs payable to the husband who had been discharged from liability for the claim (*q*). By the Married Women's Property Act, 1874 (*r*), s. 1, however, so much of the Married Women's Property Act, 1870, as enacted that a husband should not be liable for the debts of his wife contracted before marriage, was repealed so far as respects marriages which should take place after the passing of the later Act, and a husband and wife married after the passing of the later Act, and prior to Jan. 1st, 1883, might be jointly sued for any such debt.

By sect. 2, in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, the husband was made liable for the debt or damages respectively to the extent only of the assets thereinafter specified (*s*). By sect. 3, if it were not found in such action that the husband was liable in respect of any such assets, he was to have judgment for the costs of his defence, whatever the result of the action might be against the wife.

(*m*) *Lockwood* v. *Salter*, 5 B. & Ad. 303; 2 L.J. K.B. 198; *Miles* v. *Williams*, 1 P. Wms. 249, 257.

(*n*) *Chubb* v. *Stretch*, L.R. 9 Eq. 555; 39 L.J. Ch. 329; *London & Prov. Bank* v. *Bogle*, 7 Ch.D. 773; 47 L.J. Ch. 301.

(*o*) 33 & 34 Vict. c. 93.

(*p*) Aug. 9, 1870.

(*q*) *London & Prov. Bank* v. *Bogle*, *supra*; see also *Sanger* v. *Sanger*, L.R. 11 Eq. 470; 40 L.J. Ch. 372; *Chubb* v. *Stretch*, *supra*; *Williams* v. *Mercier*, 9 Q.B.D. 337; 51 L.J. Q.B. 694; affirmed on construction of agreement, 10 App. Cas. 1; 54 L.J. Q.B. 148; *Axford* v. *Reid*, 22 Q.B.D. 548; 58 L.J. Q.B. 230.

(*r*) 37 & 38 Vict. c. 50.

(*s*) This was held to apply to a husband of a wife married in England but who had contracted debts in Jersey; *De Greuchy* v. *Wills*, 4 C.P.D. 362; 48 L.J. C.P. 726.

By sect. 5, the assets in respect of, and to the extent of, which the husband was liable in any such action, were as follows:—(1.) The value of the personal estate in possession of the wife which shall have vested in the husband. (2.) The value of the *choses in action* of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession. (3.) The value of the chattels real of the wife which shall have vested in the husband and wife. (4.) The value of rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received. (5.) The value of the husband's estate or interest in any property real or personal which the wife in contemplation of her marriage with him shall have transferred to him or to any other person. (6.) The value of any property real or personal which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors. Provided that, when the husband after marriage pays any debt of his wife, or has a judgment *bonâ fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action (*t*) be liable. The husband is not liable under this Act after the death of his wife for debts contracted by her before marriage (*u*).

It would seem that in proceedings under this Act against a married woman to recover an ante-nuptial debt, it is not necessary to show that she had separate estate at the date of the judgment (*x*).

In the case of marriages since January 1st, 1883, the law has been still further altered by the Married Women's Property Act, 1882 (*y*), which by sect. 13 provides that a woman after her marriage shall continue to be liable in respect of, and to the extent of, her separate property for all debts contracted and all contracts entered into by her before her marriage (*z*), including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, and

(*t*) This means any action commenced subsequently to the commencement of the former action: *Fear* v. *Castle*, 8 Q.B.D. 380; 51 L.J. Q.B. 279.

(*u*) *Bell* v. *Stocker*, 10 Q.B.D. 129; 52 L.J. Q.B. 49.

(*x*) *Downe* v. *Fletcher*, 21 Q.B.D. 11.

(*y*) 45 & 46 Vict. c. 75.

(*z*) That is, before the marriage existing at the time her liability is under consideration: *Jay* v. *Robinson*, 25 Q.B.D. 467; 59 L.J. Q.B. 367.

all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts and contracts, and for all costs recovered in respect thereof.

By sect. 14, a husband shall be liable for the debts of his wife contracted, and for all contracts entered into by her before marriage (*a*), including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property.

By sect. 15, a husband and wife may be jointly sued in respect of any such debt or other liability contracted or incurred by the wife before marriage, as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his cost of defence, whatever may be the result of the action against the wife, if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and, as to the residue (if any) of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

(*a*) As to liability of husband after death of wife, see *Surman* v. *Wharton*, (1891) 1 Q.B. 491; 60 L.J. Q.B. 233.

By sect. 19, no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself (*b*), shall have any validity against debts contracted by her before marriage; and no settlement or agreement for a settlement shall have any greater validity or force against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

A husband who has received property with his wife cannot, when sued for her ante-nuptial debts, defend himself by setting up a previous judgment obtained against her separate estate for the same debt, if, owing to the want of separate estate, that judgment is unsatisfied; but he is not liable for an ante-nuptial debt of his wife which accrued more than six years before the commencement of the action against him (*c*). Where judgment was recovered against the separate estate of a married woman who afterwards obtained a dissolution of her marriage and married again, this was held to be a debt contracted before marriage within the meaning of sects. 13 and 19 (*d*).

Liabilities of surviving wife.—A married woman is liable at common law for a debt contracted before her marriage. The Married Women's Property Act, 1882, leaves that liability untouched, and judgment can therefore be obtained against her personally (*e*). All debts contracted by the wife prior to the marriage, and which have not been barred by the Statutes of Limitation, survive against her on the death of her husband; and she may then be charged with the payment of them (*f*).

SECTION IV.

TRANSFER BY BANKRUPTCY.

Effect of receiving order.—The mere making of a receiving order against a debtor will not divest him of any interest or liability, but his property is in the custody of the law and it is for the official receiver to protect and preserve it (*g*). Upon

(*b*) This will not include a covenant by the husband in a separation deed, executed subsequently to judgment against the married woman, to pay a monthly sum to the wife's separate use subject to restraint against anticipation; see *Birmingham Excelsior Money Society* v. *Haywood*, (1904) 1 K.B. 35; 73 L.J. K.B. 28.

(*c*) *Beck* v. *Pierce*, 23 Q.B.D. 316; 58 L.J. Q.B. 516.

(*d*) *Jay* v. *Robinson*, 25 Q.B.D. 467; 59 L.J. Q.B. 367.

(*e*) *Robinson* v. *Lynes*, (1894) 2 Q.B. 577; 63 L.J. Q.B. 759.

(*f*) *Woodman* v. *Chapman*, 1 Campb. 188.

(*g*) *Wells and Croft, In re, Official Receiver, Ex parte*, 2 Mans. 41; *Berry, In re, Duffield* v. *Williams*, (1896) 1 Ch. 939; 65 L.J. Ch. 245.

an adjudication in bankruptcy, or a composition or scheme approved by the court, however, there is a transfer of his *choses in action* and obligations, and upon the appointment of a trustee they forthwith pass to and vest in the trustee (*h*); and they are to be deemed to have been duly assigned to the trustee for the purpose of his instituting an action for their recovery (*i*).

Under the former Acts it was held, that the usual covenant in a lease, not to underlet or assign, would not prevent the transfer of the lease to the assignees if they thought fit to claim it (*k*). Trustees in bankruptcy possess the same remedies for the recovery of the bankrupt's debts and *choses in action*, and for the recovery of unliquidated damages for breaches of contract, in which the bankrupt is beneficially interested, as the bankrupt himself would have had, had he not become bankrupt (*l*). His rights are their rights; and the damages due to him, in respect of his personal estate, are due to them (*m*). So, where a person was adjudicated bankrupt in 1878, and sued for damages for wrongful dismissal in 1880, from an employment under a contract made before bankruptcy, and for money earned under such contract, it was held that both causes of action passed to the trustee (*n*). The trustees represent the creditors for all purposes, as well as the bankrupt himself: and if any fraud exist in a transaction to which the bankrupt was a party, they may take advantage of it for the benefit of the creditors (*o*), and may consequently make claims which the bankrupt himself would be estopped from doing (*p*). They may recover money received by agents of the bankrupt, and paid over to the latter after the act of bankruptcy; they may also recover the money from a creditor, who has received payment of his debt after an act of bankruptcy by way of fraudulent preference, or has enforced payment in a foreign country of a debt due to him from the bankrupt, having, at the time, notice

(*h*) 46 & 47 Vict. c. 52, ss. 9, 54.

(*i*) Sect. 50 (5).

(*k*) *Doe* v. *Bearan*, 3 M. & S. 353; *Doe* v. *Carter*, 8 T.R. 57, 300; *Doe* v. *Smith*, 5 Taunt. 795. And see *Riggs, In re, Lovell, Ex parte*, (1901) 2 K.B. 16; 70 L.J. K.B. 541.

(*l*) *Wright* v. *Fairfield*, 2 B. & Ad. 727; 9 L.J. (O.S.) K.B. 309; *Emden* v. *Carte*, 17 Ch.D. 169, 768; 51 L.J. Ch. 41; *Metropolitan Bank* v. *Pooley*, 10 A.C. 210; 54 L.J. Q.B. 449; *Perkins, In re*, (1898) 2 Ch. 182; 67 L.J. Ch. 454; *Byrne, In re, Henry, Ex parte*, 9 Morrell, 213; *Mercer* v. *Vans Colina*, 67 L.J. Q.B. 424.

(*m*) *Hill* v. *Smith*, 12 M. & W. 618; 13 L.J. Ex. 243; *Beckham* v. *Drake*, 2 H.L.C. 579; *Wetherell* v. *Julius*, 10 C.B. 267; 19 L.J. C.P. 367; *Castelli* v. *Boddington*, 1 E. & B. 66; 22 L.J. Q.B. 5; *Stanton* v. *Collier*, 3 E. & B. 274; 23 L.J. Q.B. 116; *Hodgson* v. *Sidney*, L.R. 1 Exch. 313; 35 L.J. Ex. 182; *Motion* v. *Moojen*, L.R. 14 Eq. 202; 41 L.J. Ch. 596; *Ashdown* v. *Ingamells*, 5 Ex.D. 280; 50 L.J. Ex. 109; *Morgan* v. *Steble*, L.R. 7 Q.B. 611; 41 L.J. Q.B. 260; *Guy* v. *Churchill*, 40 Ch.D. 481; 58 L.J. Ch. 345.

(*n*) *Emden* v. *Carte*, 17 Ch.D. 169, 768; 51 L.J. Ch. 41.

(*o*) *Doe* v. *Ball*, 11 M. & W. 533; 12 L.J. Ex. 328.

(*p*) *Russell* v. *Bell*, 10 M. & W. 340, 352.

of the bankruptcy (*q*). Whenever a third party has received money of the bankrupt under circumstances which create a right to recover it back, the trustee may sue for and recover it (*r*).

Executory contracts.—Among the rights and interests which pass to the trustee by virtue of his appointment are executory contracts in which the bankrupt is interested, and from which benefit may accrue to the estate, and which can be performed on the part of the bankrupt by the trustee himself. The bankruptcy puts the trustee in the place of the bankrupt, and neither rescinds the obligations of either party, nor imposes new ones (*s*). The trustee consequently may sue upon all executory contracts of sale entered into with the bankrupt, either for the non-delivery of goods and chattels, stock or shares, purchased by the bankrupt, or for the non-acceptance of property sold by him (*t*). And the bankrupt cannot, by stipulations inserted in a contract made by him with third parties, restrict the legal rights of the trustee, or deprive him of property, or of the benefit of a contract, to which he would otherwise be entitled (*u*). All that the trustee is bound to do is to fulfil the bankrupt's part of the engagement when the proper time arrives. If he expressly waives the contract, or, without any express waiver, if, at the proper time, he omits to do what by the terms of the contract he is bound to do, in the first case he certainly will, and in the second he probably may, absolve the other party from all obligation towards him (*x*). Some executory contracts, founded upon the personal skill and talent of the bankrupt, or upon a mutuality of obligation and liability, are discharged by the bankruptcy when nothing has been done under them (*y*); but, if the bankrupt does execute the contract, the trustee may sue upon it on the completion of the work (*z*).

Equitable interests not vesting in trustee.—If, by the assignment of a debt or other *chose in action*, the bankrupt has given to the assignee of such debt an equitable claim thereto, no right of action passes to the trustee (*a*), the money, when re-

(*q*) *Hunter* v. *Potts*, 4 T.R. 182; *Sill* v. *Worswick*, 1 H.Bl. 665; *Phillips* v. *Hunter*, 2 *ib.* 402; *Oriental Inland Steam Co., In re*, 9 Ch.App. 557; 43 L.J. Ch. 699; *Banco de Portugal* v. *Waddell*, 5 App.Cas. 161.

(*r*) *Brandon* v. *Pate*, 2 H.Bl. 308; *Holmes* v. *Walsh*, 7 T.R. 458.

(*s*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138.

(*t*) *Boorman* v. *Nash*, 9 B. & C. 152; 7 L.J. (O.S.) K.B. 150.

(*u*) *Tripp* v. *Armitage*, 4 M. & W. 687, 699; 8 L.J. Ex. 107.

(*x*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138.

(*y*) *Beckham* v. *Drake*, 2 H.L. Cas. 579; 12 L.J. Ex. 486; *Knight* v. *Burgess*, 33 L.J. Ch. 727.

(*z*) *Whitmore* v. *Gilmour*, 12 M. & W. 808; 13 L.J. Ex. 201.

(*a*) *Tibbits* v. *George*, 5 Ad. & E. 113; 9 L.J. K.B. 255; *Moss, Ex parte, Toward, In re*, 14 Q.B.D. 310; 54 L.J. Q.B. 126; *Davis, In re, Rawlings, Ex*

covered, not being distributable among the creditors. But, if the bankrupt possesses a legal interest and estate, with a possibility of a beneficial interest from which a benefit to his creditors may result, such legal interest and possibility of benefit will pass to the trustee, if he thinks fit to claim it(*b*). And, in the case of the assignment of a trade debt, if the debtor has received no notice of the assignment, the debt will remain in the order and disposition of the bankrupt, and will pass to the trustee (*c*). An assignment of a debenture which is a *chose in action* confers a good title on the assignee, notwithstanding he gave no notice to the company until after the bankruptcy (*d*).

If a bill of exchange has been indorsed merely for the accommodation of the bankrupt, then, as the latter has no right of action upon the bill against the acceptor, no right of action can pass to the trustee (*e*). And it has been held that, if a bill has been delivered by the bankrupt for a valuable consideration to another, so as to transfer to him the beneficial interest therein, the bankrupt may, after his bankruptcy, indorse the bill, and thus complete the legal title(*f*); and he may, of course, indorse all bills and notes which he holds with authority to indorse as agent or trustee for another (*g*). But all bills of exchange and promissory notes, holden *bonâ fide* by the bankrupt or insolvent for a valuable consideration, and in which he is beneficially interested, vest in the trustee, and may be put in suit by him in his own name (*h*). Where there are two separate causes of action totally distinct from each other, although arising upon one and the same instrument, and the bankrupt has no beneficial interest in one, the cause of action in which he has a beneficial interest will pass to the trustee, while the other will not (*i*).

Money in the hands of a bankrupt, clothed with a specific trust, does not pass to the trustee. If, therefore, money has been advanced to a bankrupt to be applied to a special purpose,

parte, 22 Q.B.D. 193; *Drew* v. *Josolyne*, 18 Q.B.D. 590; 56 L.J. Q.B. 490.

(*b*) *Cavendish* v. *Bury*, 4 B. & Ad. 382. 393; 1 Ad. & E. 883; *Doe* v. *Steward*, 1 Ad. & E. 300; 3 L.J. K.B. 141; *St. Thomas Hospital (Governors)* v. *Richardson*, (1910) 1 K.B. 271; 79 L.J. K.B. 488.

(*c*) 46 & 47 Vict. c. 52, s. 44 (3); *Buck* v. *Lee*, 1 Ad. & E. 804; 3 L.J. K.B. 206; *Gantz Jonas & Co., In re*, (1898) 1 Q.B. 787; 67 L.J. Q.B. 577. As to assignment of future receipts of a business, see *Nicholls, Ex parte, Jones, In re*, 22 Ch.D. 782; 52 L.J. Ch. 635; *Wilmot* v. *Alton*, (1896) 2 Q.B. 254; (1897) 1 Q.B. 17; 65 L.J. Q.B. 669; 69 L.J. Q.B. 42.

(*d*) *Pryce, In re*, 4 Ch.D. 685.

(*e*) *Wallace* v. *Hardacre*, 1 Campb. 46; *Willis* v. *Freeman*, 12 East, 656, 660.

(*f*) *Watkins* v. *Maule*, 2 Jac. & Walk. 243; *Greening, Ex parte*, 13 Ves. 206.

(*g*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138.

(*h*) *Willis* v. *Freeman*, 12 East, 656.

(*i*) *Boddington* v. *Castelli*, 23 L.J. Q.B. 31; 1 E. & B. 879.

and to be returned if the purpose cannot be accomplished, that money does not vest in the trustee, if it has been kept separate and apart from the moneys of the bankrupt, and has not been used by him so as to make him a borrower of the money for his own use (*k*).

Personal rights of action.—Causes of action arising from injury to the person or reputation of the bankrupt, *e.g.*, slander, seduction, breach of promise of marriage and the like, do not pass to the trustee (*l*). So also, rights of action for trespass to land or goods in the actual possession of a trader, these being in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and the primary personal injury to the bankrupt being the principal and essential cause of action (*m*). And in such cases the trustee cannot intercept or recover the damages obtained by the bankrupt so far as these are required for the maintenance of the bankrupt and his family (*n*).

Sale of bankrupt's book-debts, goodwill, &c.—By sect. 56, sub-sect. 1, of the Bankruptcy Act of 1883 (*o*), the trustee is authorised to sell the book-debts of the bankrupt and the goodwill of his business. The book-debts referred to in the section are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade books (*p*). A sale to the bankrupt himself is permissible, and in that case the bankrupt may sue in his own name (*q*).

Contracts in which bankrupt is interested in right of his wife.—Under the Married Women's Property Act, 1882 (*r*), a wife, though married before the Act, takes for her separate use any property to which her title has accrued subsequently to the Act coming into operation, and her husband has no power over it, nor will it pass to his trustee in bankruptcy. And a wife married after the commencement of the Act is entitled as a *feme sole* to all property belonging to her at the time of her marriage, or subsequently acquired by her during coverture. In

(*k*) *Toovey* v. *Milne*, 2 B. & Ald. 683; *Edwards* v. *Glyn*, 28 L.J. Q.B. 359.

(*l*) *Benson* v. *Flower*, W. Jo. 215; Cro. Car. 166, 177 (slander); *Howard* v. *Crowther*, 8 M. & W. 601 (seduction); *Beckham* v. *Drake*, 2 H.L. Cas. 579; 12 L.J. Ex. 486 (breach of promise).

(*m*) *Clark* v. *Calvert*, 8 Taunt. 742; *Rogers* v. *Spence*, 12 Cl. & F. 700; 15 L.J. Ex. 49; *Brewer* v. *Dew*, 11 M. & W. 625; 12 L.J. Ex. 448; *Rose* v. *Buckett*, (1901) 2 K.B. 449; 70 L.J. K.B. 736.

(*n*) *Graham, Ex parte, Job, In re*, 21 L.T. 802; *Vine, Ex parte, Wilson, In re*, 8 Ch.D. 364; 47 L.J. Bankr. 116; *Roberts, In re*, (1900) 1 Q.B. 122; 69 L.J. Q.B. 19.

(*o*) 46 & 47 Vict. c. 52.

(*p*) *Shipley* v. *Marshall*, 14 C.B. N.S. 566; 32 L.J. C.P. 258.

(*q*) *Kitson* v. *Hardwick*, L.R. 7 C.P. 473. By sect. 57 (1) the trustee is empowered, with the permission of the committee of inspection, to carry on th business so far as necessary for the beneficial winding up of the same: see *Emmanuel, Ex parte, Batey, In re*, 17 Ch.D. 35; 50 L.J. Ch. 305.

(*r*) 45 & 46 Vict. c. 75.

the case, however, of property of a wife married before the commencement of the Act, and to which her title accrued before that date, the bankrupt's disposable interest in his wife's property, not settled upon the wife for her separate use, passes, together with the property which the bankrupt or insolvent possesses in his own right, to the trustee, who thus becomes entitled to the rents and profits of all the real estates of which the husband is seised in right of his wife, and which have not been vested in trustees for her sole and exclusive use, and to the benefit of all covenants annexed to such estates, and all contracts relating to the same (*s*). The trustee will take the rights of the husband over the *choses in action* of the wife in the same plight and condition as the husband himself had them (*t*), and must bring a joint action in his own name and in that of the wife for the purpose of reducing her *choses in action* into possession, and recover judgment and take out execution in such joint action before the death of the husband, in order to make good a title against the wife, in case she should survive her husband (*u*). The trustee cannot sue on a promissory note, not negotiable, given to the wife before marriage (*x*); and, if the wife before her marriage has assigned to a trustee a *chose in action* for the benefit of herself, the right to sue on that *chose in action* cannot pass to the trustee of the bankrupt husband (*y*). By sect. 1 (5) of the Married Women's Property Act, 1882, a married woman carrying on a trade separately from her husband is subject to the Bankruptcy Laws in the same manner as if she were a *feme sole*, even in cases where she has ceased to carry on business at the date of the bankruptcy (*z*). This section, however, does not apply to a married woman possessed of separate estate but not carrying on a separate trade (*a*).

Contracts made with bankrupt during bankruptcy.—The trustee is entitled to sue, if he thinks fit, upon all contracts entered into with the bankrupt during the bankruptcy, not being

(*s*) *Doe* v. *Steward*, 1 Ad. & E. 311; 3 L.J. K.B. 141. As to his contingent interest in money paid to his wife after his discharge, see *Derer, Ex parte*, 18 Q.B.D. 660; 56 L.J. Q.B. 552.

(*t*) *Cuysegame, Ex parte*, 1 Atk. 192.

(*u*) *Mitford* v. *Mitford*, 9 Ves. 98; *Pierce* v. *Thornley*, 2 Sim. 177; *Purdew* v. *Jackson*, 1 Russ. 26; 4 L.J. (O.S.) Ch. 1; *Honner* v. *Morton*, 3 Russ. 68.

(*x*) *Sherrington* v. *Yates*, 12 M. & W. 855, 864; 13 L.J. Ex. 249.

(*y*) *Parnham* v. *Hurst*, 8 M. & W. 743; 10 L.J. Ex. 435.

(*z*) *Dagnall, In re*, (1896) 2 Q.B. 407; 65 L.J. Q.B. 666; *Worsley, In re*, (1901) 1 K.B. 309; 70 L.J. K.B. 93. And see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 152.

(*a*) *Gardiner, In re, Coulson, Ex parte*, 20 Q.B.D. 249; 57 L.J. Q.B. 149; *Stevens, In re*, 20 Ch.D. 697; 51 L.J. Ch. 909; *Lynes, In re*, (1893) 2 Q.B. 113; 62 L.J. Q.B. 372; *Helsby, In re*, 63 L.J. Q.B. 261; *Simonson, In re, Ball, Ex parte*, (1894) 1 Q.B. 433; 63 L.J. Q.B. 242.

contracts for the personal labour and services of the bankrupt made for the earning of his necessary subsistence (*b*). If the bankrupt or his servants have sold goods, after the bankruptcy, to parties who bought with notice of the bankruptcy, the trustee may treat the bankrupt as his agent, and sue such purchasers for the price, or he may treat the purchasers as wrong-doers, and bring an action for the goods. An application by the trustee to the purchasers for payment of the price, treating the transaction as a contract for sale, amounts only to a conditional adoption of the contract, and if payment is not made, the trustee may repudiate the sale altogether (*c*). Upon a contract entered into before the bankruptcy, but not finally completed until after the bankruptcy, the trustee alone is entitled to sue (*d*). And, with regard to all contracts made by the bankrupt before he obtains his certificate, the trustee may, if he pleases, adopt such contracts, treating the bankrupt as his agent in the transaction. So, he may enforce payment of a bill of exchange, or negotiable security, made payable to the bankrupt after the bankruptcy (*e*). He may claim the fruits of his trading, or of his carrying on business as a general medical practitioner, the proceeds of his inventions and discoveries, the profit of his patent rights and money awarded to him as compensation for a breach of contract (*f*). If the bankrupt has bestowed his work and labour and skill upon materials provided by the trustee, he is entitled to the benefit of such work and labour in common with the materials upon which it has been employed; and, if he has entered into an executory contract for the sale of goods, the trustee may affirm this contract, and treating the bankrupt as his agent in the matter, bring an action for the price (*g*). If, however, the trustee permits an undischarged bankrupt to pay away for value money which he has received since the adjudication, which the trustee could have required to be paid to him, he cannot follow it, even though the person to whom the money was paid had notice of the bankruptcy (*h*).

(*b*) 46 & 47 Vict. c. 52, s. 44 (1); *Hawkins, In re, Official Receiver, Ex parte*, (1892) 1 Q.B. 890; 61 L.J. Q.B. 458.

(*c*) *Valpy* v. *Sanders*, 5 C.B. 886; 17 L.J. C.P. 249.

(*d*) *Hillary* v. *Morris*, 5 C. & P. 6.

(*e*) *Kitchen* v. *Bartsch*, 7 East, 53.

(*f*) *Crofton* v. *Poole*, 1 B. & Ad. 568; 9 L.J. (O.S.) K.B. 59; *Elliot* v. *Clayton*, 16 Q.B. 584; 20 L.J. Q.B. 217; *Hesse* v. *Stevenson*, 3 Bos. & P. 578; *Wadling* v *Oliphant*, 1 Q.B.D. 145; 45 L.J. Q.B. 173; see also *Ford, Ex parte*, 1 Ch.D. 521; 45 L.J. Bankr. 96; *Dowling, In re*, 4 Ch.D. 689; 46 L.J. Bankr. 74; *Emden* v. *Carte*, 17 Ch.D. 768; 51 L.J. Ch. 41.

(*g*) *Whitmore* v. *Gilmour*, 13 L.J. Ex. 201; 12 M. & W. 808; *Evans* v. *Mann*, Cowp. 569.

(*h*) *Dewhirst, Ex parte, Vanlohe, In re*, L.R. 7 Ch. 185; 41 L.J. Bankr. 18; *Payne, Ex parte*, 15 Q.B.D. 616; but see *Edwards, Ex parte*, 13 Q.B.D. 747; *Collins* v. *Stimpson*, 11 Q.B.D. 142; 52 L.J. Q.B. 440.

Rights of undischarged bankrupts.—The bankrupt has a right to maintain actions upon contracts entered into with him after his bankruptcy, and before he has obtained his certificate, unless the trustee interferes to prevent him (*i*); he may sue for money lent, goods sold and delivered, and for work and labour done and materials provided by him, after he has been adjudged bankrupt, inasmuch as such after-acquired property does not vest absolutely in the trustee, although he has a right to claim it; if he does not make any claim, the bankrupt has a perfect right as against all other persons, and may maintain actions accordingly (*k*). When, therefore, after the bankruptcy, the defendant made a promissory note payable to the bankrupt or his order, and the latter indorsed the note without the previous consent of the trustee, it was held, first, that, as against the defendant, and as against all the world excepting the trustee, the bankrupt was competent to make the indorsement; and secondly, that as the defendant, notwithstanding the bankruptcy, had made the note payable to the order of the bankrupt, he could not afterwards dispute the power of the latter to indorse it, and was therefore estopped from setting up the bankruptcy as an answer to the action (*l*). Any property that a bankrupt acquires before his discharge belongs to his trustee, excepting only what is necessary for the support of himself and his family (*m*); he may sue for and recover his earnings if the trustee does not interfere, but what he recovers he recovers with this exception for the benefit of his creditors (*n*); and it has consequently been held that, if the trustee himself employs the bankrupt (*o*), and has the benefit of his personal labour under an agreement to pay him wages, he may maintain an action against him for the recovery thereof (*p*). But he

(*i*) *Cohen* v. *Mitchell*, 25 Q.B.D. 262; 59 L.J. Q.B. 409; *Hunt* v. *Fripp*, (1898) 1 Ch. 675; 67 L.J. Ch. 377; *Bennett, In re, Official Receiver, Ex parte*, (1907) 1 K.B. 149; 76 L.J. K.B. 134. This doctrine, however, does not apply to real estate: *New Land Development Association, In re*, (1892) 2 Ch. 138; 61 L.J. Ch. 495; *London and County Contracts* v. *Tallack*, 51 W.R. 408; *Preston's Trustee* v. *Cooke*, (1906) 2 Ch. 661; 75 L.J. Ch. 757; unless such real estate has been made personalty, *e.g.*, by being conveyed as partnership property: *Kent County Gas Light and Coke Co., In re*, (1909) 2 Ch. 195; 78 L.J. Ch. 625; but the doctrine does apply to leaseholds: *Clayton's Contract, In re*, (1895) 2 Ch. 212; 64 L.J. Ch. 615.

(*k*) *Webb* v. *Fox*, 7 T.R. 391; *Herbert* v. *Sayer*, 5 Q.B. 965; 12 L.J. Q.B. 286; *Jameson* v. *Brick and Stone Co.*, 4 Q.B.D. 208; 48 L.J. Q.B. 249; *Bailey* v. *Thurston*, (1903) 1 K.B. 137; 72 L.J. K.B. 36.

(*l*) *Drayton* v. *Dale*, 2 B. & C. 293; 2 L.J. (O.S.) K.B. 20.

(*m*) *Graydon, In re*, (1896) 1 Q.B. 417; 65 L.J. Q.B. 328.

(*n*) *Roberts, In re*, (1900) 1 Q.B. 122; 69 L.J. Q.B. 19; explaining *Chippendall* v. *Tomlinson*, 4 Doug. 318. As to meaning of "salary or income" in sect. 53 of 46 & 47 Vict. c. 52, see *Shine, In re*, (1892) 1 Q.B. 522; 61 L.J. Q.B. 253; *Rogers, In re*, (1894) 1 Q.B. 425; 63 L.J. Q.B. 178.

(*o*) 46 & 47 Vict. c. 52, s. 64.

(*p*) *Coles* v. *Barrow*, 4 Taunt. 754.

cannot acquire a right of property in anything beyond the produce of his daily labour reasonably necessary for his subsistence. After the close of the bankruptcy proceedings, property falling in to the bankrupt belongs to him, and not to the trustee (*q*).

Liability of trustee upon bankrupt's covenants and executory contracts.—If the trustee elects to take the bankrupt's leases and interests in land, he becomes chargeable upon the covenants annexed to such estates and running with the land. So, also, the trustee may elect to take the bankrupt's executory contracts, and will then be chargeable therewith (*r*).

Set-off in bankruptcy.—The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter was given by the Statutes of Set-off (*s*) to prevent cross actions; and if the defendant could have sued the plaintiff for a debt due to him, not in his representative character, he might have set it off under those statutes in an action by a plaintiff suing in his individual character also, though the plaintiff or defendant might be claiming their respective debts as a trustee for a third person. If the debts were legal debts due to each in his own right, it was sufficient. But under the Bankruptcy Acts, the mutual credit clause (*t*) has not been so construed. The object of this clause is not to avoid cross actions, for none would lie against the trustee in bankruptcy, and one against the bankrupt would be unavailing; but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate; and it does not authorise a set-off, where the debt, though legally due to the debtor from the bankrupt, is really due to him as a trustee for another, and though recoverable in a cross action would not have been recovered for his own benefit (*u*). A person is not entitled to claim the benefit of any set-off against the property of a debtor where he had, at the

(*q*) *Pettit's Estate, In re*, 1 Ch.D. 478; 45 L.J. Bankr. 63.

(*r*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138; *Boorman* v. *Nash*, 9 B. & C. 145; 7 L.J. (O.S.) K.B. 150; *Pearce* v. *Bastable*, (1901) 2 Ch. 122; 70 L.J. Ch. 446; *Bastable, In re*, (1901) 2 K.B. 518; 70 L.J. K.B. 784. The subject of disclaimer by the trustee in bankruptcy is fully treated in Addison on Torts, pp. 270—274 (ed. 8). If the trustee is added as a co-defendant with the bankrupt, but enters no appearance, he will not be made personally liable for costs: *Dansk, &c. Aktieselskab* v. *Snell*, (1908) 2 Ch. 127; 77 L.J. Ch. 352.

(*s*) 2 Geo. 2, c. 22, s. 13; and 8 Geo. 2, c. 24, s. 4, now repealed; see 46 & 47 Vict. c. 49.

(*t*) 46 & 47 Vict. c. 52, s. 38. See *Palmer* v. *Day & Sons*, (1895) 2 Q.B. 618; 64 L.J. Q.B. 807; *Mid-Kent Fruit Factory, In re*, (1896) 1 Ch. 567; 65 L.J. Ch. 250; and *Tilley* v. *Bowman, Ltd.*, (1910) 1 K.B. 745; 79 L.J. K.B. 547, as to set-off of damages for fraudulent representation on a sale of goods.

(*u*) Parke, B., *Forster* v. *Wilson*, 12 M. & W. 191, 203; 13 L.J. Ex. 209.

time of giving credit to the debtor, notice of an available act of bankruptcy committed by him (*x*).

Effect of annulling adjudication.—Whenever an adjudication in bankruptcy is annulled (*y*), all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, will be valid; but the property of the debtor, who was adjudged a bankrupt, will in such case vest in such person as the court may appoint, or in default of any such appointment revert to the bankrupt for all his estate or interest therein, upon such terms and subject to such conditions, if any, as the court may declare by order (*z*).

(*x*) 46 & 47 Vict. c. 52, s. 38.

(*y*) 46 & 47 Vict. c. 52, s. 35.

(*z*) See *Bailey* v. *Johnston*, L.R. 7 Ex. 263; 41 L.J. Ex. 211; *Crew* v. *Terry*, 2 C.P.D. 403; 46 L.J. C.P. 787; *Chidley, In re*, 1 Ch.D. 177; 45 L.J. Bankr. 49.

CHAPTER VI.

OF REMEDIES FOR BREACH OF CONTRACT.

SECTION I.

DAMAGES.

Compensation in damages for breach of contract.—Whenever one party to a contract has failed in performing what he has undertaken to do in favour of another contracting party, the latter is entitled to compensation in damages; that is, so far as money can do it, he is to be placed in the same situation with respect to damages as if the contract had been performed (*a*). All evidence tending to show what the damages really are is admissible; but the pecuniary consideration given for the contract is no criterion of the pecuniary damage resulting from the breach of it (*b*). Damages may be recovered, although the plaintiffs are not entitled to the whole in their own right, and although the damages are divisible between the plaintiffs and other parties in certain unknown proportions (*c*); but the right to recover is of course confined to the parties to the contract (*d*). But if a contract is made with A. for the benefit of B., A. can sue for and recover all that B. could recover if the contract had been made with him (*e*).

Nominal damages.—Whenever a contract has been broken, and no particular or precise damage can be proved to have been sustained, and no evidence of actual damage can be given, nominal damages are recoverable as a matter of course (*f*).

(*a*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L.J. Ex. 202; see, however, *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330; *post*, p. 281.

(*b*) *Brady* v. *Oastler*, 33 L.J. Ex. 300; 3 H. & C. 112.

(*c*) *Robertson* v. *Wait*, 8 Exch. 299; 22 L.J. Ex. 209.

(*d*) *Winterbottom* v. *Wright*, 10 M. & W. 115; 11 L.J. Ex. 415; *Blakemore* v. *Bristol & Exeter Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; see *Heaven* v. *Pender*, 11 Q.B.D. 503; 52 L.J. Q.B. 702.

(*e*) *Murray* v. *Flavell*, 25 Ch.D. 89; 53 L.J. Ch. 185.

(*f*) *Ashby* v. *White*, 2 Ld. Raym. 955; *Van Wart* v. *Woolley*, 3 B. & C. 439; 3 L.J. (O.S.) K.B. 51; *Marzetti* v. *Williams*, 1 B. & Ad. 424; 9 L.J. (O.S.) K.B. 42.

If, therefore, on a breach of contract, the jury are unable to ascertain the amount of damages, but find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages (*g*). But a creditor who has received the full amount of a debt due to him in satisfaction and discharge of the debt cannot sue for nominal damages in respect of the detention or non-payment of the money due (*h*).

General and special damages.—In the case of a warranty of the health and soundness of cattle at the time of a sale thereof, the general damage resulting from the breach of warranty is the deterioration in the value of the cattle resulting from disease; special damage may arise, if the diseased cattle are mixed with other flocks, and communicate to them a contagious disorder (*i*). In an action for the breach of a covenant to repair, the general damages are such a sum as it will cost to put the premises into repair. Special damages may arise and be recoverable, if the covenantee is himself only a lessee of the premises, holding them under a like covenant to repair, and has been sued by the original lessor, and compelled to pay damages and costs in consequence of the defendant's breach of covenant (*k*). In the case of contracts for the payment of a specified sum of money, the general damages are obviously the sum agreed to be paid, if the contract has been fully and properly performed by the plaintiff, and nothing has been paid on account. But when the contract is not for the payment of a specific sum of money at an appointed time, but for the performance of some particular act, the plaintiff is entitled to a full and fair compensation for the injury and inconvenience resulting from the breach of contract; and the court will not tie a jury down to any nice calculation, but will leave them considerable latitude in assessing the damages (*l*). The plaintiff is entitled to be replaced in the position in which he would have been had the contract not been broken. Thus, where stockbrokers bought shares for their principal, and contracted to resell them at any time before settling day at his request, it was held that the damages for a breach of this contract were the difference between the highest price the shares reached

(*g*) *Feize* v. *Thompson*, 1 Taunt. 121; [illegible] Co., Ltd. v. [illegible], [illegible], 1 K.B. 244; 72 L.J. K.B. 330.

(*h*) [illegible] v. [illegible], 2 C.B. 500; 15 L.J. C.P. 130.

(*i*) *Mullett* v. *Mason*, L.R. 1 C.P. 559; 35 L.J. C.P. 299; *Smith* v. *Green*, 1 C.P.D. 92; 45 L.J. C.P. 28; [illegible] v. *Hobbs*, 4 App.Cas. 13; 48 L.J. Q.B. 281; *Bostock & Co.* v. *Nicholson & Sons*, [1904], 1 K.B. 725; 73 L.J. K.B. 524; see also 56 & 57 Vict. c. 71, s. 53 (2).

(*k*) *Smith* v. *Howell*, 6 Exch. 737; 20 L.J. Ex. 377.

(*l*) *Lowe* v. *Peers*, 4 Burr. 2225; *Loosemore* v. *Radford*, 9 M. & W. 657; 11 L.J. Ex. 284; *Sanders* (*Lord*) v. *Fletcher*, 5 B. & Ald. 835.

between the date of purchase and settling day and the price at which the brokers actually sold the shares (*m*). This point was not dealt with on appeal (*n*).

Damages are recoverable only up to the time of the commencement of the action; but the prospective as well as the present injury sustained at the time the action was commenced may be regarded in determining what will be a fair compensation to be awarded to the plaintiff (*o*).

Recovery of interest generally.—As regards the recovery of interest at common law, the general rule is, that interest is allowed only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. In the case of bills of exchange and promissory notes, made payable with interest, the interest runs from the day of the date of the bill or note; if they are silent as to interest, it is payable only from the time when the bill or note becomes due (*p*). The interest forms part of the damages, and the jury may allow such a reasonable amount as they think proper (*q*). When a bill or note is payable on demand, interest may be given from the issuing of the writ, if there has been no previous demand (*r*). In the case of a bank stopping payment, the closing of the doors of the bank does not dispense with the necessity of a formal demand of payment of the notes and drafts current at the time of the stoppage; and interest will run upon them from the respective times of the claims in respect of their being sent in to the liquidator (*s*). If goods are sold, to be paid for by a bill, and the bill be not given, interest may be recovered on the price from the time when the bill would have become due (*t*). If accounts between the parties show that interest has always been claimed and allowed on sums advanced or balances unpaid, there will be evidence from which a promise to pay interest may be implied (*u*). And, if an express contract to pay interest is proved, the non-payment of it

(*m*) *Michael* v. *Hart*, (1901) 2 K.B. 867; 70 L.J. K.B. 1000; *Diestal* v. *Stevenson*, (1906) 2 K.B. 345; 75 L.J. K.B. 797; *De la Bere* v. *Pearson, Ltd.*, (1908) 1 K.B. 280; 77 L.J. K.B. 380; *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K.B. 543; 74 L.J. K.B. 688; but see *Morgan* v. *Russell*, (1909) 1 K.B. 357; 78 L.J. K.B. 187.

(*n*) See (1902) 1 K.B. 482; 71 L.J. K.B. 265.

(*o*) Com. Dig. DAMAGES, D.; *Fetter* v. *Beal*, 1 Raym. 339, 692; see also *Dominion Coal Co.* v. *Dominion Iron & Steel Co.*, (1909) A.C. 293; 78 L.J. P.C. 115; *George D. Emery & Co.* v. *Wells*, (1906) A.C. 515; 75 L.J. P.C. 104.

(*p*) As to interest, see now 45 & 46 Vict. c. 61, s. 9, *post*, pp. 1245, 1246.

(*q*) *Roffey* v. *Greenwell*, 10 Ad. & E. 222; 8 L.J. Q.B. 336.

(*r*) *Pierce* v. *Fothergill*, 2 Sc. 334.

(*s*) *East of England Banking Co., In re*, L.R. 4 Ch. 14; 38 L.J. Ch. 121.

(*t*) *Marshall* v. *Poole*, 13 East, 101; *Farr* v. *Ward*, 3 M. & W. 25.

(*u*) *Bruce* v. *Hunter*, 3 Campb. 467; *Calton* v. *Bragg*, 15 East, 227; *Anglesey (Marquis), In re, Wilmot* v. *Gardiner*, (1901) 2 Ch. 548; 70 L.J. Ch. 810.

forms part of the general damages (*x*). If no rate of interest is specified on the face of a bill of exchange, the rate of interest recoverable by way of damages is the current rate of interest payable at the place where the contract was made. If, therefore, such a bill of exchange is drawn in one country and payable in another, the drawer is liable, on the dishonour of the bill, to pay interest according to the current rate of interest in the country where the bill was drawn (*y*). Where a simple contract debt has been secured by deposit of title deeds, and nothing has been said as to interest, the mortgagee is entitled to interest at the rate of 4*l.* per cent. (*z*).

By sect. 28 of 3 & 4 Will. 4, c. 42, upon all debts or sums certain, payable at a certain time (*a*), or otherwise the jury, on the trial of any issue or any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing (*b*), so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment (*c*). The jury may also (sect. 29), if they think fit, give damages, in the nature of interest, over and above the sum recoverable, in all actions on policies of assurance made after the passing of the Act. By 1 & 2 Vict. c. 110, s. 17, it is enacted that every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment (*d*). A notice of a call on a contributory under a winding-up, which states that if the call is not paid at the time appointed interest will be charged thereon, is a sufficient notice that interest will be claimed (*e*). A general intimation upon a tradesman's account that interest will be charged after one year's credit cannot be considered as referring to each item in the account, and is not a sufficient notice claiming interest within the section (*f*). But in the case of notes payable on demand payment must be

(*x*) *Harrison* v. *Allen*, 9 Moore, 28, 30; 2 L.J. (O.S.) C.P. 97.

(*y*) *Gibbs* v. *Fremont*, 9 Exch. 31; 22 L.J. Ex. 302.

(*z*) *Kerr's Policy, In re*, L.R. 8 Eq. 331; 38 L.J. Ch. 539.

(*a*) *Horner, In re*, (1896) 2 Ch. 188; 65 L.J. Ch. 694.

(*b*) As to what is a demand in writing, see *Ward* v. *Eyre*, 15 Ch.D. 130; 49 L.J. Ch. 657; *Rhymney Ry.* v. *Rhymney Iron Co.*, 25 Q.B.D. 147; 59 L.J. Q.B. 414; *Lloyd Edwards, In re*, 61 L.J. Ch. 22.

(*c*) See as to this section, *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A.C. 429; 63 L.J. Ch. 93; *Caudery* v. *Finnerty*, 61 L.J. Q.B. 496.

(*d*) *Newton* v. *Grand Junc. Ry.*, 16 M. & W. 139; 16 L.J. Ex. 276.

(*e*) *Lintott, Ex parte*, L.R. 4 Eq. 184; 36 L.J. Ch. 510; *Barrow's case*, L.R. 3 Ch. 784; 38 L.J. Ch. 15.

(*f*) *Lloyd Edwards, In re*, 61 L.J. Ch. 22.

demanded, or interest will not begin to run (*g*), and the demand must be made on the person liable to pay: a demand upon the trustee in bankruptcy is insufficient (*h*). A policy of assurance does not bear interest, and interest is only payable under the statute where there has been a wrongful detention of the principal (*i*). It seems now to be settled law that interest is not due, and therefore cannot be given as damages under the section, on money secured by a written instrument, unless it appears on the face of that instrument that interest was intended to be paid or unless it be implied from the usage of trade (*k*). A written application for a loan till a fixed day is not an instrument by virtue of which money is payable within 3 & 4 Will. 4, c. 42, s. 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application (*l*).

Special damages.—The general rule is that all damages which are the fair and natural result of the defendant's breach of contract, although arising out of special circumstances, may be recovered in the action brought against him, provided they must, in the ordinary course of things, have been expected to occur, or may fairly be considered to have been contemplated by the parties as the probable consequence of a breach of the contract (*m*). If the contract has been made under special circumstances which were communicated and known to both parties, the damages they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated; but, if the special circumstances were wholly unknown to the party breaking the contract, he can only be supposed to have had in his contemplation the amount of injury which would arise generally, and not from any special circumstances (*n*). Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages

(*g*) *Herefordshire Banking Co., In re*, L.R. 4 Eq. 250; 36 L.J. Ch. 806. See sect. 57 (1) (*b*) of 45 & 46 Vict. c. 61, *post*, p. 1298.

(*h*) *Herefordshire Banking Co., In re*, L.R. 4 Eq. 250; 36 L.J. Ch. 806.

(*i*) *Webster* v. *British Empire Assur. Co.*, 15 Ch.D. 169; 49 L.J. Ch. 769.

(*k*) *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A.C. 429; 63 L.J. Ch. 93; following *Page* v. *Newman*, 9 B. & C. 378; 7 L.J. (O.S.) K.B. 267.

(*l*) *Taylor* v. *Holt*, 3 H. & C. 452; 34 L.J. Ex. 1; sed quære.

(*m*) *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L.J. Ex. 179; *Welch* v. *Anderson*, 61 L.J. Q.B. 167; see also 56 & 57 Vict. c. 71, ss. 51, 54.

(*n*) *Sully* v. *Duranty*, 3 H. & C. 270; 33 L.J. Ex. 319; *Burton* v. *Pinkerton*, L.R. 2 Ex. 340; 36 L.J. Ex. 137; *Borradaile* v. *Brunton*, 2 Moore, 582; 8 Taunt. 535; *Smeed* v. *Foord*, 1 E. & E. 602; 28 L.J. Q.B. 178; *Prior* v. *Wilson*, 35 L.T. 549; 8 W.R. 260; *Burrows* v. *March Gas & Coke Co.*, L.R. 7 Ex. 96; 41 L.J. Ex. 46; *Mowbray* v. *Merryweather*, (1895) 2 Q.B. 640; 65 L.J. Q.B. 50; see *McMahon* v. *Field*, 7 Q.B.D. 591; 50 L.J. Q.B. 552; *Pell* v. *Shearman*, 10 Exch. 766; see, however, *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330.

for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount (*o*). Where the defendant had been guilty of a breach of contract in not repairing a steamship within the time stipulated for, it was held that he was liable to pay as damages the net profits which the owners might have obtained by chartering the vessel, if she had been delivered at the time fixed by the contract (*p*). So where the defendant did not give possession under a lease to the plaintiff, whom he knew to be about to carry on a trade on the premises, he was held liable for the loss of trade (*q*). Where the plaintiff had entered into a contract of subsale with respect to certain goods, and the defendant knew that the plaintiff had purchased them for re-sale, but did not know of any contract of re-sale, it was held that the plaintiff could not recover damages for loss of profit of re-sale (*r*). Where, on the other hand, a miller delivered to a carrier the broken shaft of his mill to be carried for hire to an engineer, and the carrier negligently delayed the delivery of the shaft, and in consequence of the delay the mill was kept standing idle, and the miller brought an action for damages against the carrier, and sought to recover compensation for the loss of the profits of his trade whilst the mill was stopped through the default of the carrier, it was held that, in order to recover these damages, the miller should have communicated to the carrier the fact that he had no other shaft, and that his mill was necessarily stopped until the new shaft was put up; for the stoppage of the mill could not reasonably be contemplated by the carrier as the natural result of delay in the delivery of the broken shaft (*s*). The same principle of law was adopted in a case where a cotton mill came to a standstill in consequence of delay by a carrier in delivering some cotton (*t*). Where the plaintiff sent goods from Manchester by a railway company to his traveller at Cardiff, and the delivery of the goods was, through the negligence of the company, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits he would have derived

(*o*) *Cory* v. *Thames Ironworks Co.*, L.R. 3 Q.B. 181; 37 L.J. Q.B. 68; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 98.

(*p*) *Trent and Humber Ship-building Co., In re, Cambrian Steam Packet Co., Ex parte*, L.R. 4 Ch. 112; 38 L.J. Ch. 38.

(*q*) *Jacques* v. *Millar*, 6 Ch.D. 153; 47 L.J. Ch. 544; overruled on another point, see *Marshall* v. *Berridge*, 19 Ch.D. 233; 51 L.J. Ch. 329.

(*r*) *Thol* v. *Henderson*, 8 Q.B.D. 457.

(*s*) *Hadley* v. *Baxendale*, 9 Exch. 941; 23 L.J. Ex. 179; *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L.J. Q.B. 221; *Portman* v. *Middleton*, 4 C.B. N.S. 324; 27 L.J. C.P. 231.

(*t*) *Gee* v. *Lanc. & York. Ry.*, 6 H. & N. 211; 30 L.J. Ex. 11; *Fletcher* v. *Tayleur*, 17 C.B. 21; 25 L.J. C.P. 65.

from a sale at Cardiff, it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay (*u*). So, also, where a commercial traveller delivered a parcel of samples to a common carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required, and by the negligence of the carrier the parcel was delayed, and the traveller spent three days at A. unemployed waiting for it, it was held that the carrier was not liable to pay the hotel expenses of the traveller during the time he was waiting for the parcel, such damages being too remote (*x*). Where there has been a warranty that an animal is free from disease, and the plaintiff trusting to that has let the animal be with others which have become infected, the defendant is liable for all the loss if he must reasonably have known what would happen (*y*). Where there was a covenant to build a wall, and there was a breach of the covenant, but the cost of building a wall would be greatly in excess of the damage from not building one, it was held that the cost of building the wall was not the true measure of damages, but the pecuniary amount of the difference between the position of the plaintiffs by the breach or by the performance (*z*). Where a claim was made for damages for loss of expected profit sustained through the defendant's breach of contract but the expected profit depended entirely on a succession of contingencies it was held that the damages were too remote, and that the plaintiff was only entitled to nominal damages (*a*).

Recovery of cost of previous legal proceedings as part of damages.—If an agent promises to execute a commission for hire or reward, and breaks his promise, the general damage is the loss which immediately results from the non-execution of the thing agreed to be done. But special damages may arise and be recoverable, if the employer is himself only an agent acting on behalf of, and responsible to, a third party, and is sued by the latter, and has to pay damages and costs in consequence of the defendant's breach of contract (*b*). If a principal who has employed an agent to make a contract repudiates the contract made by the agent, or denies his liability, and the agent is himself sued and defends unsuccessfully, he may, in an action

(*u*) *G. W. Ry.* v. *Redmayne*, L.R. 1 C.P. 329; and see *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292.

(*x*) *Woodger* v. *G. W. Ry.*, L.R. 2 C.P. 318; 36 L.J. C.P. 177.

(*y*) *Smith* v. *Green*, 1 C.P.D. 92; 45 L.J. C.P. 28.

(*z*) *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330.

(*a*) *Sapwell* v. *Bass*, (1910) 2 K.B. 486; 79 L.J. K.B. 932.

(*b*) *Mainwaring* v. *Brandon*, 2 Moore 125; 8 Taunt. 202.

against his principal, recover the costs of his unsuccessful defence, if in defending the action he has pursued the course which a prudent man would have done under the circumstances (*c*). But the costs of previous legal proceedings can only be recovered where they are the natural and proximate consequence of the breach of contract (*d*); and costs cannot be recovered which were incurred in upholding a defence manifestly untenable (*e*).

Pecuniary liabilities swelling amount of damages.—A pecuniary liability incurred by the plaintiff in consequence of the breach of the defendant's contract may form part of the damages, though it may be difficult to estimate the extent of such pecuniary liability. Where the plaintiff, having purchased seed barley with a warranty, sold it again with a similar warranty, and the warranty was broken, and the sub-vendee claimed damages from the plaintiff, his immediate vendor, it was held that the jury ought to take this item of claim and liability on the part of the plaintiff into their consideration in estimating the amount of the damages (*f*). But where a purchaser buys goods ordinarily procurable in the market, and before he has received them sells them again, and the goods are not delivered by the first vendor, and the purchaser fails to deliver them to his vendee, he cannot charge the damages paid to the latter against the first vendor, if it appears that he had the means of fulfilling his sub-contract by going into the market and supplying himself with the article and delivering it to his vendee (*g*). Where a tenant holds over after a notice to quit, or after the expiration of his lease, and the landlord is compelled to pay damages to a party to whom he had contracted to let the land, these damages will be recoverable from the obstructive tenant (*h*).

Reduction of damages.—In estimating the damages sustained by a breach of contract the defendants are not entitled to bring into account the amount which the plaintiff may have received

(*c*) *Broom* v. *Hall*, 7 C.B. N.S. 503; *Rolph* v. *Crouch*, L.R. 3 Ex. 44; 37 L.J. Ex. 8; *Howard* v. *Lovegrove*, L.R. 6 Ex. 43; 40 L.J. Ex. 13.

(*d*) *Richardson* v. *Dunn*, 8 C.B. N.S. 655; 30 L.J. C.P. 47; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *Baxendale* v. *L. C. & D. Ry.*, L.R. 10 Ex. 35; 44 L.J. Ex. 20; overruling *Mors-le-Blanch* v. *Wilson*, L.R. 8 C.P. 227; 42 L.J. C.P. 70; and see *Fisher* v. *Val de Travers Co.*, 1 C.P.D. 511; 45 L.J. C.P. 479; *Hornby* v. *Cardwell*, 8 Q.B.D. 329; 51 L.J. Q.B. 89; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 58; *Agius* v. *G. W. Colliery Co.*, (1899) 1 Q.B. 413; 68 L.J. Q.B. 312; *Maxwell* v. *British Thomson Houston Co.*, (1904) 2 K.B. 342; 73 L.J. K.B. 644; *The Millwall*, (1905) P. 155; 74 L.J. P. 82.

(*e*) *Ronneberg* v. *Falkland Islands Co.*, 17 C.B. N.S. 1; 34 L.J. C.P. 34; *Kiddle* v. *Lovett*, 16 Q.B.D. 605.

(*f*) *Randall* v. *Raper*, E. B. & E. 84; 27 L.J. Q.B. 266.

(*g*) Maule, J., *Peterson* v. *Ayre*, 13 C.B. 365; *Josling* v. *Irvine*, 30 L.J. Ex. 78; 6 H. & N. 512.

(*h*) *Bramley* v. *Chesterton*, 2 C.B. N.S. 592; 27 L.J. C.P. 23.

under a policy of insurance (*i*). So in an action for breach of contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, another ship in which they were interested having been substituted for the purpose for which the former ship was required, it was held that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually (*k*).

Excessive damages.—It is a general rule of law, that the indemnity to be recovered in respect of damages sustained by reason of a breach of contract shall be fairly proportioned to the real injury sustained; and the court will not permit a defendant to be mulcted in excessive damages. It is a rule, also, that a catching bargain shall not be taken advantage of, so as to enable the plaintiff to put into his pocket a greater sum of money than will form a reasonable compensation for the injury he has sustained by the breach of contract. Thus, where the defendant bought a horse of the plaintiff, and agreed to pay, as the price of the horse, "a barleycorn a nail, for each nail in the horse's shoes, doubling every nail," and there were thirty-two nails in every shoe, and the plaintiff, after doubling every nail, and reckoning the entire amount, claimed five hundred quarters of barley as the price of the horse, which the defendant refused to pay, Hyde, J., directed the jury to give no more than the actual value of the horse as damages; and they accordingly gave the plaintiff 8*l*., which was held to be good (*l*).

Penal obligations.—In ancient times resort was had to penalties to secure the performance of contracts; but subsequently the legislature, by 8 & 9 Will. 3, c. 11, s. 8, extended to defendants a reasonable relief from penalties, by requiring the plaintiff in all actions upon any bond (*m*) or any penal sum for non-performance of any covenants or agreements in any indenture, deed or writing contained, to assign breaches, and the jury, upon the trial, to assess the damages that the plaintiffs have sustained thereby (*n*), which damages only are to be recovered; but judgment for the amount of the penalty is to be entered and to stand as a further security to answer to the plaintiff such

(*i*) *Bradburn* v. *G. W. Ry.*, L.R. 10 Ex. 1; 44 L.J. Ex. 9.

(*k*) *Jebsen* v. *East & West India Dock Co.*, L.R. 10 C.P. 300; 44 L.J. C.P. 181. As to an act done in mitigation of damages, see *Erie County, &c., Fuel Co.* v. *Carroll*, (1911) A.C. 105; *British Westinghouse, &c., Co.* v. *Underground Electric Ry.*, (1911) 1 K.B. 575.

(*l*) *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Chesterfield* v. *Jansen*, 1 Wils. 286.

(*m*) As to what is a "bond," see *Gerard* v. *Clowes*, (1892) 2 Q.B. 11; 61 L.J. Q.B. 487; *Strickland* v. *Williams*, (1899) 1 Q.B. 382; 68 L.J. Q.B. 241.

(*n*) 3 & 4 Will. 4, c. 42, s. 16.

damages as may be sustained from further breach of any covenants in the same indenture, deed, or writing contained.

Penalties for breach of contract.—The statute of Will. 3 embraces all penalties established to secure the performance of contracts, and is in all cases compulsory upon plaintiffs. "It is not in the power of a plaintiff to refuse to proceed according to that statute; he must assign the breach of such covenants as he proceeds to recover satisfaction for; and, if the defendant pleads to issue, and the cause goes to a jury for trial, the jury, upon trial of such cause, must assess damages for such of the breaches assigned as the plaintiff, upon trial of the issues, shall prove to have been broken" (*o*). The statute, it will be seen, refers simply to penalties for the non-performance of contracts, and does not extend to any bond conditioned for the mere payment of money. Bail bonds, replevin bonds, post-obit bonds, and all bonds conditioned for the payment of a sum certain, at a day certain, are not within the statute (*p*); but bonds for the payment of annuities, and of sums of money by instalments have been held to come within its provisions (*q*). Where, a debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments, and by a deed, reciting that the creditor agreed to give the debtor time upon having the payment of the debt secured to him with interest, "by the instalments and in manner thereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso that, upon default being made in payment of any instalment, the whole unpaid portion of the debt, with interest, should become immediately payable, and the debtor made default, it was held that the proviso was not in the nature of a penalty, and that the creditor ought not to be restrained from enforcing immediate payment of the whole of the money remaining due (*r*).

In an action upon a bond conditioned for the performance of covenants or collateral acts, the obligee cannot recover more damages against the obligor, for a breach of the condition of the bond, than the amount of the penalty and costs: for the

(*o*) *Hardy* v. *Bern*, 5 T.R. 636.

(*p*) *Smith* v. *Bond*, 3 Moo. & Sc. 528; 2 L.J. C.P. 269; *James* v. *Thomas*, 5 B. & Ad. 40; 2 L.J. K.B. 207; 1 Saund. 48, n. (b).

(*q*) *Willoughby* v. *Swinton*, 6 East, 550; *Walcot* v. *Goulding*, 8 T.R. 126; a warrant of attorney conditioned for the payment of money by instalments, or to secure the payment of an annuity, is not within the statute: *Cox* v. *Rodbard*, 3 Taunt. 74; *Shaw* v. *Worcester (Marquis)*, 4 M. & P. 21; 8 L.J. (O.S.) C.P. 98.

(*r*) *Sterne* v. *Beck*, 1 De G. J. & S. 595; 32 L.J. Ch. 682; *Protector Loan Co.* v. *Grice*, 5 Q.B.D. 592; 49 L.J. Q.B 812; *Thompson* v. *Hudson*, L.R. 4 H.L 1; 38 L.J. Ch. 431.

bond ascertains the extent of the damage by consent of the parties; and, therefore, if a bond be conditioned for the performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs (*s*). But, where the penalty is contained in a deed *inter partes* or an agreement, damages may be recovered beyond the penalty. When the performance of a covenant or agreement is secured by a penalty imposed in the contract itself, the plaintiff may, at his election, bring an action for the penalty, and recover the penalty (after which he cannot resort again to the covenants, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenants, and recover more or less than the penalty *toties quoties* (*t*). If he proceeds and recovers judgment for the penalty, he, of course, subjects himself to the restrictions imposed by 8 & 9 Will. 3, c. 11, as to issuing execution upon such judgment, and must take the opinion of a jury as to the amount that he ought, under the circumstances, to be permitted to levy. But, if he rejects the penalty, and proceeds for his real damages, he may recover a sum larger in amount than the penalty, if the jury think him entitled to it (*u*). A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase, was held to be valid to the full amount of the penal sum, which greatly exceeded the original purchase-money, there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incident thereto, expended a larger sum than the full amount of the penal sum named in the bond (*x*).

Liquidated damages.—But a sum *in solido*, fixed upon by the parties and limited to be paid by the one to the other as a compensation for a breach of contract, is not necessarily a penalty, such as courts of equity would have relieved against, or such as comes within the operation of 8 & 9 Will. 3, c. 11. If the damages accruing from a breach of contract are of an uncertain nature, and the parties have chosen to assess them beforehand, by agreement amongst themselves, and the amount agreed upon is no more than what may be a reasonable measure

(*s*) *Wilde* v. *Clarkson*, 6 T.R. 304.

(*t*) *Lowe* v. *Peters*, 4 Burr. 2228; *Hurst* v. *Hurst*, 4 Exch. 579; 19 L.J. Ex. 410; and see *Legh* v. *Lillie*, 6 H. & N. 170, n.; 30 L.J. Ex. 25.

(*u*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343.

(*x*) *Osborne* v. *Eales*, 2 Moo. P.C. N.S. 125.

of damages, it is not a penalty within the meaning of the statute, although it is denominated a "penal sum." If, however, the contract contained various stipulations, some of which were of trivial importance and none of which were for the payment of an ascertained sum of money, it is doubtful whether a condition for the payment of a sum of money as liquidated damages for the breach of any of the provisions of the contract would not be treated as constituting a penalty, but this would not be the case where there was a condition for the forfeiture of a deposit on the breach of any of the stipulations (*y*). In deciding whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the Court must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the Court to treat it as a penalty, although it raises a presumption that that was the intention of the parties; nor does the fact that the sum in question had been deposited at the making of the contract compel the Court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties (*z*). A man in possession of an estate in the country may set his own value upon the view, the timber, or other ornaments and conveniences of the property; and, if he parts with the possession, he may part with it on the terms that a tenant shall use it or cultivate it in a particular way, or pay a large sum of money as a compensation for the damage or injury occasioned by his neglect. "He may set an extraordinary value," observes Lord Eldon, "upon a particular piece of land or wood, on account of the amusement which it may afford him; and, if he choose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract" (*a*).

In cases, also, affecting the personal affections, the amount

(*y*) *Wallis* v. *Smith*, 21 Ch. D. 243; 52 L.J. Ch. 145; *Willson* v. *Love*, (1896) 1 Q.B. 626; 65 L.J. Q.B. 474.

(*z*) *Pye* v. *British Automobile Commercial Syndicate*, (1906) 1 K.B. 425; 75 L.J. K.B. 270; *Clydebank Engineering Co.* v. *Yzquierdo y Castaneda*, (1905) A.C. 6; 74 L.J. P.C. 1; *Public Works Commissioners* v. *Hills*, (1906) A.C. 368; 75 L.J. P.C. 69.

(*a*) *Astley* v. *Weldon*, 2 Bos. & P. 346; *Birch* v. *Stephenson*, 3 Taunt. 469; *Rolfe* v. *Peterson*, 2 Bro. P.C. 436; *Denton* v. *Richmond*, 1 Cr. & M. 734; 2 L.J. Ex. 269; *Farrant* v. *Olmius*, 3 B. & Ald. 692; *Jones* v. *Green*, 3 Y. & J. 304; *Pollitt* v. *Forrest*, 11 Q.B. 967; 16 L.J. Q.B. 424; *Bowers* v. *Nixon*, 12 Q.B. 558; 18 L.J. Q.B. 35; *Herbert* v. *Salisbury & Yeovil Ry.*, L.R. 2 Eq. 221; *Elphinstone* (*Lord*) v. *Monkland Iron Co.*, 11 App.Cas. 332; *Law* v. *Redditch Local Board*, (1892) 1 Q.B. 127; 61 L.J. Q.B. 172.

of damages which ought to be awarded by way of compensation cannot easily be measured by the taste or judgment of third parties; it is often such as the persons interested can alone correctly estimate; and they are permitted, when that is the case, to fix them beforehand, at a precise sum to be paid as liquidated damages. If a man seals and delivers a written promise of marriage, whereby he promises to marry a particular lady, and in default to pay her the sum of 1,000*l.*, "that very sum is the ascertained damage, and the jury are confined to it" (*b*). If a deed or agreement contains promises for the performance of various acts, and then provides for the payment of one large sum, such as 1,000*l.*, by way of compensation, in case of the non-performance of all or of any one of the things stipulated to be done, and the damages in every case of non-performance are altogether uncertain, the sum agreed to be paid will be treated as liquidated damages, and not as a penalty (*c*). Also where, in an agreement for the sale of the lease and goodwill of a tavern, it was stipulated that the defendant should not thenceforth be in any way concerned in carrying on the trade of a licensed victualler within one mile of the tavern, under the penal sum of 500*l.*, it was held that the whole sum could be recovered as liquidated damages. In cases of this sort, "the claim for damages depends not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the vendor of the lease has attached to him, and on the number which his future conduct of the house which he has taken may draw to him" (*d*). On a guarantee that a vessel should sail with or before any other vessel then in the berth "under penalty of forfeiting one-half of the freight," another vessel having sailed first, it was held that "one-half of the freight" was recoverable as liquidated damages; and that it was immaterial whether the money intended to be made payable was called by the parties a penalty or liquidated damages (*e*).

Where the obligee of a bond bound himself to complete certain smith's work in a church in a limited time, and in default to forfeit and pay 10*l.* for every week after the expiration of the time limited for the doing thereof, until the work should be

(*b*) *Lowe* v. *Peers*, 4 Burr. 2229.

(*c*) *Atkyns* v. *Kinnier*, 4 Exch. 784; 19 L.J. Ex. 132; *Leighton* v. *Wales*, 3 M. & W. 545; 7 L.J. Ex. 145; *Reynolds* v. *Bridge*, 6 E. & B. 528; 26 L.J. Q.B. 12; *Mercer* v. *Irving*, E. B. & E. 563; 27 L.J. Q.B. 291; *Price* v. *Green*, 16 M. & W. 346; 16 L.J. Ex. 108; *Galsworthy* v. *Strutt*, 1 Exch. 663; 17 L.J. Ex. 226.

(*d*) Per Best, C.J., in *Crisdee* v. *Bolton*, 3 C. & P. 243.

(*e*) *Sparrow* v. *Paris*, 7 H. & N. 594; 31 L.J. Ex. 137.

completely finished, it was held that the 10*l.* a week was recoverable as liquidated damages (*f*). Whether the sum provided to be paid is to be treated as a penalty, or as liquidated damages, is a question of law to be decided by the judge upon a consideration of the whole instrument (*g*).

Penalties under the denomination of liquidated damages.—If a contract contains stipulations for the performance of divers things, and the damages resulting from the non-performance of some of them are capable of being measured by a precise sum, and one sum is stipulated to be paid in respect of the non-performance of the contract generally, that sum is a penalty, although the parties may choose to call it liquidated damages, and even expressly declare that it is not a penalty. Since 8 & 9 Will. 3, c. 11, parties, in framing agreements, have frequently changed the word "penalty" for "liquidated damages"; and the mere alteration of the term cannot alter the nature of the thing. If the sum, by whatsoever name called, is in point of fact a "penalty," the court will treat it as such; and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provisions of the statute as to assessing the damages (*h*). There is one case in which the sum agreed for must always be considered a penalty; and that is where the payment of a smaller sum is secured by a larger (*i*).

Parties to be made plaintiffs in actions for damages for tort founded on contract.—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for a tort. Both the non-feazance and the mis-feazance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured (*k*). Whenever the goods or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury from the negligent execution of the work forms a ground of action upon a tort as well

(*f*) *Fletcher* v. *Dyche*, 2 T.R. 33; *Duckworth* v. *Alison*, 1 M. & W. 412; 5 L.J. Ex. 171; *Legge* v. *Harlock*, 12 Q.B. 1015; 18 L.J. Q.B. 45.

(*g*) *Sainter* v. *Ferguson*, 7 C.B. 727; 18 L.J. C.P. 217.

(*h*) Per Parke, B., *Green* v. *Price*, 13 M. & W. 701; affirmed 16 M. & W. 346; 16 L.J. Ex. 108; *Kemble* v. *Farren*, 6 Bing. 141; 7 L.J. (O.S.) C.P. 258; per Bramwell, B., *Betts* v. *Burch*, 4 H. & N. at p. 510; 28 L.J. Ex. at p. 271; *Dimech* v. *Corlett*, 12 Moo. P.C. 299; *Magee* v. *Lavell*, L.R. 9 C.P. 107; 43 L.J. C.P. 131; *Rayner* v. *Condor*, (1895) 2 Q.B. 289; 64 L.J. Q.B. 540; *Wallis* v. *Smith*, 21 Ch.D. 243; 52 L.J. Ch. 145; *Boys* v. *Ancell*, 7 Sc. 364; 8 L.J. C.P. 267.

(*i*) Per Chambre, J., *Astley* v. *Weldon*, 2 B. & P. at p. 354; per Coleridge, J., *Reynolds* v. *Bridge*, 6 E. & B. 528; 26 L.J. Q.B. 12; *Thompson* v. *Hudson*, L.R. 4 H.L. p. 15; 38 L.J. Ch. 431; *Newman, In re*, 4 Ch. 724; 46 L.J. Bankr. 57; *Davies* v. *Penton*, 6 B. & C. 223; 5 L.J. (O.S.) K.B. 112.

(*k*) *Bowman* v. *Brown*, 3 Q.B. 511; 11 L.J. Ex. 437; 11 Cl. & Fin. 1.

as upon a contract. So, if goods are delivered to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods (*l*).

But it is said to be a rule of law that, whenever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter (*m*). So where a person sent his luggage with his servant by a railway, and himself went by a later train, and the railway company received the luggage as the servant's, it was held that the master could not sue for its loss (*n*). But every person who exercises an employment is bound to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another. If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the person to be made plaintiff in an action for the neglect of duty; but if the person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the person to be made plaintiff.

Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously (*o*), and every person who has been injured by the negligent performance of the work of carrying is entitled to an action against the carrier, although he is no party to the contract under which the work was done (*p*).

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully

(*l*) *Coggs* v. *Bernard*, 1 Smith's L. C. 173 (ed. 11).

(*m*) *Tollit* v. *Sherstone*, 5 M. & W. 283; 8 L.J. Ex. 244; *Winterbottom* v. *Wright*, 10 M. & W. 115; 11 L.J. Ex. 415; *Blakemore* v. *Bristol and Exeter Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; but see *Heaven* v. *Pender*, 11 Q.B.D. 503; 52 L.J. Q.B. 702.

(*n*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122. See *Addison on Torts*, 717, 728, 742 (ed. 8).

(*o*) See *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201.

(*p*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 984; 20 L.J. Q.B. 411; *Marshall* v. *York and Newcastle Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; *post*, p. 1017.

treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeazance (*q*).

SECTION II.

SPECIFIC PERFORMANCE (*r*).

Specific performance of contracts.—There are very many cases in which money compensation for a breach of contract affords a very inadequate remedy; and the Court of Chancery, from a very early period, in the exercise of its equitable jurisdiction, enforced the specific performance of contracts in cases where damages at law would not have afforded a complete remedy (*s*). In the case of contracts for the sale of lands, and houses, the court will compel the vendor to convey the estate agreed to be sold to the purchaser, and to enter into all the usual covenants for title, and will compel the purchaser to pay the purchase-money, whether the price has been fixed by the parties themselves, or whether it has to be determined by valuation (*t*), it being considered that compensation in damages is not an adequate remedy, and that the purchaser ought to have the estate which he has agreed to buy, and the vendor to sell (*u*); whilst in the case of contracts for the sale of merchandise in general, and all such things as can be readily purchased in the open market, the court refuses to interfere, because it is obvious that in such cases the money which will buy the article affords the speediest and best compensation that can be given to the purchaser (*x*), except where the contract relates to an article of unusual beauty, rarity and distinction having a *pretium affectionis* (*y*), or perhaps to any specific chattel (*z*), when the Court will compel delivery of the identical article, unless it appears

(*q*) *Longmeid* v. *Holliday*, 6 Exch. 767; 20 L.J. Ex. 430; *Gladwell* v. *Steggall*, 5 Bing. N.C. 733; 8 L.J. C.P. 361.

(*r*) As to the power of the court to grant a mandamus for the performance of contracts in certain cases, see *post*, p. 439.

(*s*) 1 Fonbl. Eq., book 1, ch. 1, s. 5; Story, Eq. Jur. s. 717.

(*t*) *Collier* v. *Mason*, 25 Beav. 200, 203.

(*u*) *Flint* v. *Brandon*, 8 Ves. 159, 162.

(*x*) *Buxton* v. *Lister*, 3 Atk. 383, 384.

(*y*) See per Kindersley, V.-C., in *Falcke* v. *Gray*, 4 Drew. 651, 658; 29 L.J. Ch. 28, 30; and see cases *post*, p. 300.

(*z*) See per Lord Westbury in *Holroyd* v. *Marshall*, 10 H.L. Cas. 209, 219; 33 L.J. Ch. 193, 196.

that the price given was wholly inadequate, and that the purchaser had taken some unfair advantage of an ignorant vendor (*a*). So, as regards contracts for the sale of stock and shares generally, the court will not decree specific performance in favour of a purchaser who can at once go into the market and buy the shares (*b*); but, if the contract was for the sale of certain specific, ascertained or numbered shares, and calls have been made upon those very shares, from payment of which the vendor is entitled to be relieved, or if the remedy by recovery of damages is inadequate (*c*), the court will interfere in favour of the vendor, and compel the purchaser to accept a transfer and complete the bargain (*d*). A contract with a company to take up and pay for debentures of the company may be enforced by an order for specific performance (*e*). If the contract is conditional, there can be no decree in favour of a person who has not fulfilled the condition imposed upon him (*f*). The exercise of the jurisdiction of the court is not a matter of right in the party seeking relief, but of discretion in the court, and the conduct of the party applying for relief is always an important element for consideration (*g*). Specific performance will not, in general, be granted where the plaintiff is not in a position to perform his part of the contract (*h*); nor where the court cannot give full relief to both parties (*i*). But the circumstance that an agreement contains stipulations on the part of the plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree, if the intention was that the performance of those stipulations should be secured by covenant only (*k*). Where there is a sale of property in fee simple, and the vendor has only a reversionary interest, the purchaser may have specific performance for as much as he can get with compensation for what he cannot get (*l*). But where a trustee of property having a beneficial

(*a*) *Falcke* v. *Gray*, 29 L.J. Ch. 28; 4 Drew. 651.

(*b*) *Cuddee* v. *Rutter*, 5 Vin. Abr. 538; S.C. nom. *Cud* v. *Rutter*, 1 P. Wms. 570; Pre. Ch. 534.

(*c*) *Oriental Inland Steam Co.* v. *Briggs*, 2 Jo. & H. 625; 31 L.J. Ch. 241.

(*d*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.

(*e*) 8 Edw. 7, c. 69, s. 105.

(*f*) *Weston* v. *Collins*, 34 L.J. Ch. 353; *Finch* v. *Underwood*, 2 Ch.D. 310; 45 L.J. Ch. 522.

(*g*) *Lamare* v. *Dixon*, L.R. 6 H.L. 414, 423; 43 L.J. Ch. 203.

(*h*) *Forrer* v. *Nash*, 35 Beav. 167; *Brewer* v. *Broadwood*, 22 Ch.D. 105; 52 L.J. Ch. 136; *Bellamy* v. *Debenham*, (1891) 1 Ch. 412; 60 L.J. Ch. 166. But see *Wylson* v. *Dunn*, 34 Ch.D. 569; 56 L.J. Ch. 855.

(*i*) *Blackett* v. *Bates*, L.R. 1 Ch. 117; 35 L.J. Ch. 324; *Ogden* v. *Fossick*, 32 L.J. Ch. 73; 4 De G. F. & J. 426; *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Ry.*, 4 H. & M. 168; 32 L.J. Ch. 677; *Merchants' Trading Co.* v. *Banner*, L.R. 12 Eq. 18; 40 L.J. Ch. 515; *Stocker* v. *Wedderburn*, 3 K. & J. 393, 407; 26 L.J. Ch. 713.

(*k*) *Wilson* v. *Hartlepool Harbour Ry.*, 34 L.J. Ch. 241; 2 De G. J. & S. 475.

(*l*) *Barker* v. *Cox*, 4 Ch.D. 464; 46 L.J. Ch. 62.

interest in a share of it entered into a contract to sell the entirety without the authority of his co-trustees, specific performance as to his own share was refused (*m*). Where the principal agreement cannot be enforced, specific performance of the accessory agreement will not be decreed (*n*). Where an agreement is separable into distinct parts, one part may be enforced although owing to non-fulfilment of conditions the other parts could not be enforced (*o*). Possible inconvenience to the public is no ground for refusing specific performance of an agreement (*p*).

Among the contracts which have been specifically performed, are promises by an executor or trustee to leave a legacy to the parties for whom he is trustee, in case they consent to the sale of the trust property, where the consent is given, and the trustee dies without making the promised bequest (*q*); contracts for the sale of debts proved under proceedings in bankruptcy (*r*); agreements for the sale of the goodwill of a trade and the exclusive use of a secret therein (*s*) or for the sale of a patent (*t*); contracts to insure against loss by fire (*u*); agreements for the grant of an annuity (*x*), or for the partition or division of joint property, or property held in common (*y*); covenants and agreements in writing by a landlord to grant a lease (*z*), or oral agreements, where the tenant has been let into possession, and has expended money on the faith of the contract (*a*), or an agreement evidenced by a draft lease, where possession taken before has been continued after the agreement (*b*), provided the terms of the agreement can be distinctly ascertained, and the acts of part performance are referable to that agreement alone (*c*); contracts to renew a lease, where the intended tenant continues solvent (*d*), except where there is a breach of a condition precedent by reason of non-repairs (*e*),

(*m*) *Naylor* v. *Goodall*, 47 L.J. Ch. 53.
(*n*) *Scottish N. E. Ry.* v. *Stewart*, 3 Macq. 382.
(*o*) *Wilkinson* v. *Clements*, L.R. 8 Ch. 96; 42 L.J. Ch. 38; *Lowther* v. *Heaver*, 41 Ch.D. 248; 58 L.J. Ch. 482.
(*p*) *Raphael* v. *Thames Valley Ry.*, L.R. 2 Ch. 147; 36 L.J. Ch. 209; and see *Lloyd* v. *L. C. & D. Ry.*, 2 De G. J. & S. 568; 34 L.J. Ch. 401.
(*q*) *Ridley* v. *Ridley*, 34 L.J. Ch. 462; 34 Beav. 478.
(*r*) *Adderley* v. *Dixon*, 1 Sim. & St. 607, 610; 2 L.J. (O.S.) Ch. 103.
(*s*) *Bryson* v. *Whitehead*, 1 Sim. & St. 74; 1 L.J. (O.S.) Ch. 42.
(*t*) *Cogent* v. *Gibson*, 33 Beav. 557.
(*u*) Story's Eq. Jur. s. 722.
(*x*) *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 561, 579; 9 L.J. Ch. 21, 24.
(*y*) *Beckley* v. *Newland*, 2 P. Wms. 182.
(*z*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785, 797, 22 L.J. Ch. 94; *Rankin* v. *Lay*, 29 L.J. Ch. 734; 2 De G. F. & J. 65; *Parker* v. *Taswell*, 27 L.J. Ch. 812; 2 De G. & J. 559; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142; *Timbler* v. *Abrahams*, (1903) 1 K.B. 577; 72 L.J. K.B. 103.
(*a*) *Pain* v. *Coombs*, 3 Sm. & G. 449, 463; affirmed 1 De G. & J. 34; *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140.
(*b*) *Hodson* v. *Heuland*, (1896) 2 Ch. 428; 65 L.J. Ch. 754.
(*c*) *Price* v. *Salusbury*, 32 Beav. 446, M.R.; S.C. 32 L.J. Ch. 441, L.JJ.; S.C. 14 L.T. 110, H.L.
(*d*) *Neale* v. *Mackenzie*, 1 Keen, 474.
(*e*) *Bastin* v. *Bidwell*, 18 Ch.D. 238.

and there has been no wilful neglect or refusal, on the part of the tenant, to renew or pay the stipulated or customary fine upon renewal (*f*); and contracts to execute a mortgage with an immediate power of sale (*g*). The court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property (*h*); but not of a contract to lend money (*i*); an agreement however giving an option to purchase property, part of the purchase-money to be paid at the time of purchase and the "repayment" of the balance to be secured by mortgage, is not a contract to lend money such that specific performance of it will not be granted (*k*). Nor will the courts decree specific performance of a contract for a partnership (*l*) unless there has been a part performance (*m*), or of articles of apprenticeship (*n*) or of an agreement to refer. The court does not, in general, enforce specific performance of building contracts, or the performance of work, it being considered that damages is the appropriate remedy (*o*). Specific performance was refused of an agreement for the building of a house of a certain value, or according to a certain plan to be subsequently approved of, or an agreement to make repairs in a house or to write a book (*p*). But specific performance will be enforced of contracts for the erection of buildings, where the contract, or the circumstances enable the court to ascertain exactly what was intended to be done and the plaintiff has an interest in the performance which cannot be computed in damages (*q*); or of contracts by a defendant to make a road, or build a bridge, on the defendant's land for the use of the plaintiff (*r*), or on the plaintiff's land (*s*). Where the agreement is to build a house according to a plan and to take a lease of it, the plaintiff may waive specific performance of that part of the agreement relating to the building of the house, and may have damages for that part and specific performance of the rest of the agree-

(*f*) *Chesterman* v. *Mann*, 9 Hare, 206; 22 L.J. Ch. 151.

(*g*) *Hermann* v. *Hodges*, L.R. 16 Eq. 18; 43 L.J. Ch. 192.

(*h*) *Hexter* v. *Pearce*, (1900) 1 Ch. 341; 69 L.J. Ch. 146.

(*i*) *South African Territories* v. *Wallington*, (1897) 1 Q.B. 692; 66 L.J. Q.B. 551; S.C. (1898) A.C. 309; 67 L.J. Q.B. 470.

(*k*) *Starkey* v. *Barton*, (1909) 1 Ch. 284; 78 L.J. Ch. 129.

(*l*) *Scott* v. *Rayment*, L.R. 7 Eq. 112; 38 L.J. Ch. 48.

(*m*) *England* v. *Curling*, 8 Beav. 129.

(*n*) *Webb* v. *England*, 29 Beav. 44; 30 L.J. Ch. 222.

(*o*) *Mosely* v. *Virgin*, 3 Ves. 184; *Flint* v. *Brandon*, 8 *ib.* 159.

(*p*) *Brace* v. *Wehnert*, 25 Beav. 348, 351; 27 L.J. Ch. 572.

(*q*) *Price* v. *Penzance Corporation*, 4 Hare, 506; *Oxford* v. *Provand*, L.R. 2 P.C. 135.

(*r*) *Storer* v. *G. W. Ry.*, 2 Y. & C 48; 12 L.J. Ch. 65; *Wilson* v. *Furness Ry.*, L.R. 9 Eq. 28; 39 L.J. Ch. 19; *Wolverhampton Corporation* v. *Emmons*, (1901) 1 K.B. 515; 70 L.J. K.B. 429, C.A.; *Molyneux* v. *Richard*, (1906) 1 Ch. 34; 75 L.J. Ch. 39.

(*s*) *Greene* v. *West Cheshire Ry.*, L.R. 13 Eq. 44; 41 L.J. Ch. 17.

ment (*t*). And specific performance of a contract for the purchase of a lease will not be decreed, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation (*u*). Nor will specific performance of a charter-party be decreed; but the court will restrain the parties from employing the ship in a manner inconsistent with the rights under the charter-party (*x*). It seems doubtful if the court will enforce a contract to sell a medical practice (*y*).

The courts will decree specific performance of all promises of portions, gifts, and settlements made in consideration of marriage; also of covenants by a father, on the marriage of his daughter, to give or bequeath to such daughter an equal share with his other children of any property he may possess at the time of his death (*z*). Where a father promised the proposed husband of his daughter to give him and his intended wife a house to live in after their marriage, and the marriage was celebrated, and the husband received possession of the house, and treated it as his own, and laid out money upon it in improvements, on the strength of the ante-nuptial promise of the father-in-law, and afterwards the father-in-law died, and the heir claimed the house, the Court of Chancery ordered the ante-nuptial promise to be specifically performed, and compelled the heir to execute a conveyance of the property and carry the intention of the promisor into full effect (*a*). And a covenant to settle by the father of the intended husband will be specifically enforced notwithstanding the non-performance by the father of the intended wife of a reciprocal covenant. "It was hardly attempted to be disputed (and all the authorities in effect prove)," observes Lord Cottenham, "that, with respect to marriage contracts, there can be no resistance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it

(*t*) *Soames* v. *Edge*, Johns. 669; *London (Mayor, &c.)* v. *Southgate*, 38 L.J. Ch. 141.

(*u*) *Pegler* v. *White*, 33 Beav. 403; 33 L.J. Ch. 569.

(*x*) *Post*, p. 303.

(*y*) *May* v. *Thomson*, 20 Ch.D. 705; 51 L.J. Ch. 917.

(*z*) *Fortescue* v. *Hennah*, 19 Ves. 67; *Willis* v. *Black*, 4 Russ. 170; 2 L.J. (O.S.) Ch. 131; *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 561, 579; 9 L.J. Ch. 21; *Grafftey* v. *Humpage*, 1 Beav. 46; 8 L.J. Ch. 98; but see *Fickus, In re*, (1900) 1 Ch. 331; 60 L.J. Ch. 161.

(*a*) *Surcome* v. *Pinniger*, 22 L.J. Ch. 419; 3 De G. M. & G. 571.

against the other party, it is different in marriage articles, where the two contracting parties reciprocally enter into contracts for the benefit of a third party" (*b*). Covenants by a husband to settle after-acquired property upon his wife; deeds or articles of separation (*c*); and covenants made by a husband, on his marriage, to make a provision for his wife, will be enforced, although the wife at the time she seeks the assistance of the court may be living in notorious adultery (*d*). But a contract to leave property by will entered into by a wife who is a mere donee of a testamentary power of appointment will not be enforced (*e*).

The courts will not, it seems, decree specific performance of any contract under seal, in the total absence of a consideration. "The court," observes Lord Cottenham, "will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement" (*f*).

Specific performance will not, of course, be decreed when the contract has been made between parties not competent to contract (*g*), or where it is founded upon an illegal or an immoral consideration, or has been procured by misrepresentation, mis-statement, or fraud (*h*), or where there has been a clear mistake (*i*), or where it is doubtful whether the defendant meant to contract to the extent to which he is sought to be charged (*k*). Where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him (*l*). But specific performance of an agreement will not be refused merely on the ground that one of the contracting parties has mistaken its legal effect. Thus, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, it was held that the lessee was entitled to have the agreement

(*b*) *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 192, 204; 6 L.J. Ch. 135.

(*c*) *Wilson* v. *Wilson*, 23 L.J. Ch. 697; 5 H.L. Cas. 40; *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374; *Sanders* v. *Rodway*, 16 Jur. 1005.

(*d*) *Seagrave* v. *Seagrave*, 13 Ves. 439, 444. But as to contracts for the future separation of husband and wife, see *ante*, p. 78.

(*e*) *Parkin, In re, Hill* v. *Schwarz*, (1892) 3 Ch. 510; 62 L.J. Ch. 55.

(*f*) *Jefferys* v. *Jefferys*, 1 Cr. & Ph. 138, 141.

(*g*) Story's Eq. Jur. ss. 751, 787; *Vansittart* v. *Vansittart*, 4 K. & J. 62; 27 L.J. Ch. 222; affirmed on another ground, 2 De G. & J. 249; 27 L.J. Ch. 289. See *Laughton* v. *Port Erin Comrs.*, (1910) A.C. 565.

(*h*) *New Brunswick, &c. Co.* v. *Muggeridge*, 30 L.J. Ch. 242; 1 Dr. & S. 363.

(*i*) *Wood* v. *Scarth*, 2 K. & J. 33; *Van Praagh* v. *Everidge*, (1903) 1 Ch. 434; 72 L.J. Ch. 260.

(*k*) *Harnett* v. *Yielding*, 2 Sch. & Lef. 549, 554 (Ir.).

(*l*) *Lumley* v. *Ravenscroft*, (1895) 1 Q.B. 683; 64 L.J. Q.B. 441.

specifically performed, and to have a lease for fourteen years determinable at his own option at the end of seven years (*m*). And now under sect. 24, sub-sect. 7, of the Judicature Act, 1873 (*n*), in every case which the Statute of Frauds does not bar, the court may rectify a written agreement, upon parol evidence of mistake, and order specific performance of the agreement as rectified (*o*).

If it is provided that, if either party neglects or refuses to fulfil his part of the engagement, he shall pay a sum of money to the other by way of penalty for non-performance, or as liquidated damages, the courts will, nevertheless, decree a specific performance, if that is the appropriate remedy, just as if no such proviso had been inserted; and the defendant cannot, by forfeiting the penalty, get rid of the agreement (*p*). Where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically performed, the object being to vest in the parties the legal rights which they have mutually agreed to confer on each other (*q*). The Court of Chancery has in many cases decreed the specific performance of agreements which were so far preliminary that they were to be expanded and embodied in larger terms, and were left with a solicitor for that purpose; but, where there are elements of uncertainty about the contract, and it does not appear to have been a complete and concluded bargain, the court will not grant a decree for specific performance (*r*). Where, therefore, on the making of a contract for sale or purchase, it is agreed that the price to be paid shall be fixed by arbitration, and no arbitrators have been appointed, and no price has been fixed, there can be no decree (*s*). But the courts disapprove of vendors endeavouring to retain the power of escaping from their contracts by introducing provisions for valuing some minor part of the subject-matter of the contract, and refusing to appoint a valuer; and in such cases the courts will decree specific performance as to the main subject-matter of the contract (*t*).

(*m*) *Powell* v. *Smith*, L.R. 14 Eq. 85; 41 L.J. Ch. 734.

(*n*) 36 & 37 Vict. c. 66.

(*o*) *Olley* v. *Fisher*, 34 Ch.D. 367: 56 L.J. Ch. 208.

(*p*) *Hopson* v. *Trevor*, 1 Str. 533; *French* v. *Macale*, 2 Drur. & War. 269; *Long* v. *Bowring*, 33 Beav. 585.

(*q*) *Stocker* v. *Wedderburn*, 3 K. & J. 403; 26 L.J. Ch. 713.

(*r*) *Tillett* v. *Charing Cross Bridge Co.*, 28 L.J. Ch. 563; 23 Beav. 419; *Ridgway* v. *Wharton*, 6 H.L. Cas. 238; 27 L.J. Ch. 46; *Taylor* v. *Portington*, 7 De G. M. & G. 328.

(*s*) *Darbey* v. *Whitaker*, 4 Drew. 134, 140; *Milnes* v. *Gery*, 14 Ves. 400.

(*t*) *Richardson* v. *Smith*, L.R. 5 Ch. 648; 39 L.J. Ch. 877.

The court will not enforce specific performance of an agreement with an auctioneer for the sale by him of books, paintings, and works of art, though a sum of money was paid down by the auctioneer at the time of the execution of the agreement, which money was to be repaid to him out of the proceeds of the sale (*u*); but, if goods are deposited in the hands of an auctioneer or agent, to be sold by him, in order that he may re-pay himself his advances upon them, the authority, being coupled with an interest, cannot be revoked; and the auctioneer or agent may sell for the purpose of re-paying himself his advances, in spite of the prohibition of the principal (*x*); but it is otherwise if the advances have not been made in consideration of the authority to sell (*y*). If the agent has only a lien on goods deposited in his hands, he must resort to the courts for an authority to sell (*z*).

Granting specific performance is a matter entirely in the discretion of the court. It is not, however, an arbitrary discretion, but is regulated by settled rules (*a*). Thus the court will not force a purchaser to take a title where there is a probability that it may be questioned (*b*).

In certain cases, where a suit has been instituted for a specific performance of a contract, oral evidence has been permitted to be given of a subsequent oral agreement acted upon by the parties inconsistent with the equitable enforcement of the original written contract. Such evidence, it is said, does not in anywise contradict or alter the terms of such original contract, but simply shows, from what has subsequently occurred between the parties, that the plaintiff has no equity for a specific performance (*c*); for, if the defendant can show any circumstance *dehors* the writing, making it inequitable to interpose for the purpose of a specific performance, the court, having satisfactory information upon that subject, will not interpose (*d*). But a mere oral agreement, subsequently entered into and not acted upon in any way, will not be allowed to control, alter, or discharge the original written contract. There must be "such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement, and then, in the view of

(*u*) *Chinnock* v. *Sainsbury*, 30 L.J. Ch. 409.

(*x*) *Post*, pp. 945, 946.

(*y*) *Ib.*

(*z*) *Ib.*

(*a*) *Haywood* v. *Cope*, 25 Beav. 140, 151; 27 L.J. Ch. 468, 471.

(*b*) *Handman and Wilcox's Contract, In re*, 71 L.J. Ch. 263; (1902) 1 Ch. 599.

(*c*) *Legal* v. *Miller*, 2 Ves. sen. 299; *Davis* v. *Symonds*, 1 Cox, 402.

(*d*) *Clowes* v. *Higginson*, 1 Ves. & B. 524, 527.

equity, it is tantamount to a written agreement, and effect will be given to it" (*e*).

Performance sub modo.—In some cases a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances (*f*).

Specific performance of statements and representations forming foundation of contract.—"It is a very old head of equity," observes Lord Eldon, "that, if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false" (*g*). Thus, the courts will compel parties making representations concerning the fortunes of persons about to be married, knowing them to be false, to make such representations good (*h*). Where, for example, a father represented that his daughter would have a fortune of 10,000*l*. on the death of her parents, and a contract of marriage was entered into on the faith of the representation, the father was compelled to make good the representation he had made (*i*).

Orders for specific delivery of chattels wrongfully detained.—Where a chattel of a particular character, not readily to be purchased in the market, or having associations which give it some peculiar value in the eyes of the owner is wrongfully detained by another, as the owner cannot be fully compensated with pecuniary damages for the loss of the chattel, the Courts will give relief by ordering it to be delivered up to him. This principle has been applied in the case of an heirloom (*k*), a unique richly-chased tobacco-box (*l*), a picture (*m*).

Injunction to compel performance, or to restrain breach of contract.—Where there is a contract to abstain from doing a specific thing, and the damage sustained by its violation cannot be precisely or conveniently estimated in money, the courts will, by injunction, restrain a party from doing the thing that he has promised not to do, and thus enforce performance of the contract, or prevent a breach of it (*n*). The courts will

(*e*) 1 Sugd. V. & P. 165-6 (ed. 14); *Price* v. *Dyer*, 17 Ves. 356, 364; *Vezey* v. *Rashleigh*, (1904) 1 Ch. 634; 73 L.J. Ch. 422.

(*f*) Story's Eq. Jur. s. 775.

(*g*) *Evans* v. *Bicknell*, 6 Ves. 174, 183; *Hill* v. *Lane*, L.R. 11 Eq. 215; 40 L.J. Ch. 41.

(*h*) *Hunsden* v. *Cheyney*, 2 Vern. 150; *Beverley* v. *Beverley*, *ib.* 133; *Prole* v. *Soady*, 29 L.J. Ch. 721; 2 Giff. 1; compromised on appeal, see *Caton* v. *Caton*, L.R. 1 Ch. p. 145.

(*i*) *Bold* v. *Hutchinson*, 24 L.J. Ch. 285; 20 Beav. 250; affirmed, 25 L.J. Ch. 598, 5 De G. M. & G. 558, L.C.

(*k*) *Pusey* v. *Pusey*, 1 Vernon, 273; *Somerset* (*Duke*) v. *Cookson*, 3 P. Wms. 389.

(*l*) *Fells* v. *Read*, 3 Ves. 70.

(*m*) See *Dowling* v. *Bettjemann*, 2 J. & H. 544.

(*n*) *Exchange Telegraph Co.* v. *Central News*, (1897) 2 Ch. 48; 66 L.J. Ch. 672.

thus restrain a breach by a lessee of a covenant to use all crops and manure on the farm (*o*), or of a covenant not to let the demised premises for any part of the term (*p*), or the breach by a person of a covenant not to carry on a certain trade within a certain district (*q*). And they will do so although there is a proviso for the forfeiture of the lease or the payment of a penalty or liquidated damages in case of the non-performance of the covenants (*r*).

Where a solicitor sold his business, and covenanted with the purchaser that he would not practise as a solicitor, in any part of Great Britain, for the space of twenty years, without the purchaser's consent, the court granted an injunction to restrain the solicitor from infringing his covenant (*s*), and where a patentee and manufacturer of guns and ammunition covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage except on behalf of the company in such a business, it was held that the covenant though unrestricted as to space might, having regard to the nature of the business and the small number of customers, be enforced by injunction (*t*). Where a surgeon's assistant covenanted that he would not act as assistant to any other surgeon within a radius of five miles a breach of the covenant was restrained by injunction (*u*). Where a messuage was granted to the defendant and his heirs, to the intent and purpose that the trade of a baker should not at any time be carried on therein, the court granted an injunction to restrain the defendant, his servants and agents, from carrying on such trade (*x*). But the court will not restrain the breach by a lessee of a covenant not to carry on an objectionable trade at the instance of a reversioner in fee unless the case be a gross one (*y*). Where the lease of a house and the goodwill of the trade of a cheesemonger were sold upon an understanding, by word of mouth, that the vendor would not set up the same trade in the same street, the court, by decree restrained the vendor from infringing the oral contract (*z*). Where the churchwardens of a parish covenanted with a lady in consideration of a mutual covenant which was duly performed by her that the early

(*o*) *Onslow* v. ——, 16 Ves. 173; *Grey de Wilton (Lord)* v. *Saxon*, 6 Ves. 106.

(*p*) *Greenaway* v. *Adams*, 12 Ves. 395, 400.

(*q*) *Benwell* v. *Inns*, 26 L.J. Ch. 663; 24 Beav. 307.

(*r*) *Barret* v. *Blagrave*, 5 Ves. 555; *Howard* v. *Woodward*, 34 L.J. Ch. 47.

(*s*) *Whittaker* v. *Howe*, 3 Beav. 383. As to validity of these contracts, see *ante*, p. 95.

(*t*) *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, (1894) A.C. 535; 63 L.J. Ch. 908.

(*u*) *Giles* v. *Hart*, 5 Jur. N.S. 1381.

(*x*) *Hodson* v. *Coppard*, 29 Beav. 4; 30 L.J. Ch. 20.

(*y*) *Johnstone* v. *Hall*, 2 K. & J. 414, 421; 25 L.J. Ch. 462.

(*z*) *Harrison* v. *Gardner*, 2 Mad. 198

morning bell, which was rung at five o'clock, should not be again rung in the lifetime of the lady, and the bell was silent for two years, when it was again rung, the Court decreed an injunction against the ringing of the bell (*a*).

In the case of transfers of shares, where directors have disregarded the forms of their deed of settlement in the mode of transfer they have established, the courts will interfere(*b*), by injunction, to prevent them from annulling their forms and reversing their own regulations to the prejudice of *bonâ fide* purchasers (*c*).

The principle of the jurisdiction is to bind men's consciences to a fair performance of their agreements, not leaving the party with whom the contract has been broken to the chance of what a jury may give in the shape of damages, but enforcing, where it can, the literal performance of the contract. Where there is a contract containing a positive agreement to do something, accompanied by a negative agreement not to do another thing, and complete justice can be done between the parties, the court will restrain the breach of the negative agreement, although it may be unable to enforce performance of the positive agreement (*d*). Where a young lady agreed to sing at the Queen's Theatre for a certain number of nights, and not to sing anywhere else during the period, but afterwards accepted an engagement, and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's Theatre (*e*). The court has interfered in such cases where there was no distinct negative stipulation (*f*); but it seems that it will not now do so in the absence of such a stipulation (*g*). A covenant which though in terms positive is in substance negative will, however, be enforced (*h*). A negative agreement which is unreasonable will not be enforced (*i*); but where a negative agreement is severable into two distinct stipu-

(*a*) *Martin* v. *Nutkin*, 2 P. Wms. 266; 2 Eq. Cas. Abr. 23, pl. 22; *post*, p. 400.

(*b*) *Post*, p. 649.

(*c*) *Bargate* v. *Shortridge*, 5 H.L. Cas. 297; 24 L.J. Ch. 457.

(*d*) *Donnell* v. *Bennett*, 22 Ch D. 835; 52 L.J. Ch. 414; *Grimston* v. *Cuningham*, (1894) 1 Q.B. 125.

(*e*) *Lumley* v. *Wagner*, 21 L.J. Ch. 898; 1 De G. M. & G. 604; and see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L.J. Ch. 468.

(*f*) *Webster* v. *Dillon*, 3 Jur. N.S. 432; *Montague* v. *Flockton*, L.R. 16 Eq. 189; 42 L.J. Ch. 677.

(*g*) *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416; 60 L.J. Ch. 428; *Davis* v. *Foreman*, (1894) 3 Ch. 654; 64 L.J. Ch. 187; *Kirchner* v. *Gruban*, (1909) 1 Ch. 413; 78 L.J. Ch. 117; *Harris* v. *Boots Cash Chemists*, (1904) 2 Ch. 376; 73 L.J. Ch. 708.

(*h*) *Catt* v. *Tourle*, L.R. 4 Ch. 654; 38 L.J. Ch. 665; *Wolverhampton, &c. Ry.* v. *L. & N. W. Ry.*, L.R. 16 Eq. 433, 440; 43 L.J. Ch. 131; *Metropolitan Electric Supply Co.* v. *Ginder*, (1901) 2 Ch. 799; 70 L.J. Ch. 862.

(*i*) *Ehrman* v. *Bartholomew*, (1898) 1 Ch. 671; 67 L.J. Ch. 319.

lations one of which is, while the other is not, reasonable, the former will be enforced though the latter could not (*k*). The court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform (*l*); and where the principal portion of an agreement is incapable of specific enforcement by the court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed (*m*). Where a vessel has been engaged under a charter-party for the performance of a particular voyage, the court will, in certain cases, indirectly enforce performance of the contract by restraining the shipowner from employing his vessel in a manner different from that agreed upon (*n*). And, where a landowner has granted an easement, privilege, or incorporeal right, the court will restrain the vendor and all who buy the land burthened with the easement or servitude from preventing the exercise of the privilege. So, where an easement is sold by parol, and has been enjoyed for years, the court will not allow the privilege to be re-called by the vendor or any person claiming under him, unless such person can show that he was a purchaser of the land for value without notice (*o*).

Enforcement of covenants and agreements not to build, plant, or inclose, &c.—A covenant or agreement between a vendor and purchaser on the sale of land, that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced, by injunction, against the immediate parties to the contract (*p*), and against all subsequent purchasers who purchase the land with notice of the existence of the covenant (*q*), and even against a person who is merely in occupation of the premises for the purpose of

(*k*) *Robinson* v. *Heuer*, (1898) 2 Ch. 451; 67 L.J. Ch. 644.

(*l*) *Fothergill* v. *Rowland*, L.R. 17 Eq. 132; 43 L.J. Ch. 252.

(*m*) *Brett* v. *East India & London Shipping Co.*, 2 H. & M. 404.

(*n*) *De Mattos* v. *Gibson*, 4 De G. & J. 276; 28 L.J. Ch. 498; *Serin* v. *Deslandes*, 30 L.J. Ch. 457; *Le Blanch* v. *Granger*, 35 Beav. 187.

(*o*) *Hervey* v. *Smith*, 22 Beav. 299; *Fox* v. *Pursell*, 3 Sm. & G. 242; see *Allen* v. *Seckham*, 11 Ch.D. 790; 48 L.J. Ch. 611.

(*p*) *Rankin* v. *Huskisson*, 4 Sim. 13.

(*q*) *Tulk* v. *Moxhay*, 18 L.J. Ch. 83; 2 Ph. 744; *Mann* v. *Stephens*, 15 Sim. 377; *Cole* v. *Sims*, 5 De G. M. & G. 1; 23 L.J. Ch. 37; *Patching* v. *Dubbins*, Kay, 1; affirmed, 23 L.J. Ch. 45; *Clements* v. *Welles*, L.R. 1 Eq. 200; 35 L.J. Ch. 265; *Keates* v. *Lyon*, L.R. 4 Ch. 218; 38 L.J. Ch. 357; *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174; see *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73.

managing a business with notice of the covenant (*r*) unless the party entitled to the benefit of the performance of the contract has acquiesced in the non-observance thereof, and slumbered over his rights (*s*). But the court will not enforce a covenant binding only in equity and not running with the land at law which is not a restrictive covenant but involves the expenditure of money, such as a covenant to lay out money in doing certain work upon the land (*t*). The circumstance that a work undertaken in breach of a valid covenant is one of great public importance is not sufficient to induce the courts to refuse to restrain the breach of covenant (*u*). Covenants restricting the mode of using the land, and perhaps all such as impose such a burden on the land as can be enforced against the land, will be enforced against an assignee who has notice; but a covenant to repair is not one of these (*x*).

The summary remedy by injunction is only granted in those cases where it would be strictly equitable to grant it. If the condition of the property has become entirely changed and altered, and a new set of interests and rights has been created since the covenant was entered into, so that it would be unfair and unjust to enjoin a strict performance of the covenant, the courts will leave the parties to their remedy by recovery of damages, and will decline to interfere by injunction (*y*). "It must not therefore be supposed," observes Lord Brougham, "that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient to the . . . public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress

(*r*) *Mander* v. *Falcke*, (1891) 2 Ch. 554; 61 L.J. Ch. 3.

(*s*) *Roper* v. *Williams*, 1 Turn. & R. 18; *Child* v. *Douglas*, 2 Jur. N.S. 950; S.C. 5 De G. M. & G. 739; as to circumstances not amounting to acquiescence, see *Mitchell* v. *Steward*, L.R. 1 Eq. 541; 35 L.J. Ch. 393; *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472; *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250; *Knight* v. *Simmonds*, (1896) 2 Ch. 294; 65 L.J. Ch. 583.

(*t*) *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *L. & S. W. Ry.* v. *Gomm*, 20 Ch.D. 562; 51 L.J. Ch. 530; *Austerberry* v. *Oldham Corporation*, 29 Ch.D. 750; 55 L.J. Ch. 633.

(*u*) *Lloyd* v. *L. C. & D. Ry.*, 34 L.J. Ch. 401; 2 De G. J. & S. 568.

(*x*) *Haywood* v. *Brunswick Building Society*, *supra*. See *Hall* v. *Ewin*, 37 Ch.D. 74; 57 L.J. Ch. 95.

(*y*) *Bedford* (*Duke*) v. *British Museum Trustees*, 2 Myl. & K. 552; 2 L.J. Ch. 129. See *Sayers* v. *Collyer*, 28 Ch.D. 103; 54 L.J. Ch. 1.

upon their lands and tenements a peculiar character, which should follow them into all hands, however remote" (*z*). All covenants, nevertheless, entered into by vendors or purchasers of lands, providing that the land sold or purchased by them shall be used for the purpose of pleasure and the personal accommodation of the inhabitants of certain houses, and shall not be inclosed or built upon, or injured by the introduction of manufactories, or the carrying on of particular trades and professions, or the conveyance of heavy goods across it, may in general be enforced by injunction against all subsequent purchasers who buy and take possession of the property with notice of the covenant (*a*). Where there was a covenant not to use or occupy houses otherwise than for a private residence and not for any purpose of trade, it was held that using a house for the education and lodging of 100 girls in a charitable institution was a breach (*b*).

If a covenant is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building, it is immaterial whether any damage is consequent on the breach of the covenant; and an assignee of the covenant may obtain an injunction without showing damage (*c*); and the same holds good of an assignee with notice of such a covenant (*d*). For restrictive covenants as between lessor and lessee, see *post*, p. 694.

Where the owner of an estate built several houses upon it, and sold some of them, subject to a covenant on the part of the purchaser, that he would keep the area, in front of the houses, inclosed with open iron palisades, and would not suffer a single shop window to be put up in them, or carry on any trade, business or calling whatever in them, or upon the adjoining premises, or suffer the same to be used to the annoyance, nuisance, or injury of any of the houses on the estate, it was held that all subsequent assignees and purchasers of the houses who took them with notice of the covenants were bound by them; and an injunction was granted to prevent one of the houses being used as a girls' school: and it was further held that the covenantee had not waived the benefit of the covenant,

(*z*) *Keppell* v. *Bailey*, 2 Myl. & K. 517, 535.

(*a*) *Whatman* v. *Gibson*, 9 Sim. 196, 206; 7 L.J. Ch. 160; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174; *Child* v. *Douglas*, 5 De G. M. & G. 739; 2 Jur. N.S. 950; *Long Eaton, &c. Co.* v. *Midland Ry.*, 71 L.J. K.B. 74; in C.A. (1902) 2 K.B. 574; 71 L.J. K.B. 837.

(*b*) *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250.

(*c*) *Manners* (*Lord*) v. *Johnson*, 1 Ch.D. 673; 45 L.J. Ch. 404; it was held in this case that a bay window was a "building," and that the making of it was an invasion of privacy, and therefore a "damage."

(*d*) *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472.

although he had permitted other houses, held under a like covenant, to be used as schools (*e*); for it does not follow that because a plaintiff has permitted one infringement of a covenant, he is bound to permit another (*f*). But, where a covenant was entered into by purchasers of land for building, that the buildings should all be erected on a general plan, and the covenantee relaxed the covenant, and allowed important deviations from the plan in favour of some of the covenantors, and others, who had not been licensed to deviate, did deviate, and the covenantor did not interfere with promptitude, but allowed the parties to expend a considerable sum of money, and then applied, by injunction, to prevent them from infringing their covenant, the court refused to interfere, saying that it was a proper case for compensation in damages, and not for an injunction (*g*). And the same principle was applied, where the defendant had executed the deed after the breach by the other covenanting parties had been committed, and where the covenant was also a covenant between all the purchasers *inter se* (*h*). An injunction is not in general granted where the plaintiff has acquiesced in the performance of the act he seeks to prohibit. But acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended (*i*). Covenants creating an interest in land which infringes the rule against perpetuities cannot be specifically enforced (*k*).

Injunction and specific performance to compel parties to abide by their own statements and representations.— If a man makes a representation on the faith of which another man alters his position, enters into a deed, or incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity or to make a provision by will, that in the eye of a court of equity being a contract, an engagement which the man making it is bound to perform (*l*). But in all such cases the man making the representation must be brought face to face with the promisee (*m*). Where the defendant, being possessed of certain leasehold

(*e*) *Kemp* v. *Sober*, 1 Sim. N.S. 517, 520; 20 L.J. Ch. 602.

(*f*) *Lloyd* v. *L. C. & D. Ry.*, 34 L.J. Ch. 401; 2 De G. J. & S. 568; *Western* v. *MacDermott*, L.R. 2 Ch. 72; 36 L.J. Ch. 76; *Richards* v. *Revitt* and *German* v. *Chapman*, *ante*, p. 305.

(*g*) *Roper* v. *Williams*, Turn. & Russ. 18; but see *German* v. *Chapman*, *supra*; as to parties entitled to the benefit of these covenants, see *Schreiber* v. *Creed*, 10 Sim. 9.

(*h*) *Peek* v. *Matthews*, L.R. 3 Eq. 515.

(*i*) *Western* v. *MacDermott*, *supra*.

(*k*) *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532; 75 L.J. Ch. 761.

(*l*) *Dashwood* v. *Jermyn*, 12 Ch.D. 776, 781.

(*m*) *Ib.*

estates, sub-let a part of the demised premises to the plaintiff, on the strength of a representation that he, the defendant, was prevented by the covenants of the lease from building so as to obstruct the sea view, and thereby received an increased price for his land, and stood by whilst the sub-lessee erected houses on the property sub-let, which were valuable by reason of the sea view, and would be almost worthless without it, the court interfered by injunction to prevent the defendant from building so as to obstruct the sea view from the houses so erected (*n*).

Foreign contracts.—A foreign contract, as a general rule, will not be enforced, unless it is valid both by the law of the country in which it was made, and by the law of the country in which it is sought to be enforced (*o*). A debt or liability arising in a foreign country may, of course, be discharged by the laws of that country, and such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim in the courts of this country (*p*).

Injunction where option to take liquidated damages.—It seems that where by the terms of an agreement there is a provision for the payment of liquidated damages for a breach, the parties may have an option whether to sue for liquidated damages or for an injunction, but if a party elects to take liquidated damages, he cannot also get an injunction (*q*).

(*n*) *Piggott* v. *Stratton*, 29 L.J. Ch. 1; 1 De G. F. & J. 33; affirming Johns. 341. See *Spicer* v. *Martin*, 14 App.Cas. 12; 58 L.J. Ch. 309; *Mackenzie* v. *Childers*, 43 Ch.D. 265; 59 L.J. Ch. 188.

(*o*) 2 Spence's Eq. Jur. 13, 14; *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417; and see *Kaufman* v. *Gerson*, (1904) 1 K.B. 591; 73 L.J. K.B. 320.

(*p*) *Burrows* v. *Jemino*, 2 Stra. 733; *Potter* v. *Brown*, 5 East, 124; *Odwin* v. *Forbes*, Buck. 57; *Quelin* v. *Moisson*, 1 Knapp, 265; *Gardiner* v. *Houghton*, 2 B. & S. 743; *Phillips* v. *Eyre*, L.R. 6 Q.B. 1; 40 L.J. Q.B. 28.

(*q*) *General Accident Assur. Corporation* v. *Noel*, (1902) 1 K.B. 377; 71 L.J. K.B. 236.

CHAPTER VII.

OF THE PARTIES TO CONTRACTS.

Parties entitled to enforce simple contracts—Strangers to contract.—A contract by English law consists of mutual promises given by two or more parties, and mutual considerations moving from those parties, and, generally speaking, no one can enforce a contract who is a stranger to it, either as not being a person from whom the consideration moved (*a*), or as not being a person to whom the promise was given (*b*). Even where one party enters into a contract with another by which he expressly undertakes to confer a benefit upon a stranger, the latter cannot as a rule enforce the contract. Thus where, after the marriage, the fathers of the husband and wife agreed together that each should pay a sum of money to the husband, and that the latter should have full power to sue for the money, it was held, nevertheless, that the husband, not being a party to the agreement, could not enforce it (*c*).

An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained by his servant through their negligence, whereby the master lost the benefit of the services of the servant; the contract from which the duty to carry safely arose being a contract between the company and the servant (*d*). So, also, where a master sent forward his servant by train, with his portmanteau, and it was delivered by the servant and

(*a*) *Price* v. *Easton*, 4 B. & Ad. 434; 2 L.J. K.B. 51; *Crow* v. *Rogers*, 1 Str. 592; *Bourne* v. *Mason*, 1 Ventr. 6; 2 Keb. 457.

(*b*) *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L.J. Q.B. 265; *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292; *Playford* v. *United Kingdom Telegraph Co.*, L.R. 4 Q.B. 706; 38 L.J. Q.B. 249; *Browne* v. *La Trinidad*, 37 Ch.D. 1; 57 L.J. Ch. 292; *Cavalier* v. *Pope*, (1906) A.C. 428; 75 L.J. K.B. 609; *Cameron* v. *Young*, (1908) A.C. 176; 77 L.J. P.C. 68.

(*c*) *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L.J. Q.B. 265. Apparent rather than real exceptions to the rule are afforded by the cases in which a *cestui que trust* has been held entitled to enforce the contract of his trustee (*post*, p. 312), and the principal that of his agent (*post*, pp. 321—324). Possibly most of the older cases in which an apparent stranger has been held entitled to enforce a contract are capable of being regarded as cases of either trust or agency: see *Dutton* v. *Poole*, 2 Lev. 210; Hardr. 321; 1 Ventr. 218, 334; T. Jones. 102, in Ex. Ch.; T. Raym. 392; *Curtis* v. *Collingwood*, 1 Ventr. 297; *Provender* v. *Wood*, Hetley, 30; *Martyn* v. *Hind*, Cowp. 437; 1 Dougl. 142.

(*d*) *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292. See further, *Meux* v. *G. E. Ry.*, (1895) 2 Q.B. 387; 64 L.J. Q.B. 657; see *Addison on Torts*, 742 (ed. 8).

accepted by the company as part of the servant's luggage, nothing being said as to the ownership of the portmanteau, it was held that no action lay against the company by the master for the loss of his portmanteau, on the ground that the contract was between the company and the servant (*e*). And, where a telegraph company negligently mis-sent a message containing an offer for a cargo of ice to the vendor, in consequence of which the vendor incurred expense, it was held that he could not sue the telegraph company, because their contract was with the sender of the message and not with the receiver, although, if the sale had been effected, the vendor would, by the course of the trade, have been bound to re-pay the sender the cost of the message (*f*).

The wife and children of a tenant have no cause of action against the landlord for loss or injury resulting from the defective or insanitary state of the premises, as they are not parties to the contract of tenancy (*g*).

If money is sent to a banker for the payment of a debt, the consideration for a promise by the banker to pay over the money is said to move from the creditor whose debt is to be paid, it being considered that the debtor is the agent of the creditor, and that the money is paid indirectly to the banker by the latter (*h*). But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain an action against the remittee, there must be an express promise or assent on the part of the latter to pay over the money to the former, or to hold it to his use, inasmuch as the mandate is revocable so long as no such promise or assent has been given (*i*). When, however, the assent has been given, the order to pay the money, if founded upon a precedent debt or other good consideration, becomes irrevocable (*k*); the creditor looks no longer to the

(*e*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122. But it is difficult to understand why the plaintiff was not entitled to recover the value of the portmanteau on the ground that it was his property.

(*f*) *Playford* v. *United Kingdom Telegraph Co.*, L.R. 4 Q.B. 706; 38 L.J. Q.B. 249.

(*g*) *Cavalier* v. *Pope*, (1906) A.C. 428; 75 L.J. K.B. 609; *Cameron* v. *Young*, (1908) A.C. 176; 77 L.J. P.C. 68.

(*h*) *Lilly* v. *Hays*, 5 Ad. & E. 548; 6 L.J. K.B. 5; *Noble* v. *Nat. Discount Co.*, 5 H. & N. 225; 29 L.J. Ex. 210.

(*i*) *Williams* v. *Everett*, 14 East, 582; *Fisher* v. *Miller*, 1 Bing. 150; 7 Moore, 527; *Baron* v. *Husband*, 4 B. & Ad. 611; *Howell* v. *Batt*, 5 B. & Ad. 504; 3 L.J. K.B. 49; *Wedlake* v. *Hurley*, 1 C. & J. 83; *Grant* v. *Austen*, 3 Price, 58; *Brind* v. *Hampshire*, 1 M. & W. 365; 5 L.J. Ex. 197; *Moore* v. *Bushell*, 27 L.J. Ex. 3; *Malcolm* v. *Scott*, 5 Ex. 601; *Hill* v. *Royds*, L.R. 8 Eq. 290; 38 L.J. Ch. 538; *Whitting, In re, Hall, Ex parte*, 10 Ch. D. 615; 48 L.J. Bankr. 79.

(*k*) *Winter* v. *Foweracres*, 2 Roll. Rep. 39, 40; *Robertson* v. *Fauntleroy*, 8 Moore, 10; 1 L.J. (O.S.) C.P. 55; *Atkin* v. *Barwick*, 1 Str. 165; *Hodgson* v. *Anderson*, 3 B. & C. 842; 5 D. & R. 735; *Walker* v. *Rostron*, 9 M. & W. 411; 11 L.J. Ex. 173; *Griffin* v. *Weatherby*, L.R. 3 Q.B. 753; 37 L.J. Q.B. 280.

security of his original debtor, but relies on the assent of the remittee, which cannot be retracted (*l*). But, if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee (*m*); just as money, when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back (*n*), while, on the other hand, money paid to the receiver of a company under duress of which the receiver had no notice, could not be recovered back after it had been actually paid by the receiver into the company's account (*o*). Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money; and when they have accepted a delivery order presented to them by a purchaser, they become the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal (*p*).

Except in the case of bills of exchange, promissory notes, and bills of lading, parties cannot annex to their contracts the incident of negotiability, and make them floating contracts payable to bearer. Where, therefore, the owner of a quantity of iron issued a note or undertaking in writing, whereby he promised to deliver on and after a future day 1,000 tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid; for the law does not give a floating right of action to any one into whose hands such a writing may come (*q*). But the publication of a promise to pay a certain specified sum to any person who shall do a particular act, is a general offer to any person who will do the act, and a person who accepts the offer by doing the act becomes a party to a valid contract, and is entitled to the money promised to be paid (*r*).

On a sale of goods, conditions cannot be imposed so as to run with the goods and be enforceable against subsequent buyers by the original seller, even though the subsequent buyers had notice of them at the time of their purchase (*s*).

(*l*) Best, C.J., *Gibson* v. *Minet*, 9 Moore, 31, 36; 2 L.J. (O.S.) C.P. 99, 100.

(*m*) *Lyte* v. *Peny*, Dyer, 49 a, b, p. 7; *Taylor* v. *Lendey*, 9 East, 49, 54.

(*n*) *Buller* v. *Harrison*, Cowp. 565.

(*o*) *Owen* v. *Cronk*, (1895) 1 Q.B. 265; 64 L.J. Q.B. 288.

(*p*) *Bryans* v. *Nix*, 4 M. & W. 775, 791; 8 L.J. Ex. 137.

(*q*) *Dixon* v. *Bovill*, 3 Macq. H.L. 1, 16.

(*r*) *M'Kune* v. *Joynson*, 5 C.B. N.S. 218; 28 L.J. C.P. 133; *Williams* v. *Carwardine*, 4 B. & Ad. 621; 2 L.J. K.B. 101; *Thatcher* v. *England*, 3 C.B. 254; 15 L.J. C.P. 241; *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 256; 62 L.J. Q.B. 257.

(*s*) *Taddy* v. *Sterious*, (1904) 1 Ch.

Parties entitled to enforce contracts under seal.—As a contract under seal requires no consideration to support it, the common law regarded only the instrument itself; and whenever a deed was expressed to be made between certain persons named in the premises of the instrument, or described therein as the contracting parties, those persons only, and their privies claiming through them by blood, representation, or otherwise, could take advantage of it by way of action (*t*). It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties: if they had not been made parties to the contract they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as the parties to the instrument (*u*). And although sect. 5 of 8 & 9 Vict. c. 106, enacted that an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker thereof was not named a party to the same indenture, this enactment was held only to apply to covenants respecting any tenements or hereditaments; and, therefore, where a composition deed was expressed to be made between the persons scheduled thereunder, being creditors executing it as parties and other parties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with all creditors (*x*). But where a similar deed was expressed to be made with all the creditors, it was held that all were parties, and could sue on the covenants, which were expressed to be made with each creditor severally (*y*). When an indenture was not made reciprocal between parties of the one part and parties of the other part, then it was in the nature of a deed poll, and if any one party covenanted therein with a stranger, the latter might bring an action upon the deed against the party so covenanting, provided he had duly sealed and executed the instrument (*z*).

When there was no formal commencement to a deed de-

354; 73 L.J. Ch. 191; *McGruther* v. *Pitcher*, (1904) 2 Ch. 306; 73 L.J. Ch. 653.

(*t*) *Chesterfield Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 34 L.J. Ex. 121.

(*u*) *Gilby* v. *Copley*, 3 Lev. 138; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L.J. (O.S.) K.B. 184; *Southampton* (*Lord*) v. *Brown*, 6 B. & C. 718; 5 L.J. (O.S.) K.B. 253; *Metcalfe* v. *Ryerοft*, 6 M. & S. 75.

(*x*) *Chesterfield Colliery Co.* v. *Hawkins*, *supra*; *Gurrin* v. *Kopera*, 3 H. & C. 694; 34 L.J. Ex. 128.

(*y*) *Gresty* v. *Gibson*, L.R. 1 Ex. 112; 35 L.J. Ex. 74; *Reeves* v. *Watts*, L.R. 1 Q.B. 412; 35 L.J. Q.B. 171; *McLaren* v. *Baxter*, L.R. 2 C.P. 559; 36 L.J. C.P. 247.

(*z*) *Cooker* v. *Child*, 2 Lev. 74.

scribing who were the parties to it, and whose deed it was, it was held to be the deed of those who were named in the instrument as the contracting parties, and who put their seals to it (*a*). But they must have been named or designated in the body of the deed; for no person could maintain an action upon a contract under seal unless he was named therein, either by his own name or by some acquired or adopted name, or was otherwise described therein (*b*); and the contract or covenant must in express terms have been made with him (*c*).

Trustee and cestui que trust.—It was a fixed rule of law that the action upon a contract under seal, whether such contract was a deed *inter partes* or a deed poll, must be brought by the party with whom the contract was in terms made, and not by the person on whose behalf, or for whose benefit it had been made (*d*). In those cases the party to whose use or for whose benefit the contract had been entered into had only a remedy in equity against the person with whom it was expressed to be made, the Court of Chancery deeming the latter a trustee for the former. When, however, no express promise or engagement was entered into with any person or persons in particular, the case was different. If, for example, a man by writing, sealed and delivered, acknowledged generally that he had received a particular sum of money to the use of A., this made him a debtor to A. to the amount specified (*e*). A bill or receipt under seal was couched in the following terms: "Received of A. 40*l*., to the use of B. & C., equally to be divided between them, to be repaid at such time as shall be most to the profit of B. & C.;" and it was held that this was an engagement with B. & C. to pay the money to them whenever they required it, and that B. & C. might consequently maintain an action for the recovery of the 40*l*. (*f*).

These distinctions have, however, become of less consequence since the passing of the Supreme Court of Judicature Act, 1873, by the operation of which the beneficial interests arising under deeds will be recognised in every court as amply as they were formerly in the Courts of Equity. The rule appears now to be that a third person who is not named as a party to a contract cannot sue either of the contracting parties unless he

(*a*) *Nurse* v. *Framton*, 1 Ld. Raym. 28.

(*b*) *Maugham* v. *Sharpe*, 17 C.B. N.S. 443; 34 L.J. C.P. 19; *Wray* v. *Wray*, (1905) 2 Ch. 349; 74 L.J. Ch. 687.

(*c*) *Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q.B. 925, 935; 20 L.J. Q.B. 417, 421.

(*d*) *Offly* v. *Warde*, 1 Lev. 235; *Barford* v. *Stuckey*, 5 Moore, 23; 2 B. & B. 333.

(*e*) *Core* v. *Woddye*, Dyer. 20. a.

(*f*) *Shaw* v. *Sherwood*, Cro. Eliz. 729; *Sunderland Marine Ins. Co.* v. *Kearney*, *supra*.

possesses an actual beneficial right which puts him in the position of a *cestui que trust* under the contract (*g*).

Covenantees omitting to execute deed.—It is not in general necessary that those who have been made parties to a deed *inter partes* should execute the deed to be enabled to sue thereon (*h*). Neither need a grantee under a deed execute, provided he has been made a party to the deed; for the law presumes his assent to the grant in the absence of an express disclaimer (*i*). Where real property, therefore, is conveyed to trustees, parties to a deed, it is not necessary for them to execute, as the legal estate forthwith vests in them unless they disclaim the grant; and, if one of the trustees renounces, the whole property vests in those who accept the trust (*k*). When, however, the execution of the deed by one of the parties is necessary to create some estate or interest, the creation of which forms the consideration for the covenants contained in the deed, the party neglecting to execute cannot then maintain an action upon the covenants (*l*). Where tenant for life and remainderman are parties to an indenture, whereby they respectively demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainderman (*m*).

Parties liable upon simple contracts.—As a general rule, only a person who is a party to a contract can incur liability under it (*n*). An undertaking by one man on behalf of another may either be the undertaking of an agent, or of a principal and sole contracting party, who secures on his own credit and responsibility, some benefit and advantage for a friend (*o*); or it may be that of a surety, who binds himself for the performance of some act or duty by a third party who is to be primarily liable upon the contract. A person who signs a promissory note or an undertaking on behalf of another (*p*), or who is made a party to an agreement *inter partes*, and signs

(*g*) *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154, explaining *Touche* v. *Metropolitan Ry. Warehousing Co.*, L.R. 6 Ch. 671; *Empress Engineering Co., In re*, 16 Ch.D. 125.

(*h*) *Rose* v. *Poulton*, 2 B. & Ad. 822; 1 L.J. K.B. 5; *Morgan* v. *Pike*, 14 C.B. 473; 23 L.J. C.P. 64.

(*i*) *Townson* v. *Tickell*, 3 B. & Ald. 31; *Standing* v. *Bowring*, 31 Ch.D. 282; 55 L.J. Ch. 218. The disclaimer of a grant of realty should be made by deed. Fitz. Ab. Joint-Tenancy, pl. 9.

(*k*) *Small* v. *Marwood*, 9 B. & C. 300; 7 L.J. (O.S.) K.B. 197.

(*l*) *Antram* v. *Chace*, 15 East, 209.

(*m*) *How* v. *Greek*, 3 H. & C. 391; 34 L.J. Ex. 4.

(*n*) *The Kate*, (1906) P. 317; 75 L.J. P. 104.

(*o*) *Redhead* v. *Cator*, 1 Stark. 14; *Hall* v. *Ashurst*, 1 Cr. & M. 714; 2 L.J. Ex. 295; *Downman* v. *Jones*, 14 L.J. Q.B. 228; S. C., 7 Q. B. 103; *Harper* v. *Williams*, 4 Q. B. 219; 12 L.J. Q.B. 227; *Johnson* v. *Ogilby*, 3 P. Wms. 277.

(*p*) *Iveson* v. *Conington*, 2 Dowl. & R. 309; 1 B. & C. 160; 1 L.J. (O.S.) K.B 71; *Gee, In re*, 10 Jur. 694; *Burrell* v. *Jones*, 3 B. & Ald. 47.

it in his own name on behalf of another, will himself be personally responsible for the fulfilment of the contract, unless it clearly appears that he executed it as agent only and was not intended to be personally liable (*q*). Where the plaintiff agreed with two persons "to pave their streets in Putney," and they, "on behalf of the parish, agreed to pay him" therefor, it was held that, as the parish could not be sued upon such an undertaking, the two persons were personally liable upon their agreement (*r*). Where a defendant gave a written undertaking to pay the directors of gas works for all the gas which might be consumed in a theatre during the time that it was occupied by his brother-in-law, it was held that he might be made liable as the primary and sole debtor in an action for goods sold and delivered (*s*).

One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party: "If A. contracts with B. to make a coat for C., A. must pay for it, though C. wears it." But, if the plaintiff has made the party to whom goods have been furnished his debtor, if, for instance, he describes him as such in his books or in letters, he can only treat the other as a surety (*t*).

Where the managers of an undertaking, having a public, or corporate, or partnership fund at their disposal, or power to impose assessments or make calls, and create a fund to defray expenses, employ workmen and servants, they will be personally responsible if credit has been given to them and not to the fund. But "whether any contract is made, or on what terms it is made, must depend upon the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract" (*u*). If he is to be paid, provided the requisite funds are obtained and not otherwise, there is a conditional contract, which becomes absolute as soon as funds have been received (*x*).

(*q*) *Cooke* v. *Wilson*, 1 C.B. N.S. 153, 164; 26 L.J. C.P. 15; *Lennard* v. *Robinson*, 5 E. & B. 125; 24 L.J. Q.B. 275; *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36; 2 E. & E. 602.

(*r*) *Meriel* v. *Wymondsold*, Hardr. 205; *Watson* v. *Murrell*, 1 C. & P. 307.

(*s*) *Wood* v. *Benson*, 2 Cr. & J. 94; 1 L.J. Ex. 18; *Edge* v. *Frost*, 4 Dowl. & R. 243.

(*t*) *Austen* v. *Baker*, 12 Mod. 250; *Anderson* v. *Hayman*, 1 H. Bl. 120; *Langdale* v. *Parry*, 2 Dowl. & R. 337; 1 L.J. (O.S.) K.B. 70.

(*u*) *Landman* v. *Entwistle*, 7 Exch. 632; 21 L.J. Ex. 208; *Giles* v. *Smith*, 11 Jur. 334; *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198; *Andrews* v. *Dally*, 4 Bing. 566; 6 L.J. (O.S.) C.P. 117.

(*x*) *Higgins* v. *Hopkins*, 3 Exch. 163; 18 L.J. Ex. 113.

Parties liable upon deeds.—A person not made a party to a deed may render himself liable to be sued thereon by sealing and delivering the deed (*y*). A man may also be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assents to it, and takes a benefit under it, and treats the contract as his deed (*z*). A party who sends forth a deed to the world as his deed, cannot be heard to say, against those who have dealt with him on the strength of it, that it is not his deed, that it was never executed by him, or that it was executed without his sanction or authority (*a*). If, too, he sends forth a deed, and induces others to act upon it, he is estopped from afterwards setting up the invalidity of the instrument (*b*). Where property is assigned by deed to a trustee, who covenants with the assignor, the assignor has no equity to proceed against the *cestui que trust* (*c*).

Covenants in feigned names—Estoppel.—Generally speaking, the name of the covenantor or obligor appears in the body of the deed; but there is a sufficient designation of the party to be charged if the name is written at the foot of the instrument (*d*). A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description (*e*).

Covenants and obligations by one person on behalf of another.—If an individual in a private capacity covenants in his own name for the act of another, he is personally bound, although he describes himself in the deed as covenanting "for and on the part and behalf" of that other person; but when upon the face of the contract it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should be responsible (*f*).

Agreements and promises, whether joint or separate.—If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party

(*y*) Holt, C.J., *Salter* v. *Kidgley*, Holt, 210; Carth. 76.

(*z*) *Webb* v. *Spicer*, 13 Q.B. 886, 893; 18 L.J. Q.B. 142.

(*a*) *North of England Banking Co., In re, Straffon, Ex parte*, 22 L.J. Ch. 194; 1 De G. M. & G. 576.

(*b*) *Sheffield & Manchester Ry.* v. *Woodcock*, 2 Rail. Cas. 522.

(*c*) *International Contract Co., In re, Pickering's Claim*, L.R. 6 Ch. 525.

(*d*) *Nurse* v. *Framton*, 1 Ld. Raym. 28; 1 Salk. 214; 4 Ed. 2, cited Cro. Eliz. 57.

(*e*) *Elliot* v. *Davis*, 2 Bos. & P. 338, 339.

(*f*) *Unwin* v. *Wolseley*, 1 T.R. 674; *Allen* v. *Waldegrave*, 2 Moore, 621; see *post*, p. 356.

employed, although they may have several beneficial interests, and be possessed of separate shares, in the subject-matter of the contract; but, if there be a separate retainer by each, in respect of the separate share of each, then they have separate interests in the fulfilment of the contract (*g*). If a promise is made to pay a sum of money to several persons, this is a joint promise in favour of all the promisees in which all are jointly interested (*h*). But if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then their interests are separate (*i*).

Joint or separate interests of covenantees.—If parties take a joint estate under a deed, and a covenant affecting the enjoyment of that estate is entered into with them and "each of them," the covenant is a joint covenant. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each one in respect of their several estates (*k*). If a covenant to do a particular act be entered into with several persons generally, as "with A., B., and C.," they have all *primâ facie* a joint interest in the performance of it (*l*).

If any one of several partners or joint adventurers enter into a contract or stipulation with the rest, such as an engagement not to trade on his own account, or not to sell merchandise without the assent of the others, &c., this is a joint contract; for they have a joint interest in the performance of it, and the breach operates as a joint damage to all (*m*). A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests (*n*); but, if a covenant be made with several persons to pay a distinct sum of money to each of them, a separate duty

(*g*) *Hatsall* v. *Griffith*, 2 Cr. & M. 679; 3 L.J. Ex. 191; *Hill* v. *Tucker*, 1 Taunt. 7; *Ivans* v. *Draper*, 1 Roll. Abr. 31, pl. 9; *Kilham* v. *Collier*, 21 L.J. Q.B. 65; *Lucas* v. *Beale*, 20 L.J. C.P. 134; 10 C.B. 739.

(*h*) *Petrie* v. *Bury*, 3 B. & C. 353; 3 L.J. (O.S.) K.B. 29.

(*i*) *Thomas* v. ——, Style, 461.

(*k*) *Slingsby's case*, 5 Co. 18 b; *Windham's case*, *ib.* 7 a; *James* v. *Emery*, 8 Taunt. 245; 2 Moore, 195; *Eccleston* v. *Clipsham*, 1 Wms. Saund. 153; *Foley* v. *Addenbrooke*, 4 Q.B. 197; 12 L.J. Q.B. 163; *Hopkinson* v. *Lee*, 6 Q.B. 964; 14 L.J. Q.B. 101; *Wakefield* v. *Brown*, 9 Q.B. 209; 15 L.J. Q.B. 373; *Keightley* v. *Watson*, 3 Exch. 716; 18 L.J. Ex. 339; *Pugh* v. *Stringfield*, 27 L.J. C.P. 34; 3 C.B. N.S. 2; *Haddon* v. *Ayers*, 28 L.J. Q.B. 105; 1 E. & E. 118.

(*l*) *Sorsbie* v. *Park*, 12 M. & W. 146; 13 L.J. Ex. 9; *Bradburne* v. *Botfield*, 14 M. & W. 559; 14 L.J. Ex. 830; *Wetherell* v. *Langston*, 17 L.J. Ex. 341; 1 Exch. 634; *Servante* v. *James*, 10 B. & C. 410; 8 L.J. (O.S.) K.B. 64.

(*m*) *Thimblethorp* v. *Hardesty*, 7 Mod. 116; *Vesey* v. *Mantell*, 9 M. & W. 323; 11 L.J. Ex. 99.

(*n*) *Lane* v. *Drinkwater*, 1 C. M. & R. 599; 4 L.J. Ex. 32; *Byrne* v. *Fitzhugh*, 1 C. M. & R. 613, n. (a); *English* v. *Blundell*, 8 C. & P. 332.

arises to each; and it is the same in contemplation of law as if a separate and distinct contract had been entered into with each separately (*o*).

Rights of tenants in common.—If two tenants in common make a lease reserving one entire rent to themselves, they have a joint interest in the rent, although it is reserved to them "according to their several and respective rights and interests;" but, if there are several demises, and a separate reservation of rent to each tenant in common, they have separate interests (*p*). When an estate in land, with covenants annexed, comes to two persons as tenants in common, their interests are in certain cases joint or several at their election (*q*). If, after a joint demise by tenants in common with a general reservation of one entire rent, one tenant in common dies, the rent is severable, and follows the separate reversions, so that the heir-at-law of the deceased tenant in common is entitled to one moiety of the rent, and may maintain an action against the surviving tenant in common, for receiving more than his share (*r*). A covenant to repair in a joint demise by tenants in common runs with the entire reversion; and all the tenants in common of the reversion at the time of the breach, or their representatives, are jointly interested in it (*s*). Where premises were demised to G. & A., their executors, administrators, and assigns, as tenants in common, and not as joint tenants, at a single yearly rent, and G. & A. covenanted "for themselves, their executors, administrators, and assigns, that they, the said G. & A., or some or one of them, their executors, administrators, or assigns," would pay the rent, it was held that the covenant was in form joint and not several, and that G.'s executors were not liable (*t*). One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs (*u*).

Rights of joint tenants.—If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect of the joint reversion (*x*); and the same rule holds good with respect to parceners who have a unity of

(*o*) *Withers* v. *Bircham*, 3 B. & C. 254; 3 L.J. (O.S.) K.B. 30; *Shaw* v. *Sherwood*, Cro. Eliz. 729.

(*p*) *Powis* v. *Smith*, 5 B. & Ald. 850; *Last* v. *Dinn*, 28 L.J. Ex. 94; *Wilkinson* v. *Hall*, 1 Sc. 675; 4 L.J. C.P. 204.

(*q*) *Midgley* v. *Lovelace*, Carth. 289; *Kitchen* v. *Buckly*, 1 Lev. 109; *Womersley* v. *Dally*, 26 L.J. Ex. 219.

(*r*) *Beer* v. *Beer*, 12 C. B. 60; 21 L.J. C.P. 124.

(*s*) *Thompson* v. *Hakewell*, 19 C.B. N.S. 713; 35 L.J. C.P. 18.

(*t*) *White* v. *Tindall*, 13 App.Cas. 263; 57 L.J. P.C. 114.

(*u*) *Roberts* v. *Holland*, (1893) 1 Q.B. 665; 62 L.J. Q.B. 621.

(*x*) Co. Litt. 214 a, 180 b.

interest, title, and possession, and together constitute but one heir (*y*).

Joint or separate interests in the case of implied contracts.—In implied contracts and promises, if the consideration moves from several persons jointly, the law raises a corresponding implied promise in favour of all, in which all are jointly interested; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favour of each, and their interests are separate (*z*). If several persons agree to make a joint purchase, and employ an agent to buy merchandise on their joint account, and the agent makes the purchase in his own name, the employers of the agent are jointly interested in the contract made by their agent and may sue the vendor jointly (*a*); and if goods and chattels are deposited by several joint owners in the hands of a bailee, they are not claimable by one of them alone (*b*); and money paid into a bank to the joint account of several persons cannot be drawn out by one of them alone; but if several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual dealing with him, and refuse to be accountable to the joint owners of the money (*c*).

If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of repayment in favour of all; but if several sums be advanced separately by each, the law implies a corresponding separate promise in favour of each (*d*). But, although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum *in solido*, the implied promise of repayment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto (*e*). If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced

(*y*) *Decharms* v. *Horwood*, 4 M. & Sc. 400; 3 L.J. C.P. 198.

(*z*) *Coleman* v. *Sherwin*, 1 Salk. 137; *Story* v. *Richardson*, 6 Bing. N.C. 123, 129; 9 L.J. C.P. 43; *Smith* v. *Hunt*, 2 Chit. 142.

(*a*) *Cothay* v. *Fennell*, 10 B. & C. 671; 8 L.J. (O.S.) K.B. 302.

(*b*) See *post*, p. 848.

(*c*) *Innes* v. *Stephenson*, 1 M. & Rob. 147.

(*d*) *Osborne* v. *Harper*, 5 East, 225; *Driver* v. *Burton*, 17 Q.B. 989; 21 L.J. Q.B. 157; *Winterstoke, &c.*, Dyer, 370 a, pl. 59; *Brand* v. *Boulcot*, 3 Bos. & P. 235. By Ord. XVI. r. 1, all persons may be joined as plaintiffs in whom any right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. See also Ord. XVIII. r. 6.

(*e*) *May* v. *May*, 1 C. & P. 44.

as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to refund the money arises in favour of all (*f*). In a statutory mortgage under the Conveyancing Act, 1881, the implied covenants are joint and several unless the amount is expressed to be secured in distinct shares or sums (*g*). And where in a mortgage or obligation the sum is expressed to be advanced by two or more persons out of money belonging to them on a joint account, the mortgage money due to them is deemed to belong to them on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representative is a good discharge (*h*), unless otherwise provided.

Joint or several liabilities ex contractu.—Where by contract several persons become jointly bound they are together liable to perform the contract and if an action is brought against one of them he may require the others to be joined with him as defendants (*i*); but if he does not do so and judgment is recovered against him, no action can afterwards be brought against any of the others (*i*). It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons covenant generally for themselves, without any words of severance, or, that they or one of them, shall do a particular act, a joint charge is created (*k*). If three are bound in a bond by these words: "We bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly" makes the obligation joint, which the word "each" cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done (*l*). If several persons sign a promissory note commencing, "We promise to pay," &c., each is liable for the other, and all are liable for the full amount of the note (*m*). There is no absolute rule of equity that a contract which is in terms joint, and would be so construed at law, is in equity joint and several (*n*). Under the Conveyancing Act, 1881, a covenant, contract, bond, or obligation, under seal, made with

(*f*) *English* v. *Blundell*, 8 C. & P. 332.
(*g*) 44 & 45 Vict. c. 41, s. 28.
(*h*) Sect. 61.
(*i*) *King* v. *Hoare*, 13 M. & W. 494, 505; 14 L.J. Ex. 29; *Kendall* v. *Hamilton*, 4 App.Cas. 504; 48 L.J. C.P. 705; *Pilley* v. *Robinson*, 20 Q.B.D. 155; 57 L.J. Q.B. 54.
(*k*) Bacon's Abr. tit. "Obligations" (D.), 4.
(*l*) 1 Saund. 291 b, n. 4.
(*m*) *Manley* v. *Boycott*, 2 E. & B. 46; 22 L.J. Q.B. 265.
(*n*) *Kendall* v. *Hamilton*, 4 App.Cas. 504; 48 L.J. C.P. 705.

two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, implies an obligation to do the act to or for the benefit of the survivor or any other person to whom the right to sue devolves (*o*).

If two or more persons who have joined together in a contract "covenant severally," or become "severally bound," it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment (*p*). When the parties engage for the performance of distinct and several duties, mere words of plurality, such as "we bind ourselves," will not make the contract joint (*q*). Where two persons guaranteed the due payment of an acceptance for 400*l.* "in the proportion of 200*l.* each," it was held that a several liability only was clearly expressed (*r*).

Joint and several promises.—Where by contract several persons become jointly and severally bound, all are jointly bound, and each is also severally bound and they may be sued either together or separately, and the fact that an unsatisfied judgment has been recovered against one of them does not prevent an action from being brought against any of the others (*s*). And this is so even though their interest in the subject-matter of the covenant be joint (*t*). A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant (*u*). It has been held that, where the lessees in the first covenant of a lease "covenant jointly and severally in manner following," the joint and several liability extends to all the subsequent covenants, in the absence of any express words manifesting an intention to the contrary (*x*). If several persons enter into a joint bond or promissory note, or other contract, and in the obligatory part make use of the pronoun *I* instead of *we*, they are jointly and severally bound (*y*).

Where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and

(*o*) 44 & 45 Vict. c. 41, s. 60. This extends to an implied covenant. It applies unless otherwise provided.

(*p*) *Newton* v. *Blunt*, 3 C.B. 675, 681; 16 L.J. C.P. 121; *Beaumont* v. *Greathead*, 2 C.B. 494; 15 L.J. C.P. 130; *Addison* v. *Gibson*, 10 Q.B. 106; 16 L.J. Q.B. 165; *Cross* v. *Williams*, 7 H. & N. 675; 31 L.J. Ex. 145.

(*q*) *Collins* v. *Prosser*, 1 B. & C. 682; 1 L.J. (O.S.) K.B. 212.

(*r*) *Fell* v. *Goslin*, 7 Exch. 185; 21 L.J. Ex. 145.

(*s*) *King* v. *Hoare*, 13 M. & W. 595; 14 L.J. Ex. 20; *Jeffery*, *In re*, *Honey*, *Ex parte*, L.R. 7 Ch. 178; 41 L.J. Bankr. 9.

(*t*) *Enys* v. *Donnithorn*, 2 Burr. 1190; *Lilly* v. *Hodges*, 1 Str. 553; 8 Mod. 166.

(*u*) *May* v. *Woodward*, 1 Freem. 248; *Bolton* v. *Lee*, 2 Lev. 56.

(*x*) *Northumberland* (*Duke*) v. *Errington*, 5 T.R. 522.

(*y*) *Sayer* v. *Chaytor*, 1 Lutw. 696; *Clerk* v. *Blackstock*, Holt, N.P.C. 474; *Clarke*, *In re*, *Buckley*, *Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341.

agreed to perform the award, and the arbitrator awarded that two of them should pay a sum of money to the third, it was held that each was liable for the whole amount awarded, as well as for his individual share (*z*). If a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary (*a*). In a case where provisions were furnished for the use of the officers of a regimental mess in camp, Lord Kenyon seems to have thought that the officers were severally liable only in respect of the articles used and consumed by each (*b*). Where goods supplied to a volunteer regiment were ordered by or on behalf of the commanding officer he was held personally liable for the price (*c*).

Joint and several purchases.—If two persons join in giving an order for an undivided parcel of goods, they are jointly liable for the price of them, unless it be proved that there was a separate contract with each (*d*). If they employ an agent to make the purchase, and he purchases an undivided quantity, they are jointly and severally responsible for the price (*e*). But, if there be no agency in the matter, and the purchaser of an undivided parcel of goods subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this sub-division of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract (*f*).

Contract with agents—Rights of principal.—If the agent who makes the contract contracts only in the name of the principal, intending to bind the latter, and not himself, by the contract, he will have no right of action upon it in his own name, unless he has himself an interest in the contract. Where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, to let seats and receive the rents thereof for the use of the lessees, it was held, that the lessees of the synagogue, and not their servant, the treasurer, were the proper parties to maintain an action for the rent of a seat (*g*). By the Sale of Goods Act, 1893, the rules of the

(*z*) *Mansell* v. *Burredge*, 7 T.R. 352.
(*a*) *Forster* v. *Taylor*, 3 Campb. 49.
(*b*) *Brown* v. *Doyle*, cited in a note to *Forster* v. *Taylor*, *supra*; Rolle's Abr. 24, 31.
(*c*) *Samuel* v. *Whetherly*, (1907) 1 K.B. 709; 76 L J. K.B. 357; affirmed on facts, (1908) 1 K.B. 184; 77 L.J. K.B. 69.
(*d*) *Gibson* v. *Lupton*, 2 M. & Sc. 371; 2 L.J. C.P. 4.
(*e*) *Gouthwaite* v. *Duckworth*, 12 East, 421, 426.
(*f*) *Coope* v. *Eyre*, 1 H. Bl. 37.
(*g*) *Israel* v. *Simmons*, 2 Stark. 356; *Seignior and Wolmer's case*, Godb. 360;

common law, including the law merchant, relating to the law of principal and agent, save in so far as they are inconsistent with the provisions of the Act, continue to apply to contracts for the sale of goods (*h*).

Principals contracting as agents.—If a party describes himself on the face of a written contract as agent, but does not disclose who his principal is, he may repudiate the agency, and claim the benefit of the contract as the principal, if he is in reality the principal. Although a man cannot, in strict propriety of speech, be agent to himself, yet in a contract of charter-party he may reserve to himself the right to fill either or both of those characters at his election; he may contract as agent to the freighter, whoever that freighter may turn out to be, and may then, if he pleases, adopt that character himself (*i*).

Concealment of agency—Rights of undisclosed principals.—If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may, in general, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it: but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself (*k*). If, therefore, a factor entrusted with the possession of goods, sells them as his own with the authority of the true owner, and the purchaser deals with the factor as, and believes him to be, the principal in the transaction, in an action by the true owner for the price the purchaser may avail himself of any set-off which has accrued to him against the factor while he believed the factor to be the principal (*l*). This right of the principal to disclose his real character, and require the fulfilment of the contract with himself personally, exists even in the case of factors who have sold goods for the principal in their own names under a *del credere* commission, provided the general

Pigott v. *Thompson*, 3 Bos. & P. 147; *Bowen* v. *Morris*, 2 Taunt. 374.

(*h*) 56 & 57 Vict. c. 71, s. 61 (2).

(*i*) *Schmaltz* v. *Avery*, 16 Q.B. 655, 663; 10 L.J. Q.B. 231.

(*k*) *Risbourg* v. *Bruckner*, 27 L.J. C.P. 90; 3 C.B. N.S. 812; *Carr* v. *Hinchcliff*, 4 B. & C. 547; 4 L.J. (O.S.) K.B. 5; *Fish* v. *Kempton*, 7 C.B. 687, 692; 18 L.J. C.P. 206; *Phelps* v. *Protheroe*, 16 C.B. 370; 24 L.J. C.P. 225; *Semenza* v. *Brinsley*, 18 C.B. N.S. 467; 34 L.J. C.P. 161; *Dresser* v. *Norwood*, 17 C.B. N.S. 466; 34 L.J. C.P. 48; *Ramazotti* v. *Bowring*, 7 C.B. N.S. 851; 29 L.J. C.P. 30.

(*l*) *George* v. *Claggett*, 7 T.R. 359; *Borries* v. *Imperial Ottoman Bank*, L.R. 9 C.P. 38; 43 L.J. C.P. 3; *Cooke* v. *Eshelby*, 12 App.Cas. 271; 56 L.J. Q.B. 505.

balance of accounts between the principal and the factor is at the time in favour of the former (*m*). And no rule or custom of the Stock Exchange can alter the law in this respect, or in anywise control the legal rights of the principal, although the principal was cognizant of the rule at the time he employed the broker (*n*). Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, his commission on the sale moneys advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the moneys so due to him from the latter (*o*). In the case of a contract for the sale of land, specific performance has been decreed, although the purchaser was a mere nominal contractor, purchasing on behalf of, or in trust for, an unknown and undisclosed principal (*p*). As soon as a purchaser dealing with an unknown agent discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent (*q*).

In certain cases, however, where a contracting party professes to be a principal in the transaction, those who have contracted with him as a principal may refuse to fulfil the contract with any other person than the party with whom they have contracted as a principal. Where, for example, on the face of a charter-party for the hire of a vessel, one of two contracting parties was described as the owner of the vessel, and contracted with the other party in that character, it was held that a third person could not come forward and claim the benefit of the contract on the ground that he was himself the principal and owner of the vessel, and that the person described on the face of the contract as owner was not, in truth, the owner, but his agent. The inducement to the one party to enter into the contract may have been the character, credit, and substance of the other party described as the principal; and the former has a right, therefore, to decline performance of the contract with any other person (*r*). So, in the case of a contract for the sale of land, if it appears that the agent treat-

(*m*) *Bonzi* v. *Stewart*, 5 Sc. N.R. 1; 11 L.J. C.P. 228; *Scrimshire* v. *Alderton*, 2 Str. 1182; *Hornby* v. *Lacy*, 6 M. & S. 166; *Drinkwater* v. *Goodwin*, Cowp. 251, 255; *Sadler* v. *Leigh*, 4 Camp. 195.

(*n*) *Humphrey* v. *Lucas*, 2 Car. & K. 152.

(*o*) *Hudson* v. *Granger*, 5 B. & Ald. 27.

(*p*) *Hall* v. *Warren*, 9 Ves. 605, 608.

(*q*) *Cornish* v. *Abington*, 4 H. & N. 549, 557; 28 L.J. Ex. 262.

(*r*) *Humble* v. *Hunter*, 12 Q.B. 310; 17 L.J. Q.B. 350; approved in *Formby Brothers* v. *Formby*, 102 L.T. 146.

ing for the land contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal consideration, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal cannot come forward and enforce the contract so obtained. So, where a merchant, residing in England, orders goods for a foreigner, the usage of trade is that the credit is given to the home agent, who has apparently contracted as the principal, and that the foreigner is not bound by, and consequently cannot enforce, the contract (*s*).

Proof of agency where the contract is in writing.—When the contract is in writing, and the agency is concealed, so that the agent appears on the face of the contract to be the contracting party, and no mention is made of any principal, it has been held that, whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents may be explained" (*t*). In all cases where the character in which parties contract is not defined on the face of the writing (*u*), "it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents, in making the contract, so as to give the benefit of the contract to the unnamed principals, and this whether the agreement be or be not required to be in writing" (*x*). But, if the consideration moves from only one of the partners in a firm, such partner may sue alone (*y*); and upon negotiable instruments, such as bills of exchange and promissory notes, none but the parties mentioned by their name or firm can be admitted to sue (*z*).

Purchases in name of one of several joint adventurers.—If several persons send their cattle to a particular salesman, who sells them all to one individual, the only contract is the contract with the salesman alone, and each separate owner cannot bring an action against the purchaser for the price of his cattle (*a*).

(*s*) *Elbinger Actien-Gesellschaft* v. *Claye*, L.R. 8 Q.B. 313; 42 L.J. Q.B. 151; *Hutton* v. *Bullock*, L.R. 8 Q.B. 331; affirmed L.R. 9 Q.B. 572.

(*t*) *Humfrey* v. *Dale*, 26 L.J. Q.B. 137; 7 E. & B. 266; 27 L.J. Q.B. 390; E. B. & E. 1004.

(*u*) *Wilson* v. *Hart*, 1 Moore, 45, 50; 7 Taunt. 295.

(*x*) Parke, B., *Higgins* v. *Senior*, 8 M. & W. 834, 844; 11 L.J. Ex. 199; *Wake* v. *Harrop*, 31 L.J. Ex. 451; 1 H. & C. 202; *Bateman* v. *Phillips*, 15 East, 272; *Garrett* v. *Handley*, 3 B. & C. 462; 3 L.J. (O.S.) K.B. 47; 4 B. & C. 664; *Ruppell* v. *Roberts*, 4 N. & M. 31; *Cooke* v. *Seeley*, 17 L.J. Ex. 286; 2 Exch. 746; *Spurr* v. *Cass*, L.R. 5 Q.B. 656; 39 L.J. Q.B. 249.

(*y*) *Agacio* v. *Forbes*, 14 Moore, P.C. 160, 171.

(*z*) *Per* Lord Abinger, *Beckham* v. *Drake*, 9 M. & W. 79, 92; 11 L.J. Ex. 201.

(*a*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 843, 852; 22 L.J. Ex. 355.

But, if a number of persons agree to be jointly interested in a purchase which is to be made by one of them separately in his own name, and the contract is made accordingly, all may join in suing for a breach of it (*b*).

Recovery of principal's money paid away by agent.—If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, as for example, by mistake, or on the strength of a false or fraudulent representation, either the agent or the principal may bring an action for "money had and received," and recover the money (*c*). If the money of the principal is lent by the agent, the principal cannot maintain an action against the borrower to recover it back when the time of repayment arrives, unless it is proved that the principal was in reality the lender (*d*). Where a cargo belonging to several joint-owners was sold by their agent, and the money realised by the sale was paid into a bank by such agent in his own name, it was held that the bankers were accountable only to the agent from whom they had received the money (*e*).

Rights of principals upon deeds made by agents.—By an authority in writing under seal, one man may authorise another to enter into, and to execute, contracts under seal in his behalf (*f*); but it depends upon the express terms of such contracts, and upon the mode in which the power given to the agent is exercised, whether the contract, when made, is the contract of the principal or of the agent, or of neither the one nor the other (*g*). If the principal has, by a written authority, sealed and delivered, authorised the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal in express terms, and the agent merely executes the deed in the name of the principal, then the contract is the contract of the principal (*h*). If, on the other hand, the agent is made a party to the deed on behalf of the principal, and the covenants are entered into with the agent as such, then the contract is the contract of the agent (*h*).

(*b*) *Cothay* v. *Fennell*, 10 B. & C. 671; 8 L.J. (O.S.) K.B. 302.

(*c*) 1 Roll. Abr. 38, pl. 12; *Drope* v. *Thaire*, Latch. 126; *Tracy* v. *Veal*, Cro. Jac. 223; *Norfolk* (*Duke*) v. *Worthy*, 1 Campb. 337; *Stevenson* v. *Mortimer*, Cowp. 805; *Smith* v. *Sleap*, 12 M. & W. 585; *Bastable* v. *Poole*, 1 C. M. & R. 410; 4 L.J. Ex. 25; *Holt* v. *Ely*, 1 E. & B. 795; *Ancher* v. *Bank of England*, 2 Dougl. 637.

(*d*) *Sims* v. *Bond*, 5 B. & Ad. 389; *Calland* v. *Loyd*, 6 M. & W. 26; 9 L.J. Ex. 56; *Cooke* v. *Seeley*, 2 Exch. 746; 17 L.J. Ex. 286.

(*e*) *Sims* v. *Brittain*, 4 B. & Ad. 375, *Pinto* v. *Santos*, 5 Taunt. 447; Martin, B. *Walshe* v. *Provan*, *ante*, p. 324.

(*f*) Com. Dig. C. 1, C. 5; *Horsley* v *Rush*, cited 7 T.R. 209; *Harrison* v. *Jackson*, *ib.* 207; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L.J. (O.S.) K.B. 184.

(*g*) *Jung* v. *Phosphate of Lime Co.*, L.R. 3 C.P. 139; 37 L.J. C.P. 73.

(*h*) *Frontin* v. *Small*, 2 Ld. Raym. 1418; *Combe's case*, 9 Co. 76 b; *Wilks*

Liability of undisclosed principals upon simple contracts.—The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealing between the parties. When the authority of an agent is general, it will be construed liberally, but according to the usual course of business in such matters. When the authority is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters; and, where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. Where an express authority is given, an authority is implied to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. A general parol authority may be enlarged by parol, or even an additional authority superadded to it by the course of employment of the parties known to and acquiesced in by them. For instance, a merchant may authorise a clerk to accept or indorse bills of exchange for him; but this will not of itself authorise his paying or receiving money due on such bills. But, if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bill. An agent, employed to negotiate and conclude contracts, is not thereby authorised to pay or receive money which becomes due under such contracts; but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him (*i*). If a principal employs an agent in a particular trade or business in which there are established usages regulating the powers and duties of agents, these usages will be binding on the principal if they were known to him, and are not inconsistent with the authority of the agent (*k*). We have seen that oral evidence is admissible to show that a party contracting in writing was an agent, so as to give the benefit of the contract to an unnamed principal (*ante*, p. 324); it is in like manner admissible so as to fix the principal as the party really interested in the matter, and make him liable upon the contract (*l*). And in the case of oral agreements, although an agent contracts for

v. *Back*, 2 East, 142; *Berkeley* v. *Hardy*, *ante*, p. 325; *M'Ardle* v. *Irish Iodine Co.*, 15 Ir. Com. L.R. 146.

(*i*) *Pole* v. *Leask*, 28 Beav. 562; 29 L.J. Ch. 888; affirmed in H.L. 33 L.J. Ch. 155.

(*k*) *Sweeting* v. *Pearce*, 7 C.B. N.S. 449; 29 L.J. C.P. 265; affirmed 9 C.B. N.S. 534; 30 L.J. C.P. 109.

(*l*) *Higgins* v. *Senior*, 8 M. & W. 834, 844; 11 L.J. Ex. 199; *Calder* v. *Dobell*, L.R. 6 C.P. 486; 40 L.J. C.P. 224; *Wilson* v. *Hart*, 7 Taunt. 295; 1 Moore, 45; *Humfrey* v. *Dale*, 27 L.J. Q.B. 390; E. B. & E. 1004.

the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable (*m*). If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does not know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, when he finds out the principal, claim payment of the latter (*n*), provided he makes his election so to do within a reasonable time (*o*). And the mere fact of filing an affidavit of proof against the estate of an insolvent agent after the undiscovered principal is known to the creditor is not a conclusive election by the creditor to treat the agent as his debtor (*p*). But, if, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, notwithstanding such knowledge, chooses to give credit to the agent, he cannot afterwards resort to the principal for payment (*q*). And, if an agent, having made a contract in his own name, has been sued on it to judgment, no second action is maintainable against the principal (*r*). If an agent has borrowed money for his principal, and the amount has been received by the latter, he may be sued in an action of debt by the lender, although the lender, at the time he lent the money, supposed that the agent was the borrower (*s*). The burden of proof of agency is on the person dealing with any one as an agent, through whom he seeks to charge another as principal; he must show that the agency did exist, and that the agent had the authority he assumed to exercise, or that the principal is estopped from disputing it (*t*).

Agent's authority to sign writings for principal.—Except for the purposes described in the first, second, and third sections of the Statute of Frauds, viz., for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents to bind a corporation to certain

(*m*) *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598; 41 L.J. Q.B. 253. But see *Irvine* v. *Watson*, 5 Q.B.D. 414; 49 L.J. Q.B. 531; and *Davison* v. *Donaldson*, 9 Q.B.D. 623.

(*n*) *Kymer* v. *Suwercropp*, 1 Camp. 109; *Thomson* v. *Davenport*, 9 B. & C. 78; *Thomas* v. *Edwards*, 2 M. & W. 215.

(*o*) *Smethurst* v. *Mitchell*, 1 E. & E. 623; 28 L.J. Q.B. 241.

(*p*) *Curtis* v. *Williamson*, L.R. 10 Q.B. 57; 44 L.J. Q.B. 27.

(*q*) *Paterson* v. *Gandasequi*, 15 East, 62; *Thomson* v. *Davenport*, *supra*.

(*r*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L.J. Ex. 173.

(*s*) *Samuel* v. *Green*, 10 Q.B. 262; 16 L.J. Q.B. 239.

(*t*) *Pole* v. *Leask*, 33 L.J. Ch. 155; 28 Beav. 562.

contracts, a mere verbal authority to the agent will suffice to bind the principal; and, in the great majority of instances, an authority binding one man to the acts of another is raised by implication of law (*u*). Any person who accredits another by employing him in any particular course of dealing is bound by what he has done in his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the authority with which he was apparently clothed by the principal (*x*). If B. has repeatedly signed A.'s name to policies of insurance, or to bills or notes, and A. has subsequently recognised and sanctioned such signatures, the law will imply a general warrant from A. to B. authorising the latter to sign in A.'s name, and A. will continue liable upon such contracts made by B. in the name of A., until the determination of the implied general authority has been publicly announced (*y*). From repeated instances of employment the law infers the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognised dealings (*z*). But an agent employed specially to sign a contract for his principal upon one particular occasion is not impliedly clothed with any general authority to sign contracts for him. And a person whose agency has been strictly confined to bill transactions has no implied authority to give a guarantee. The liability of the principal is always to be measured by the nature and extent of the previous employment of the agent; and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them (*a*). The fact of a landlord employing a steward to let and manage his property does not clothe the steward with a general authority to grant leases, or to enter into agreements for leases, without the sanction of the landlord or contrary to

(*u*) *Ridgway* v. *Wharton*, 6 H.L.Cas. 238; 27 L.J. Ch. 46.

(*x*) *Whitehead* v. *Tuckett*, 15 East, 400; *Watkins* v. *Vince*, 2 Stark. 368; Holt, C.J., *Anon.*, 12 Mod. 514; *Attwood* v. *Munnings*, 7 B. & C. 278; 6 L.J. (O.S.) K.B. 9; *Danby* v. *Coutts*, 29 Ch.D. 500; 54 L.J. Ch. 577.

(*y*) *Neal* v. *Irving*, 1 Esp. 61; *Brockelbank* v. *Sugrue*, 5 C. & P. 21.

(*z*) *Todd* v. *Robinson*, Ry. & M. 217; *Gilman* v. *Robinson*, *id.* 226; *Hazard* v. *Treadwell*, 1 Str. 506.

(*a*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Polhill* v. *Walter*, 3 B. & Ad. 114; 1 L.J. K.B. 92; cp. *Halbot* v. *Lens*, (1901) 1 Ch. 344; 70 L.J. Ch. 125. See also *Russo-Chinese Bk.* v. *Li Yau Sam*, (1910) A. C. 174; 79 L.J. P.C. 60. As to the revocation of authority by the dissolution of a company represented by a solicitor, see *Salton* v. *New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L.J. Ch. 20.

his express directions (*b*). And the agent of an insurance company derives no authority, from the mere fact of his agency, to enter into a contract to grant a policy of insurance without the sanction of the directors (*c*). An agent has, in general, no authority to borrow money on account of the principal so as to render the latter responsible as the borrower, unless it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan (*d*), but in so far as money borrowed by an agent without authority has been in fact applied to the purposes of the principal's business, the lender has an equitable right to recover it from the principal (*e*). When an agent has been authorised to accept bills in the name of the principal, he may, it seems, in certain circumstances, select the hand of another person to carry the intention into effect without violating the rule "*delegatus non potest delegare*" (*f*). The duly appointed agent or attorney of a person who is abroad has been held to have authority to instruct a solicitor to show cause against an adjudication in bankruptcy against his principal (*g*), and to sign on behalf of his principal a bankruptcy petition against a debtor of the latter (*h*).

Special authority.—An agent entrusted with the performance of a particular duty has an implied authority to do all such incidental acts as are usual and necessary for the purpose of carrying the main objects of the principal into effect (*i*). Therefore an agent employed to sell property has authority to enter into and, if necessary, to sign a binding contract of sale (*i*), but an agent to find a purchaser has not authority to do so (*k*). An agent employed to get a bill discounted, and not restricted as to the mode of doing it, may endorse it in the name of the principal, and bind the latter by such indorsement, but, if he is expressly ordered by the principal not to put his name to the bill, and has not been employed as his general agent to discount and endorse bills, the principal cannot be made liable upon it (*l*). An agent authorised to make contracts of purchase and sale, and as incidental thereto to do certain specified acts,

(*b*) *Collen* v. *Gardner*, 21 Beav. 540.

(*c*) *Linford* v. *Provincial Horse Ins. Co.*, 34 Beav. 291 ; 10 Jur. N.S. 1066.

(*d*) *Hawtayne* v. *Bourne*, 7 M. & W. 595, 599 ; 10 L.J. Ex. 224. See *Montaignac* v. *Shitta*, 15 App.Cas. 357 ; *Jacobs* v. *Morris*, (1902) 1 Ch. 816 ; 71 L.J. Ch. 363.

(*e*) *Bannatyne* v. *MacIver*, (1906) 1 K.B. 103 ; 75 L.J. K.B. 120.

(*f*) *Lord* v. *Hall*, 8 C.B. 627 ; 19 L.J. C.P. 47.

(*g*) *Frampton*, *In re and Ex parte*, 1 D. F. & J. 263 ; 28 L.J. Bank. 21.

(*h*) *Wallace*, *In re and Ex parte*, 14 Q.B.D. 22 ; 54 L.J. Q.B. 293.

(*i*) *Rosenbaum* v. *Belson*, (1900) 2 Ch 267 ; 69 L.J. Ch. 569.

(*k*) *Hamer* v. *Sharp*, L.R. 19 Eq. 108 ; 44 L.J. Ch. 53 ; *Chadburn* v. *Moore*, 61 L.J. Ch. 674.

(*l*) *Fenn* v. *Harrison*, 3 T.R. 757.

which however did not include the borrowing of money, cannot, it has been held, bind his principal by contract of loan (*m*). A power to an agent to sell property belonging to his principal does not authorise him to sell property of which his principal is mortgagee under the mortgagee's statutory power of sale (*n*). Whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or endorsed, bills in his name, it must be distinctly shown that he knew of, and had sanctioned, such previous acceptances or indorsements (*o*). The customary mode of indorsement through the medium of an agent is by the agent's signing the name of the principal, adding under it "per procuration, A. B.," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly express that the indorsement is made by one man on behalf of another—as A. for B., B. by A. or by procuration of A., &c.; but the name of the principal, whether the bill be drawn, accepted, or endorsed by the agent, must appear on the face of the bill, in order to express that the principal does the act through the medium of his agent; for, if the agent merely signs his own name, the principal cannot be made liable upon it (*p*). Where an agent accepts or endorses a bill "per pro.," the taker is bound to inquire as to the extent of the agent's authority (*q*). When, however, a firm in partnership trade under the name of "A. & Co.," and such partnership name appears on the face of the bill, all the members of the firm are liable upon it, although their individual names do not appear (*r*).

Contracts by infant agents.—The principal cannot rely upon any personal incapacity on the part of his agent to contract as a defence against an action brought by those who have dealt with such agent; for the principal who has employed and accredited the agent cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for anything beyond the necessaries of life, he may nevertheless contract so as to bind his employer (*s*).

Subsequent ratification by the principal.—Although no pre-

(*m*) *Bryant* v. *La Banque du Peuple*, (1893) A.C. 170; 62 L.J. P.C. 68.

(*n*) *Dowson and Jenkins's Contract, In re*, (1901) 2 Ch. 219; 73 L.J. Ch. 684.

(*o*) *Davidson* v. *Stanley*, 3 Sc. N.R. 49; *Fearn* v. *Filica*, 7 M. & Gr. 513; 14 L.J. C.P. 15.

(*p*) *Barlow* v. *Bishop*, 1 East, 432; *Emly* v. *Lye*, 15 East, 7. See 45 & 46 Vict. c. 61, ss. 25, 26, *post*, p. 1301.

(*q*) *Bryant* v. *La Banque du Peuple*, (1893) A.C. 170; 62 L.J. P.C. 68.

(*r*) See 45 & 46 Vict. c. 61, s. 23, *post*, p. 1301.

(*s*) *Watkins* v. *Vince*, 2 Stark. 368.

vious authority may have been given, yet if there be subsequent acts of assent or acquiescence on the part of the principal, he is liable upon the contract: "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*" (*t*). Where a contract has been made by a person in the hope and expectation that it will be ratified by a third party, but without disclosing that fact to the other party to the contract, the third party cannot ratify the contract so as to enable him to sue upon it (*u*). If a bill or note be signed without authority by A.'s servant or agent in the name of A., a subsequent promise by the latter to pay the bill is equivalent to a prior authority (*x*); and, if the proceeds of such a bill are applied to A.'s use or for his benefit, with his knowledge, this amounts to a subsequent sanction and ratification of the act of the agent (*y*). An adoption of the agency as to one part of a contract generally operates as an adoption of the whole transaction; for an act cannot be affirmed as to so much as is beneficial and rejected as to the residue(*z*). "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority" (*a*). But in order to make it binding, the ratification must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it all events and under whatever circumstances (*b*). The subsequent ratification of the contract by the principal relates back to the time when it was made by the agent. And, therefore, where an offer was accepted by an agent, and was withdrawn before the acceptance was ratified by the principal, it was held that since the acceptance was subsequently ratified by the principal, the withdrawal was inoperative (*c*). A principal may, in the absence of fraud on his part, ratify and adopt a contract made by his agent without his authority, notwithstanding that the other parties to it have before ratification repudiated it, and notwithstanding that the

(*t*) *Soames* v. *Spencer*, 1 Dowl. & Ry. 32; *Maclean* v. *Dunn*, 1 Moo. & P. 761; 6 L.J. (O.S.) C.P. 184; *Fitzmaurice* v. *Bayley*, 26 L.J. Q.B. 114; 6 E. & B. 868; on another point in Ex. Ch., 27 L.J. Q.B. 143; 8 E. & B. 664; in H.L., 9 H.L.Cas. 78.

(*u*) *Keighley, Maxsted & Co.* v. *Durant*, (1901) A.C. 240; 70 L.J. Q.B. 662.

(*x*) *Fenn* v. *Harrison*, 4 T.R. 177.

(*y*) *Bolton* v. *Hillersden*, 1 Ld. Raym. 224.

(*z*) *Hovil* v. *Pack*, 7 East, 164.

(*a*) Tindal, C.J., *Wilson* v. *Tumman*, 12 L.J. C.P. 306; 6 M. & Gr. 236; *Berwick* v. *Horsfall*, 4 C.B. N.S. 450; 27 L.J. C.P. 193; *Lewis* v. *Read*, 13 M. & W. 834; 14 L.J. Ex. 295. As to ratification by a person of an act tortious to himself, see *Lythgoe* v. *Vernon*, 5 H. & N. 180; 29 L.J. Ex. 164.

(*b*) Willes, J., *Phosphate of Lime Co.* v. *Green*, L.R. 7 C.P. 43; *Marsh* v. *Joseph*, (1897) 1 Ch. 213; 66 L.J. Ch. 128.

(*c*) *Bolton* v. *Lambert*, 41 Ch.D. 295; 58 L.J. Ch. 425; as to acceptance by unauthorised agents, see *Dibbins* v. *Dibbins*, (1896) 2 Ch. 348; 65 L.J. Ch. 724.

agent acted with fraudulent intent (*d*). And in those cases where, by the Statute of Frauds, or the Sale of Goods Act, 1893, the contract is required to be authenticated by writing, such ratification renders the agent an agent duly authorised to bind his principal under the provisions of the statute at the time the contract was entered into (*e*). But ratification can only be by a person ascertained at the time of the act done, that is, by a person then in existence, either actually or in contemplation of law (*f*); and, consequently, a company cannot ratify a contract purporting to have been made on their behalf before they existed as a company (*g*). A subsequent ratification, however, may be valid, although the principal was ignorant of the transaction until after it took place; and such a ratification may be made after an action has been commenced upon the contract in the name of the principal (*h*). Ratification of an act purporting to determine a contract will not relate back to the date of the act if the interests of persons other than the parties to the contract might be affected (*i*).

Acquiescence by a principal in a contract entered into by his agent may amount to a ratification of it (*k*).

Limitation of authority.—If an agent exceeds his authority in cases where it is notorious that the authority of the agent is generally limited, the principal will not be liable beyond the extent of the authority given; and, if the contract is indivisible, the principal will not be liable at all. Thus, where the defendant authorised a broker at Liverpool to underwrite marine policies for him, "not exceeding 100*l.* by any one vessel," and the broker underwrote a policy for 150*l.*, and at Liverpool it is notorious that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public, it was held that the agent had no authority to underwrite for 150*l.*, and that, the contract being indivisible, the assured could recover nothing from the defendant in respect of the policy (*l*).

(*d*) *Tiedemann, In re*, (1899) 2 Q.B. 66; 68 L.J. Q.B. 852.

(*e*) *Maclean* v. *Dunn*, 1 Moo. & P. 761; 6 L.J. (O.S.) C.P. 184.

(*f*) *Watson* v. *Swann*, 11 C.B. N.S. 756; 31 L.J. C.P. 210; *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94.

(*g*) *Melhado* v. *Porto Alegre Ry.*, L.R. 9 C.P. 503; 43 L.J. C.P. 253; *Empress Engineering Co., In re*, 16 Ch.D. 125; *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154; *English and Colonial Produce Co., In re*, (1906) 2 Ch. 435; 75 L.J. Ch. 831; but see *contra*, *Spiller* v. *Paris Skating Rink Co.*, 7 Ch.D. 368, *per* Malins, V.-C., following *Touche* v. *Metropolitan Ry. Warehousing Co.*, L.R. 6 Ch. 671.

(*h*) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L.J. Ex. 163.

(*i*) *Gloucester Municipal Election Petition, In re*, (1901) 1 Q.B. 683; 70 L.J. K.B. 459.

(*k*) *Phillips* v. *Homfray*, L.R. 6 Ch. 770.

(*l*) *Baines* v. *Ewing*, L.R. 1 Ex. 320; 35 L.J. Ex. 194; *Russo-Chinese Bk.* v. *Li Yau Sam*, (1910) A.C. 174; 79 L.J. P.C. 60.

Publication of revocation of authority.—In order to determine the liability of the principal to third parties who have dealt with the agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at large as the existence of the previous general authority and employment. When a person has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he means to pay ready money in future; it must be given to the tradesman himself, unless the servant is a foreman or manager having the general superintendence of the business (*m*). The authority of the agent is determined by the death of the principal (*n*)—as also by the dissolution of a company for whom the agent is acting (*o*)—as soon as the death or dissolution is brought to the knowledge of the parties.

Misrepresentation and fraudulent concealment by agents.—"If," said Lord Abinger, C.B., "the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposes to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation" (*p*). If the representation forms part of the contract, the principal must take the contract in its entirety. "Whatever the previous authority of the agent," further observed Wilde, B., "whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which do not bind their principals; but I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal" (*q*). Where a policy holder was induced to continue paying premiums to the insurance company by means of unauthorised and untrue statements of agents of the company, it was held that the company were liable to repay these premiums to the policy

(*m*) *Gratland* v. *Freeman*, 3 Esp. 85.

(*n*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Overweg, In re*, (1900) 1 Ch. 209; 69 L.J. Ch. 255.

(*o*) *Salton* v. *New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L.J. Ch. 20.

(*p*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297; *Schneider* v. *Heath*, 3 Campb. 506; *Everett* v. *Desborough*, 3 Moo. & P. 190; 7 L.J. (O.S.) C.P. 223; Holt, C.J., *Hern* v. *Nicholls*, 1 Salk. 289; Ld. Ellenborough, *Crockford* v. *Winter*, 1 Campb. 124; *Taylor* v. *Green*, 8 C. & P. 316; *Wright* v. *Crookes*, 1 Sc. N.R. 685; *Wheelton* v. *Hardisty*, 8 E. & B. 232; 27 L.J. Q.B. 241.

(*q*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 337; *Bristowe* v. *Whitmore*, 9 H.L.Cas. 391; 31 L.J. Ch. 467. As to liability of principal for acts of agent, see Addison on Torts, pp. 120, 843 (ed. 8)

holder (*r*). A proviso in a contract between a corporation and a contractor that the contractor should verify all representations for himself was held to protect the corporation only against honest and not against fraudulent representations of their agent (*s*). False statements made by an agent, being within his authority, may be sufficient to vitiate a contract, and prevent a decree for specific performance (*t*).

Agent acting in his own interest.—A contract entered into by an agent on behalf of his principal within the scope of his authority is binding on the principal as regards all persons dealing in good faith with the agent, although the contract was made in the latter's own interest and not in that of the principal (*u*).

Liabilities of principals on contracts under seal.—If, in a contract under seal, the principal is made to covenant in his own name, and not in the name of his agent, and the deed is executed in the name of the principal, and the agent's authority to execute the deed is under seal, the principal is liable upon it just as if he had personally sealed and delivered the instrument; but, if the agent has covenanted in his own name on behalf of the principal, the action may be brought against the agent, who, in such a case, constitutes himself the trustee of the principal (*x*). The principal is not, in any case, liable upon a deed, unless the authority of the agent to make and execute the deed is under seal (*y*); but there is an exception in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other *in the presence* of that other" (*z*).

Warranties by agents.—It has been held that a buyer who takes a warranty from a known agent, professedly selling on behalf of his principal, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that a known servant, intrusted to sell, has no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the business of buying and selling (*a*); but, although a vendor who employs

(*r*) *Refuge Assurance Co.* v. *Kettlewell*, (1909) A.C. 243; 78 L.J. K.B. 519.

(*s*) *Pearson* v. *Dublin Corporation*, (1907) A.C. 381; 77 L.J. P.C. 1.

(*t*) *Mullens* v. *Miller*, 22 Ch.D. 194; 52 L.J. Ch. 380.

(*u*) *Hambro* v. *Burnand*, (1904) 2 K.B. 10; 73 L.J. K.B. 669. But see *Kinahan & Co.* v. *Parry*, (1910) 2 K.B. 389; 79 L.J. K.B. 1083; reversed on facts (1911) 1 K.B. 459; 80 L.J. K.B. 276.

(*x*) Co. Litt. 258, n.; *Anon.*, Moore, 70, pl. 19; *White* v. *Cuyler*, 6 T.R. 176.

(*y*) *Steiglitz* v. *Egginton*, 1 Holt, 141.

(*z*) *Ball* v. *Dunsterville*, 4 T.R. 313.

(*a*) *Brady* v. *Tod*, 9 C.B. N.S. 592; 30 L.J. C.P. 223; *Udell* v. *Atherton*, *ante*, p. 333, qualifying *Alexander* v. *Gibson*, 2 Campb. 555; *Helyear* v. *Hawke*, 5 Esp. 71.

an agent to sell gives the latter no authority to warrant, yet, if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent had exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction altogether; but, if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty (*b*). If an agent employed by the indorsee of a bill to get it discounted warrants the bill to be a good bill, and receives cash for it on the strength of the warranty, and hands over the money to his principal, and the bill turns out to be a piece of worthless paper, the principal cannot retain the money (*c*). It was his own fault, as Lord Holt has observed, to repose a trust in unworthy hands, and he ought not to be allowed to derive a profit from the misconduct of his own servant to the prejudice of an innocent purchaser (*d*).

If a person puts goods into the custody of another whose common business it is to sell, he thereby confers upon him an authority to do all that is necessary and usual to be done to obtain a purchaser (*e*); and, therefore, if the servant of a horse-dealer with express directions not to warrant does warrant, the master is bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed (*f*). Here the maxim *respondeat superior* applies; and the principal has his remedy against the agent for his misconduct (*g*). Where a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown, and it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen, it was held that the master was answerable for the fraud of the apprentice (*h*), on the ground that the sale took place in the course of business in the master's shop (*i*). Where the owners of a vessel,

(*b*) Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 373; 9 L.J. Ex. 297; *Hern* v. *Nicholls*, *ante*, p. 333; *Armory* v. *Delamirie*, 1 Str. 505.

(*c*) *Fenn* v. *Harrison*, 4 T.R. 177.

(*d*) *Coleman* v. *Riches*, 16 C. B. 115; 24 L.J. C.P. 125; *Cornfoot* v. *Fowke*, *supra*.

(*e*) *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 143.

(*f*) Bayley, J., *Pickering* v. *Busk*, 15 East, 38, 45; *Howard* v. *Sheward*, L.R. 2 C.P. 148; 36 L.J. C.P. 42.

(*g*) Ld. Kenyon, C.J., *Fenn* v. *Harrison*, 3 T.R. 757; 4 T.R. 115.

(*h*) *Grammar* v. *Nixon*, 1 Str. 653.

(*i*) Jervis, C.J., *Coleman* v. *Riches*, 16 C.B. 115; 24 L.J. C.P. 125.

which had once been classed A 1 at Lloyd's, authorised their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner in all respects as he should think proper, and generally to represent the owners in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not especially mentioned, it was held that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given (*k*).

Representations by agents not amounting to a warranty.—It is not every affirmation and representation which will amount to a warranty. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, and the agent making the statement merely says what he believes to be true, there is no warranty on the part of the agent of the truth of what he states; it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party. And, if there is, under such circumstances, a defect unknown to the party making the statement, which the other party had as good means of discovering as the agent himself, the rule of *caveat emptor* applies (*l*). A servant, serving in a shop, and demanding only the ordinary market price of the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.

Representations forming no part of contract with principal.—In order to charge the principal, it must not only be shown that the representation was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests (*m*). Therefore, if an agent employed by his principal to find parties willing to contract, and then to send

(*k*) *Routh* v. *Macmillan*, 33 L.J. Ex. 38; 2 H. & C. 750.

(*l*) *Fuller* v. *Wilson*, 3 Q.B. 58; 11 L.J. Q.B. 251; *Collins* v. *Evans*, 5 Q.B. 828; 13 L.J. Q.B. 180.

(*m*) *Helyear* v. *Hawke*, 5 Esp. 71.

them to the principal to conclude the bargain with him, makes in the course of conversation with them statements and representations respecting the subject-matter of the contract which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them (*n*). Thus, where a house-agent, on going to show a house, was asked if there was anything objectionable about the house, to which he replied "Nothing whatever," and, after this conversation, the parties differed about the rent, and the matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into with the principal himself, which contract made no mention of the previous representation of the agent, it was held that the principal was not bound by the representation (*o*).

Purchases by servant in name of master.—If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But, if the servant "usually buys for the master upon tick, and the servant buys some things without the master's order, yet, if the master were trusted by the trader, he is liable" (*p*). "If goods," observes Lord Ellenborough, "are taken up by the master, and the money given *afterwards* to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money; for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorised him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant has not paid the plaintiff, though he may have received the money from the defendant, his master" (*q*). The mere relation of master and coachman or groom does not of itself involve, as a matter of law, ostensible authority for the coachman or groom to pledge his master's credit for forage for his horses (*r*). But where a master sent his coachman wearing his livery to hire horses which the master afterwards used, knowing of whom they were hired, and without ascertaining if his credit had been pledged for them, it was held that the master was bound to pay the

(*n*) *Knight* v. *Barber*, 16 M. & W. 69; 16 L.J. Ex. 18.

(*o*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297.

(*p*) Holt, C.J., Show. 95; *Southby* v. *Wiseman*, 3 Keb. 625; *Nickson* v. *Brohan*, 10 Mod. 109; *Pearce* v. *Rogers*, 3 Esp. 214.

(*q*) *Rusby* v. *Scarlett*, 5 Esp. 76; *Miller* v. *Hamilton*, 5 C. & P. 433.

(*r*) *Wright* v. *Glyn*, (1902) 1 K.B. 745; 71 L.J. K.B. 497.

hire, although he had contracted with his coachman that he should provide horses, and had paid him a large salary for the purpose (*s*). If the father of a family put his children under the protection of servants, and lives himself at a distance from them, the servants have an implied authority to procure necessary medical advice in case of sudden illness or accident (*t*). But, if the plaintiff has shown a want of due caution, or has trusted the servant to an improper extent, the master will not be liable (*u*).

Authority of foremen and managers.—A foreman entrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business (*x*). If the acts of agency have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority can be proved. If the agent has published advertisements, and thereby induced parties to contract with him, the principal will be bound by the publicity of the announcement, although no actual authority has been given. "It is a question between the principal and his agent; and the public has nothing to do with it" (*y*). Wherever the principal, by his conduct, has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal; and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded (*z*). Thus, where J., carrying on business at one place, and having a branch establishment at another, placed the latter under the management and superintendence of B., as his agent, and the branch business was carried on in the name of B. & Co., but B. had no authority to accept bills, and B. nevertheless exceeded his authority by the acceptance of a bill of exchange, it was held that J. was liable thereon, it not being in his power to divest his agent, by any secret reservation, of the powers incidental to the character of principal which he had empowered him to assume (*a*).

(*s*) *Rimell* v. *Sampayo*, 1 C. & P. 254.

(*t*) *Cooper* v. *Phillips*, 4 C. & P. 581.

(*u*) *Stubbing* v. *Heintz*, 1 Peake, 66.

(*x*) *Summers* v. *Solomon*, 26 L.J. Q.B. 301; 7 E. & B. 879; *Richardson* v. *Cartwright*, 1 Car. & K. 328.

(*y*) *Runquist* v. *Ditchell*, 3 Esp. 64.

(*z*) Ld. Ellenborough, *Pickering* v. *Busk*, 15 East, 38, 42; *Smethurst* v. *Taylor*, 12 M. & W. 545; 14 L.J. Ex. 86; *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L.J. Ex. 465; *Edmunds* v. *Bushell*, L.R. 1 Q.B. 97; 35 L.J. Q.B. 20.

(*a*) *Edmunds* v. *Bushell*, *supra*; *Watteau* v. *Fenwick*, (1893) 1 Q. B. 346

Authority of telegraph clerks.—A telegraph clerk is only authorised to transmit a telegraphic message in the terms in which the sender delivers it; and, if he makes a mistake in the transmission of the message, the sender is not bound by it (*b*).

Authority of shipmasters.—Masters of ships have an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under their command; and by the word "necessary" is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered (*c*). He may also pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage (*d*). If it be necessary to pay harbour dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to bind the owners by a contract for that purpose. But this authority does not extend to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can do the thing required (*e*). If the vessel is in a foreign port where the owner has no agent, or in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, the occasion authorises the master to pledge the credit of the owner and make him liable upon the contract. But in all these cases the things must be absolutely necessary to enable the vessel duly to prosecute the voyage (*f*). The owners will not be bound, if the money is borrowed, not upon their credit, but upon the private credit of the master himself (*g*). The liability of the owner depends, not on his ownership of the vessel merely, but on his having authorised the master to bind him, either expressly, or by his having held out the master as his master, and having thereby induced the vendor to supply the necessaries on the credit of the owner (*h*). The master has also, it seems, authority to settle a claim for demurrage made by him for the detention of the vessel at a foreign port (*i*).

Limitation of authority of shipmasters.—"The authority of

(*b*) *Henkel* v. *Pape*, L.R. 6 Ex. 7; 40 L.J. Ex. 15.

(*c*) *Webster* v. *Seekamp*, 4 B. & Ald. 352; *Weston* v. *Wright*, 7 M. & W. 396; 10 L.J. Ex. 329; *Stainbank* v. *Shepard*, 13 C.B. 441; 22 L.J. Ex. 341; *The Aaltje Willemina*, L.R. 1 A. & E. 107.

(*d*) *Robinson* v. *Lyall*, 7 Price, 592.

(*e*) *Gunn* v. *Roberts*, L.R. 9 C.P. 331; 43 L.J. C.P. 233.

(*f*) As to home ports, see the 19 & 20 Vict. c. 97, s. 8; *Arthur* v. *Barton*, 6 M. & W. 138; 9 L.J. Ex. 187; *Johns* v. *Simons*, 2 Q.B. 425; *Stonehouse* v. *Gent*, *ib.* 431, n.

(*g*) *Thacker* v. *Moates*, 1 Moo. & R. 79.

(*h*) *The Great Eastern*, L.R. 2 A. & E. 88; 36 L.J. Adm. 15.

(*i*) *Alexander* v. *Dowie*, 25 L.J. Q.B. 281; 1 H. & N. 152.

the shipmaster is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary those which the shipowner has made" (*k*). He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case; and he cannot make them responsible for money not actually necessary, though he may pretend that it is(*l*). He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight-free. So with regard to goods put on board, he may sign a bill of lading, acknowledging the nature, quality, and condition of the goods (*m*); but his authority to give bills of lading is limited to such goods as have been actually put on board. A party, therefore, taking a bill of lading either originally or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it, in order to charge the shipowner upon it (*m*); nor can the master draw bills of lading making the freight payable otherwise than to the shipowner (*n*). The shipmaster has no authority to sell any part of the ship or cargo, except in a case of absolute necessity (*o*), or where the sale is warranted by the law of the country in which it takes place (*p*); nor has he any authority to hypothecate the ship or to borrow money upon the credit of the shipowners, after the work has been done, for the purpose of paying the debt due for it (*q*). The master of a disabled ship has power under certain circumstances to forward the cargo by another ship; but he is not the agent of the owners of the cargo, so as to render them responsible for his act in so doing, where he has the opportunity of communicating with them or their agent, and neglects to avail himself of it (*r*). Where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners

(*k*) *Harris* v. *Carter*, 3 E. & B. 559; 23 L.J. Q.B. 295.

(*l*) *Mackintosh* v. *Mitchenson*, 4 Exch. 175; 18 L.J. Ex. 385; *Edwards* v. *Havill*, 14 C.B. 107; 22 L.J. C.P. 8; *Organ* v. *Brodie*, 10 Exch. 450; 24 L.J. Ex. 70.

(*m*) *Grant* v. *Norway*, 10 C.B. 665, 687; 20 L.J. C.P. 93; *Hubbersty* v. *Ward*, 8 Exch. 330; 22 L.J. Ex. 113; *Coleman* v. *Riches*, 16 C.B. 104; 24 L.J. C.P. 125; *Cox* v. *Bruce*, 18 Q.B.D. 147; 56 L.J. Q.B. 121; *Whitechurch* v. *Cavanagh*, (1902) A.C. 117; 71 L.J. K.B. 400; *Compania Naviera Vasconzada* v. *Churchill*, (1906) 1 K.B. 237; 75 L.J. K.B. 94; *Russo-Chinese Bk.* v. *Li Yau Sam*, (1910) A.C. 174; 79 L.J. P.C. 60; cp. *Thiodon* v. *Tindall*, 60 L.J. Q.B. 526.

(*n*) *Reynolds* v. *Jex*, 34 L.J. Q.B. 251; 7 B. & S. 83.

(*o*) *Freeman* v. *E. I. Co.*, 5 B. & Ald. 621; *The Bonita*, 30 L.J. Adm. 145; *The Gipsy*, 33 L.J. Adm. 195.

(*p*) *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L.J. Ex. 350.

(*q*) *Beldon* v. *Campbell*, 6 Exch. 886; 20 L.J. Ex. 342.

(*r*) *Gibbs* v. *Grey*, 2 H. & N. 22; 26 L.J. Ex. 286; *Duranty* v. *Hart*, 33 L.J. Adm. 116.

is that conferred by the law of the country to which the ship belongs; and the flag of a ship is notice to all the world that his implied authority is limited by the law of that flag (*s*).

When shipowners have appointed a shipmaster and placed him in charge of the vessel, and have been in the habit of paying for stores and repairs ordered by such master, the general authority of the latter cannot be revoked or circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant (*t*).

Where the ship is let to freight, and the charter-party or contract of affreightment operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer; and the latter, and not the registered owner, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer (*u*). The shipowner, however, is *primâ facie* liable for repairs and stores ordered for his vessel by the master (*x*). If, therefore, on looking to the registry, the defendant is found to be the legal owner, a *primâ facie* liability is established against him. But the register is not conclusive; for the question is a pure question of contract and credit, which, like all other questions of goods sold or work done, must be decided by a jury upon consideration of all the circumstances.

If the charter-party operates, as it generally does, merely as a contract for the carriage of merchandise, the shipowner retaining the possession and control of the vessel through the medium of his servants and agents, he cannot repudiate the agency of the master acting as such with his knowledge (*y*). Where the defendant had never employed the plaintiff himself to do repairs to his vessel, but was the legal owner upon the register, and was in concurrent possession of the ship with a party to whom he professed to have sold it, and was fully aware that the shipmaster who was appointed by the latter was giving orders for repairs, and some of the defendant's servants were on board and in charge of the vessel, it was held that the defendant

(*s*) *Lloyd* v. *Guibert*, 35 L.J. Q.B. 74; L.R. 1 Q.B. 115; *The Karnak*, L.R. 2 P.C. 505; 38 L.J. Adm. 57; *The Gaetano*, 7 P.D. 137; 51 L.J. P. 67; *The August*, (1891) P. 328; 60 L.J. P. 57. But see *The Industrie*, (1894) P. 58; 63 L.J. P. 84.

(*t*) *Rich* v. *Coe*, Cowp. 636; *Preston* v. *Tamplin*, 2 H. & N. 684; 27 L.J. Ex. 192.

(*u*) *Fraser* v. *Marsh*, 13 East, 238; *Briggs* v. *Wilkinson*, 7 B. & C. 34; 5 L.J. (O.S.) K.B. 349; *Reeve* v. *Davis*, 1 Ad. & E. 312; 3 N. & M. 873.

(*x*) *The Riga*, L.R. 3 A. & E. 516; 41 L.J. Adm. 39.

(*y*) *The St. Cloud*, 1 Br. & L. 4; *Sandeman* v. *Scurr*, L.R. 2 Q.B. 86; 36 L.J. Q.B. 58; *The Figlia Maggiore*, L. R. 2 A. & E. 106; 37 L.J. Adm. 52; *The Nepoter*, L.R. 2 A. & E. 375; 38 L.J Adm. 63.

was responsible for repairs done to the ship by the plaintiff upon the order of the shipmaster (*z*). Where, on the other hand, the shipowner had sold his shares in a vessel, and had ceased to be beneficially interested in her, and was not known as a part owner to the party doing the repairs until after they had been ordered and done, but his name continued on the register, it was held that he was not liable for such repairs, unless it could be shown that the master who gave the order for them had an express or implied authority to bind him (*a*). And so where the owner of the ship has so dealt with it as to have given all the rights of ownership for a limited time to some other person who appoints and pays the master, officers, and crew, and gives them orders, the owner is not liable for the loss of goods shipped under bills of lading signed by the captain (*b*); but where a charter-party contained a clause providing that the captain and crew should be the agents and servants of the charterers for all purposes, and that in signing bills of lading the captain should only do so as agent for the charterers, it was held that that stipulation, although valid as between the charterers and the owners, did not affect the true position of the captain and crew, and had no effect upon the holder of the bill of lading, although the bill of lading referred in terms to the charter-party (*c*). A part owner of a ship has no implied general authority to bind his co-owners for repairs (*d*). Where a party is mortgagee of a ship only, taking merely the security of the ship without intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and to the earnings of the ship, will not make the master his agent so as to bind him in respect of contracts entered into by the master after the date of the mortgage (*e*). A mortgagee in possession of a ship is not liable for necessaries supplied, unless the master in ordering them acted as his agent (*f*). A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action: the creditor has an election to sue either one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other (*g*).

(*z*) *Frost* v. *Oliver*, 2 E. & B. 315; 22 L.J. Q.B. 353.

(*a*) *Curling* v. *Robertson*, 8 Sc. N.R. 19; 13 L.J. C.P. 137; *Mitcheson* v. *Oliver*, 5 E. & B. 419, 444; 25 L.J. Q.B. 39; and see *Hibbs* v. *Ross*, L.R. 1 Q.B. 534; 35 L.J. Q.B. 193.

(*b*) *Baumwoll Manufactur* v. *Furness*, (1893) A.C. 8; 62 L.J. Q.B. 201.

(*c*) *Manchester Trust* v. *Furness*, (1895) 2 Q.B. 539; 64 L.J. Q.B. 766.

(*d*) *Brodie* v. *Howard*, 17 C.B. 118; 25 L.J. C.P. 57.

(*e*) *Myers* v. *Willis*, 17 C.B. 77, 103; 18 *ib.* 886; 25 L.J. C.P. 39, 255; *Hackwood* v. *Lyall*, 17 C.B. 124; *Mackenzie* v. *Pooley*, 11 Exch. 638; 25 L.J. Ex. 124.

(*f*) *The Troubadour*, L.R. 1 Adm. 302.

(*g*) *Priestley* v. *Fernie*, 34 L.J. Ex. 172; 3 H. & C. 977.

Authority of ship's husband.—A ship's husband who has authority from the owners to make a charter-party by which commission on freight, primage, and demurrage, is to be due to the charterers, has not power to bind the owners by making an agreement to cancel the charter-party, and pay the charterers a sum of money in lieu of commission, although such agreement is for the benefit of the owners (*h*). The procuring of charters and freights is part of his duty and is covered by his remuneration (*i*). His authority extends to the conduct on shore of all that concerns the employment of the ship, and he may therefore bind the owners by orders for the repair, fitting and outfit necessary for such employment (*k*).

Authority of brokers.—One who employs a broker to transact business for him in a general market, as, for instance, upon the Stock Exchange, impliedly authorises him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But, when a custom or usage is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage (*l*).

Authority of ship brokers.—If a broker who is authorised to advertise a ship for a voyage, warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority (*m*).

Authority of counsel.—Counsel retained to conduct a cause is clothed with an apparent authority to do everything belonging to the conduct of it, which, in the exercise of his discretion, he thinks best for the interest of his client; and, if, acting within the limits of this apparent authority, he enters into an agreement with the counsel for the other side as to the cause, this agreement is binding on the client (*n*), but not if contrary to conditions imposed by the client. But counsel has no right to manage a cause against the will of his client or to make a

(*h*) *Thomas* v. *Lewis*, 4 Ex.D. 18; 48 L.J. Ex. 7.

(*i*) *Williamson* v. *Hine*, (1891) 1 Ch. 390; 60 L.J. Ch. 123.

(*k*) *The Huntsman*, (1894) P. 214; see *Von Freeden* v. *Hull*, 75 L.J. K.B. 359; reversed on a question of fact, 76 L.J. K.B. 715.

(*l*) *Grissell* v. *Bristowe*, L.R. 3 C.P. 112; 38 L.J. C.P. 10; in Ex. Ch., L.R. 4 C.P. 36; *Maxted* v. *Paine*, L.R. 6 Ex. 132; 40 L.J. Ex. 57; *Nickalls* v. *Merry*, L.R. 7 H.L. 530; *Spooner* v. *Browning*, (1898) 1 Q.B. 528; 67 L.J. Q.B. 339.

(*m*) *Runquist* v. *Ditchell*, 2 Campb. 556, n.

(*n*) *Neale* v. *Gordon-Lennox*, 71 L.J. K.B. 939; (1902) A.C. 465.

binding agreement as to it, if the other side is informed that this apparent general authority has been, in fact, limited (*o*).

Authority of solicitors.—The force of a solicitor's retainer is at an end, and his power to bind his client by a compromise ceases, when judgment is recovered (*p*); but if, after judgment, the relation of solicitor and client is continued or re-created, the former will have authority to bind the latter by a compromise (*q*). A solicitor retained to bring an action has no implied authority to compromise the claim before action brought (*r*). Where a party entered into a compromise as to her interests under a will in consequence of a wrong interpretation placed upon counsel's opinion by a solicitor acting as the common agent of all parties, it was held that she was not bound by the compromise (*s*). A solicitor employed in the general conduct of a cause or matter as agent of another solicitor, possesses the same general authority therein, including power to compromise, as is possessed by the principal solicitor, unless this authority has been expressly limited (*t*).

Rights of agents on simple contracts.—Simple contracts entered into by agents, in their representative character, on behalf of a principal whose name is disclosed at the time of contracting, must, as a general rule, be enforced by the principal; and the agent cannot bring an action upon them in his own name (*u*), unless he can show that he has an interest or a special property in the subject-matter of the contract, or unless he has so contracted as to make himself personally responsible for the fulfilment of the contract (*x*). But, if a bill of exchange or a promissory note is made payable to one man for "the use," or "for and on behalf," or for the benefit of another person named on the face of the bill or note, the payee is the proper party to bring an action upon the instrument (*y*). And a mortgagee not in possession who grants a lease "as agent," can enforce the covenants in the lease binding on the tenant (*z*). If an agent carries on trade for his principal in his own name, and ostensibly on his own account, he is entitled to maintain an action in respect of goods sold

(*o*) *Strauss* v. *Francis*, L.R. 1 Q.B. 379; 35 L.J. Q.B. 133.

(*p*) *Macbeth* v. *Ellis*, 4 Bing. 578.

(*q*) *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

(*r*) *Macaulay* v. *Polley*, (1897) 2 Q.B. 122; 66 L.J. Q.B. 665.

(*s*) *Roberts, In re, Roberts* v. *Roberts*, (1905) 1 Ch. 704; 74 L.J. Ch. 483.

(*t*) *Newen, In re, Carruthers* v. *Newen* (1903) 1 Ch. 812; 72 L.J. Ch. 356; *Little* v. *Spreadbury*, (1910) 2 K.B. 658; 79 L.J. K.B. 1119.

(*u*) *Fairlie* v. *Fenton*, L.R. 5 Ex. 169; 39 L.J. Ex. 107; *Evans* v. *Hooper*, 1 Q.B.D. 45; 45 L.J. Q.B. 206.

(*x*) *Cooke* v. *Wilson*, 1 C.B. N.S. 153; 26 L.J. C.P. 15; *Fawkes* v. *Lamb*, 31 L.J. Q.B. 98.

(*y*) *Evans* v. *Cramlington*, Carth. 5; 2 Ventr. 307. See 45 & 46 Vict. c. 61. s. 35, *post*, p. 1251.

(*z*) *Chapman* v. *Smith*, (1907) 2 Ch. 97; 76 L.J. Ch. 394.

by him in the course of that trade, unless the real principal interferes, and asserts his right to the sum due (*a*). Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless it can be also shown that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases the action may be brought either in the name of the person by whom, or of the party for whom, the contract was made (*b*).

Right of action of factors, auctioneers, and policy-brokers.— If the agent himself has an interest or a special property in the subject-matter of the contract, he is entitled to maintain an action upon it. Where a broker has advanced money on the credit of a cargo consigned to him by his principal for sale, he is entitled to an action in his own name against the buyer, although the sale note given by the broker mentions the name of the principal (*c*); and the buyer in such a case cannot set off a debt due to him from the principal in an action by the agent. But, if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he will be entitled to make use of that circumstance as a defence. So, too, in the sale of goods by a factor, although the principal may be named or known at the time of the sale, yet, as the factor has a claim on the price of the goods in the hands of the buyer for the balance due to him on the general account with his principal, he has a right to require payment of the price, to the extent of such general balance, to himself, and not to the principal (*d*). An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, &c.; and he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter (*e*). He has a lien also on the proceeds of the sale, as well as on the specific article sold, and seems to be in the same position as a factor who sells goods upon which he has advanced money, so that it is no answer to an action by an auctioneer for the price of goods sold by him to say that before action the defendant paid the price to the principal (*f*). But it is other-

(*a*) *Gardiner* v. *Davis*, 2 C. & P. 49.
(*b*) *Sargent* v. *Morris*, 3 B. & Ald. 277; *Clay* v. *Southern*, 7 Exch. 717; 21 L.J. Ex. 202; R.S.C. 1883, Ord. XVI.
(*c*) *Atkyns* v. *Amber*, 2 Esp. 493.
(*d*) *Drinkwater* v. *Goodwin*, Cowp. 251.
(*e*) *Williams* v. *Millington*, H. Bl. 81; *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.
(*f*) *Robinson* v. *Rutter*, 4 E. & B. 954; 24 L.J. Q.B. 250; *Webb* v. *Smith*, 30 Ch.D. 192.

wise if the auctioneer's charges have been paid before action, and the purchaser has a good answer to any action by the vendor for the price (*g*); and, if goods are sold, to be paid for at a future period, and are delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer, in the absence of such notice, settles with the principal, the agent's right of action is destroyed (*h*). A policy-broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit, or interest the same is made, is entitled to an action on the policy, inasmuch as, by the usage of trade, he has a lien upon it for the premium, which is generally paid by the broker, also for his commission, and for the general balance due to him on the account between himself and his principal.

Repudiation of contract by principal.—When an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defence to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it (*i*).

Pretended assumption of agency.—When a man has assumed to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and bring an action as the principal and party really interested in the contract, without giving to the defendant previous notice of the situation in which he stands. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive him before bringing an action (*k*). But, if the principal is not named on the face of the contract, the party professing to contract as agent for an unnamed principal is not precluded from saying at any time, that he is himself the principal, and from asserting his rights in that character (*l*).

Right of action of agents on contracts under seal.—If the agent contracts under seal in his own name on behalf of his principal, he may sue upon the contract, although his representative character is disclosed on the face thereof; but, if the principal is made to covenant in his own name, and not the agent for him and in his behalf, the agent has then, of course, no right of action at all upon the contract (*m*).

(*g*) *Grice* v. *Kenrick*, L.R. 5 Q.B. 340; 29 L.J. Q.B. 175.

(*h*) *Coppin* v. *Walker*, 7 Taunt. 237.

(*i*) *Short* v. *Spackman*, 2 B. & Ad. 962.

(*k*) *Bickerton* v. *Burrell*, 5 M. & S. 383; *Rayner* v. *Grote*, 15 M. & W. 359; 16 L.J. Ex. 79.

(*l*) *Schmaltz* v. *Avery*, 16 Q.B. 655; 20 L.J. Q.B. 228; *Harper* v. *Vigers*, (1909) 2 K.B. 549; 78 L.J. K.B. 876.

(*m*) *Ante*, p. 334.

Liabilities of agents on simple contracts.—Whenever an agent contracts in his own name for the fulfilment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfilment of the act undertaken to be done (*n*), although he was known to be acting only as an agent for some third party (*o*), unless it was expressly agreed that he was not to incur any personal liability upon the contract (*p*), or there is evidence from which this may be inferred (*q*). Where a person signs a contract in his own name without qualification, he *primâ facie* contracts personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal (*r*); and the use of the words "as agent for" in the body of the contract does not prevent the liability of a party who signs as principal (*s*). For the words "as agent" may be merely words of description, but if the words "on account of" are used there is no ambiguity, and the intention to act for another is clear (*t*). So, whenever, in the body of a simple contract in writing, the agent contracts in his own name, and signs his name to the contract, he may render himself personally responsible for the fulfilment of the contract, although he declares that he contracts on behalf of a named principal (*u*), or that he signs by procuration of, or as agent for, a named principal (*x*). If it appears from the general context of the written instrument that the agent himself was to be responsible for the due fulfilment of the contract, the words "for and on behalf" or "as agent for," will be deemed to be mere matter of description, and will not exempt the agent from personal liability; and there is no distinction in this respect between deeds and simple contracts (*y*). Whether he is so liable depends upon the terms of the particular contract construed in connexion with the surrounding circumstances and the relative situations of the parties at the time the contract was entered into (*z*). If, on the face

(*n*) *Saxon* v. *Blake*, 29 Beav. 438; *Bird*, *Ex parte*, 4 D. J. & S. 200; 33 L. J. Bk. 49.

(*o*) *Reid* v. *Dreaper*, 6 H. & N. 813; 30 L.J. Ex. 268.

(*p*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451.

(*q*) *Williamson* v. *Barton*, 7 H. & N. 899; 31 L.J. Ex. 170.

(*r*) *Thomson* v. *Davenport*, 9 B. & C. 78; 7 L.J. (O.S.) K.B. 136.

(*s*) *Paice* v. *Walker*, L.R. 5 Ex. 173; 39 L.J. Ex. 109; and see *Hough* v. *Manzanos*, 4 Ex.D. 104; 48 L.J. Ex. 398.

(*t*) *Gadd* v. *Houghton*, 1 Ex.D. 357; 46 L.J. Ex. 71.

(*u*) *Parker* v. *Winlow*, 7 E. & B. 942; 27 L.J. Q.B. 49.

(*x*) *Lennard* v. *Robinson*, 5 E. & B 126; 24 L.J. Q.B. 275.

(*y*) Best, C.J., *Norton* v. *Herron*, 1 Car. & P. 638; Ry. & Mood. 229; *Tanner* v. *Christian*, 4 E. & B. 591; 24 L.J. Q.B. 91; *Weidner* v. *Hoggett*, 1 C.P.D. 533; *Chapman* v. *Smith*, (1907) 2 Ch. 97; 76 L.J. Ch. 394.

(*z*) *Downman* v. *Williams*, 7 Q.B. 103; 14 L.J. Q.B. 226; *Spittle* v. *Lavender*, 5 Moo. 270; *Gaby* v. *Driver*, 2 Y. & J.

of the contract, there is an express disclaimer of personal liability on the part of the agent, effect will be given to such disclaimer, although the agent has contracted in his own name on behalf of an unnamed principal; but the agent must have had authority to enter into the contract on behalf of his principal, and must have intended to contract so as to bind the latter (*a*). Where goods were accepted by an agent under a bill of lading, which made them deliverable to him "for the London Gas Company, or to his assignees, he or they paying freight for the said goods," and the defendant on the delivery of the goods promised to pay the freight, it was held that, as the defendant appeared, upon the face of the bill of lading, to be merely the agent of the London Gas Company, and had received the goods in that character, and not on his own account, the promise must be taken to have been made by him in his character of agent for the company, to pay the freight on their account, and was not a promise to be personally responsible for it (*b*).

Whenever the agent contracts as agent, and signs his name, adding "as agent," or "by procuration," or signs the name of the principal, adding "by A. B., as agent," and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally responsible upon the contract (*c*).

Contracts by agents on behalf of foreign principals.—When an English agent is contracting on behalf of a foreign principal, it will, in general, be presumed that the agent was intended to be responsible for the fulfilment of the contract (*d*). In such a case both the agent and the principal are liable upon the contract; but the presumption of liability on the part of the agent may be rebutted by the form and terms of the contract (*e*).

Undisclosed agencies. Oral evidence.—Whenever an agent enters into an agreement and neglects to declare the agency, and to qualify his liability upon the face of the contract, he is personally responsible, and is not, in general, permitted to

549, 555; as to the position of a receiver under a debenture trust deed, see *Owen* v. *Cronk*, (1895) 1 Q.B. 265; 64 L.J. Q.B. 288.

(*a*) *Oglesby* v. *Yglesias*, E. B. & E. 930; 27 L.J. Q.B. 356.

(*b*) *Amos* v. *Temperley*, 8 M. & W. 805; 11 L.J. Ex. 183.

(*c*) *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36; 2 E. & E. 602; *Green* v. *Kopke*, 18 C.B. 549; 25 L.J. C.P. 297; *Mahony* v. *Kekulé*, 14 C.B. 390; 23 L.J. C.P. 54; *Jenkins* v. *Hutchinson*, 13 Q.B. 744; 18 L.J. Q.B. 274. As to the liability of an agent to the trustee in bankruptcy of the principal, see *Helder, Ex parte*, 24 Ch.D. 389; 53 L.J. Ch. 106.

(*d*) *Wilson* v. *Zulueta*, 14 Q.B. ~~405~~ 405; 19 L.J. Q.B. 49; *Cooke* v. *Wilson*, 1 C.B. N.S. 153; 26 L.J. C.P. 15.

(*e*) *Mahony* v. *Kekulé*, *supra*.

show, by oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was at the time he signed the contract. Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burthen of the performance of the contract; but not for the purpose of discharging the agent from an agreement which is absolute and unqualified, and in which he has represented himself as the really contracting party (*f*). But, if an agent contracting on behalf of his principal has contracted in writing so as to render himself personally responsible upon the written contract, oral evidence is now admissible to show that at the time the contract was entered into the plaintiff knew the defendant to be only an agent, and that it was expressly agreed that he should not incur any personal liability upon the contract, and that the drawing up the agreement so as to make the defendant personally liable was the result of a mistake, and was contrary to the intention of the parties to the contract (*g*). Although brokers contract as such on the face of their bought and sold notes, yet, if they do not name their principals, they are by the custom of some trades liable to be treated as principals, and sued as such (*h*).

All bills of exchange and promissory notes signed by an agent, without any qualification of his liability, are binding upon the agent; and he cannot discharge himself from liability merely by showing that, at the time he accepted or endorsed the bill, or made the note, he was known to be merely an agent, having himself no interest in, and deriving no benefit from, the transaction (*i*). By the Bills of Exchange Act, 1882 (*k*), s. 26, "(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from

(*f*) *Higgins* v. *Senior*, 8 M. & W. 834; 11 L.J. Ex. 199; *Magee* v. *Atkinson*, 2 M. & W. 440; 6 L.J. Ex. 115; *Jones* v. *Littledale*, 6 A. & E. 486; 6 L.J. K.B. 169; *Hanson* v. *Roberdeau*, Peake, 163; *Kendray* v. *Hodgson*, 5 Esp. 228; *De Gelder* v. *Savory*, 2 Keb. 812; *Gray* v. *Gutteridge*, 1 Moo. & R. 618; 6 L.J. (O.S.) K.B. 154; *Franklyn* v. *Lamond*, 16 L.J. C.P. 231; 4 C.B. 637.

(*g*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451, *ante*, p. 347.

(*h*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49. See *Southwell* v. *Bowditch*, 1 C.P.D. 374; 45 L.J. C.P. 630, where a distinction is drawn between the words "bought of you for my principals," and "sold for you to my principals."

(*i*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Thomas* v. *Bishop*, 2 Str. 955; *Buckley*, *Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341.

(*k*) 45 & 46 Vict. c. 61.

personal liability. (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

If an agent orders goods, or enters into dealings and transactions in his own name on behalf of an unknown or undisclosed principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal, and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract" (*l*). And even where the name of the principal appears upon the face of the contract, if the contract shows that the auctioneer is dealing personally with the purchaser, the auctioneer will be personally bound by his contract (*m*). It has been held that an auctioneer has an implied authority to sell without reserve, and therefore is not liable to an action for breach of warranty of authority by so selling even though as between himself and the seller his authority is subject to a reserve (*n*). Where the sale is known to be subject to a reserve, the auctioneer by inadvertently knocking down the property at less than the reserved price does not render himself liable to an action by the bidder for another reason, namely, that the making of any contract of sale is conditional on the reserved price being reached (*o*). If the agent contracts in his representative character avowedly as agent, on behalf of a named or known principal, he is not personally responsible upon the contract, unless he has himself some special interest in the subject-matter of the contract, as presently mentioned and described (*p*). Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him liable unless the goods come to his use in some shape or another (*q*).

Notoriety of agency—Public officers.—If a person is placed in a situation rendering his character of agent notorious, he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment (*r*). A witness

(*l*) *Hanson* v. *Roberdeau*, Peake, 163; *Franklyn* v. *Lamond*, 4 C.B. 637; 16 L.J. C.P. 221.

(*m*) *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.

(*n*) *Rainbow* v. *Howkins*, (1904) 2 K.B. 322; 73 L.J. K.B. 641; commented upon in *McManus* v. *Fortescue*, *infra*.

(*o*) *McManus* v. *Fortescue*, (1907) 2 K.B. 1; 76 L.J. K.B. 393.

(*p*) *Infra*, and see *ante*, p. 345.

(*q*) *Owen* v. *Gooch*, 2 Esp. 568.

(*r*) *Pochin* v. *Pawley*, 1 W. Bl. 670.

who has been subpœnaed to give evidence in a cause conducted by a solicitor cannot maintain an action against the latter for his expenses of attendance, as it is notorious that the solicitor is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal(*s*). If, however, the agent himself has any interest in the subject-matter of the contract—if he acts for himself as well as for third parties whom he professes to represent—he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly.

Assumed or pretended agencies.—When the agent contracts without authority from the principal on whose behalf he professes to act, the nature and extent of his liability will depend upon the nature and form of the contract. He cannot be sued in any case upon the contract, if he has not contracted therein in his own name (*ante*, p. 348). He may, however, be liable to the plaintiff for warranting or representing himself to be an agent, and to have authority to make the contract, when he is not the agent and had no such authority (*t*); provided the misrepresentation was a misrepresentation of fact and not merely of law (*u*). But he will not be liable if he signs in a form commonly adopted in the business in order to negative a warranty of authority (*x*). Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability (*y*). If the acceptor of a bill of exchange professes to accept per procuration as agent, he is responsible upon the bill, if he was himself the principal, and acted without the authority of the party on whose account he professed to act (*z*). But the burthen of proving that the party

(*s*) *Robins* v. *Bridge*, 3 M. & W. 118; 7 L.J. Ex. 49.

(*t*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215; *Simons* v. *Patchett*, 7 E. & B. 568; 26 L.J. Q.B. 195; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *Hughes* v. *Græme*, 34 L.J. Q.B. 335; *Cherry* v. *Colonial Bank of Australasia*, L.R. 3 P.C. 24; 38 L.J. P.C. 49; *Richardson* v. *Williamson*, L.R. 6 Q.B. 276; 40 L.J. Q.B. 145; *Weeks* v. *Propert*, L.R. 8 C.P. 427; 42 L.J. C.P. 129; *McCollin* v. *Gilpin*, 6 Q.B.D. 516; *Dickson* v. *Reuter's Telegraph Co.*, 3 C.P.D. 1; 47 L.J. C.P. 1; *Chapleo* v. *Brunswick Building Society*, 6 Q.B.D. 696; 50 L.J. Q.B. 372; *National Coffee Palace Co., In re*, 24 Ch.D. 367; 53 L.J. Ch. 57; *Meek* v. *Wendt*, 21 Q.B.D. 126, affirmed by C.A.; see W.N. (1889) p. 14; *Halbot* v. *Lens*, (1901) 1 Ch. 344; 70 L.J. Ch. 125; *Starkey* v. *Bank of England*, (1903) A.C. 114; 72 L.J. Ch. 402; *Yonge* v. *Toynbee*, (1910) 1 K.B. 215; 79 L.J. K.B. 208.

(*u*) *Rashdall* v. *Ford*, L.R. 2 Eq. 750; 35 L.J. Ch. 769; *Beattie* v. *Ebury* (*Lord*), L.R. 7 Ch. 777; 41 L.J. Ch. 804.

(*x*) *Lilly* v. *Smales*, (1892) 1 Q.B. 456.

(*y*) *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94.

(*z*) *Owen* v. *Van Uster*, 10 C.B. 318; 20 L.J. C.P. 61.

describing himself on the face of the contract as agent is in truth the principal falls upon the plaintiff seeking to falsify the contract, and to show that the defendant assumed a false position (*a*).

"One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it" (*b*). Where, therefore, the defendant represented himself to be the agent of one G., and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation (*c*). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person he has induced to contract is concerned, in no way aids such person, or alleviates the inconvenience and damage which he sustains. . . . The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist" (*d*), and this principle is not confined to cases in which the transaction with the person representing himself to be an agent results in a contract (*e*). Thus, where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on behalf of the society, and that they were therefore personally liable to repay the money (*f*).

(*a*) *Carr* v. *Jackson*, 21 L.J. Ex. 137; 7 Exch. 382.

(*b*) *Jenkins* v. *Hutchinson*, 13 Q.B. 748; 18 L.J. Q.B. 274; *Randell* v. *Trimen*, 18 C.B. 786; 25 L.J. C.P. 307; *Richardson* v. *Dunn*, 8 C.B. N.S. 655; 30 L.J. C.P. 44.

(*c*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215.

(*d*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215; *Pow* v. *Davis*, 4 B. & S. 220; 30 L.J. Q.B. 257; *Firbank* v. *Humphreys*, 18 Q.B.D. 54; 56 L.J. Q.B. 57.

(*e*) *Starkey* v. *Bank of England*, (1903) A.C. 114; 72 L.J. Ch. 402.

(*f*) *Richardson* v. *Williamson*, L.R. 6 Q.B. 276; 40 L.J. Q.B. 145. See

Even where the agent's authority has been determined without his own knowledge by the death or bankruptcy of his principal, he will be liable as on an implied warranty of authority to a person with whom he purports to transact business on behalf of the principal (*g*).

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess (*h*).

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty (*i*), but does not render him liable to an action for deceit (*k*); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer (*l*).

Contracts by agents of irresponsible principals—Government agents.—If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not, in such a case, be liable upon the contract (*m*). If the agent acts in a public employment, and the extent of his authority is as much known to the party contracting with the agent as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any misstatement or misrepresentation on the part of the agent respecting his authority in the matter, the agent will not incur any personal liability. Thus the governor of a fort, or of a colony, is not personally answerable for stores ordered by him for the use of government; neither is a military commissary, nor the captain of a troop, liable for forage supplied to the army or to the troop, nor for provisions furnished to the men; nor is the

Cherry v. *Colonial Bank of Australasia*, L.R. 3 P.C. 24; 38 L.J. P.C. 49; *Leather* v. *Simpson*, L.R. 11 Eq. 398; 40 L.J. Ch. 177.

(*g*) *Yonge* v. *Toynbee*, (1910) 1 K.B. 215; 79 L.J. K.B. 208; overruling, on this point, *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357.

(*h*) *Macgregor* v. *Deal and Dover Ry.*, 22 L.J. Q.B. 69; 18 Q.B. 618.

(*i*) See, *per* Blackburn, J., *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201.

(*k*) *Thom* v. *Bigland*, 8 Exch. 725; 22 L.J. Ex. 243.

(*l*) *Pewtriss* v. *Austen*, 6 Taunt. 522.

(*m*) *Lewis* v. *Nicholson*, 18 Q.B. 503; 21 L.J. Q.B. 311; *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451.

First Lord of the Treasury personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government (*o*); nor is the Secretary of War liable to a retired clerk of the War Office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the Crown, and responsible only to the Crown for the due execution of the trust committed to him (*p*). An action will not lie against the Secretary of State for India as the successor of the East India Company for arrears of a life pension granted by the Company, as representing the Crown, to a native prince (*q*). No action lies against a public servant of the Crown contracting on behalf of the Crown upon any implied warranty of authority to make the contract (*r*). But an action has been held to lie against H.M. Commissioners of Public Works for damages for breach of a contract entered into by them with a builder for the erection of a public building (*s*). In all these cases the nature and extent of the agent's authority are as much known to the party with whom he contracts as to the agent himself; and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honour and good faith of the irresponsible principal. The agent of a foreign government cannot be sued upon their bonds (*t*). The clerk of the County Court, giving orders for the fitting up of a building for the holding of the sittings of the court, is not a public officer acting in a public employment, so as to be exonerated from liability in respect of the order so given (*u*).

Money received by agent for principal.—If money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal to the money in an action against the agent (*x*). The agent having

(*o*) *Rice* v. *Chute*, 1 East, 579; *Myrtle* v. *Beaver*, *ib.* 135; *Macbeath* v. *Haldimand*, 1 T.R. 172.

(*p*) *Gidley* v. *Palmerston* (*Lord*), 3 B. & B. 275; 7 Moore, 91. See also *Palmer* v. *Hutchinson*, 6 App.Cas. 619; 50 L.J. P.C. 62.

(*q*) *Salaman* v. *Secretary of State for India*, (1906) 1 K.B. 613; 75 L.J. K.B. 418.

(*r*) *Dunn* v. *Macdonald*, (1897) 1 Q.B. 555; 66 L.J. Q.B. 420.

(*s*) *Graham* v. *Public Works Commissioners*, (1901) 2 K.B. 781; 70 L.J. K.B. 860.

(*t*) *Twycross* v. *Dreyfus*, 5 Ch.D. 605; 46 L.J. Ch. 510.

(*u*) *Autey* v. *Hutchinson*, 17 L.J. C.P. 304; 6 C.B. 266.

(*x*) *Sadler* v. *Evans*, 4 Burr. 1985; *Greenward* v. *Hurd*, 4 T.R 553.

received the money on behalf of the principal, and for his use, is accountable to the latter for it. The maxim, *respondeat superior*, therefore, applies; and the agent, whether he has paid over the money, or not, is answerable to the principal alone(*y*). But, if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over, or settled for it in account with his principal, at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, is paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money; and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in consequence of it, is not equivalent to a payment of it over (*z*). But if he has paid it over or settled for it in account with his principal, he cannot be compelled to refund it (*a*). If, however, he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defence of payment over (*b*).

Money wrongfully and illegally received by agent.—The doctrine, that the receipt of the agent is the receipt of the principal, does not extend to the case of a wrong-doer, so that if an agent gets money into his hands by his own fraudulent or illegal act, he cannot discharge himself from liability by paying it over to his principal (*c*).

Receipt of money by agents to be paid over to stranger.—The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes, as we have already seen (*d*), no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received; and the mere receipt of the money

(*y*) *Dixon* v. *Hamond* 2 B. & Ald. 313; *Hardman* v. *Willcock*, 9 Bing. 382, n.; *Stephens* v. *Badcock*, 3 B. & Ad. 354; 1 L.J. K.B. 75; *White* v. *Bartlett*, 9 Bing. 378; 2 L.J. C.P. 43; *Goodall* v. *Lowndes*, 6 Q.B. 464.

(*z*) *Buller* v. *Harrison*, Cowp. 565; *Bishop* v. *Eagle*, 10 Mod. 23; *Cox* v. *Prentice*, 3 M. & S. 344; *Horsfall* v. *Handley*, 2 Moore, 5; 8 Taunt. 136; *Holland* v. *Russell*, 32 L.J. Q.B. 297; 4 B. & S. 14; *Newall* v. *Tomlinson*, L.R. 6 C.P. 405.

(*a*) *Holland* v. *Russell*, *supra*; *Shand* v. *Grant*, 15 C.B. N.S. 324; *Taylor* v. *Metropolitan Ry.*, (1906) 2 K.B. 55; 75 L.J. K.B. 735; *Owen* v. *Cronk*, (1895) 1 Q.B. 265; 64 L.J. Q.B. 288.

(*b*) *Edwards* v. *Hodding*, 5 Taunt. 815.

(*c*) *Townson* v. *Wilson*, 1 Campb. 397; *Anon.*, *ib.* 398, n.; *Clark* v. *Johnson*, 3 Bing. 426; *Miller* v. *Aris*, 1 Selw. N.P. 123, n. (ed. 13); Addison on Torts, p. 120 (ed. 8)

(*d*) *Ante*, p. 309.

by the agent is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter: the privity of contract is between him and his principal and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use (*e*).

Liability of agent on contracts under seal.—The liability in the case of deeds is always confined to the person who has contracted therein in his own name, and who has sealed and delivered the deed, and does not extend to the person on whose behalf, and for whose benefit, the contract is expressed to be made. When, therefore, an individual acting in a private capacity, and not on behalf of the government, covenants in his own name, under his own hand and seal, for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; for "a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either case" (*f*). A proviso totally inconsistent with any personal liability, where no fund is pointed out or provided for the payment of the money, has been held to be repugnant and void (*g*); but a proviso limiting but not destroying the liability is valid (*h*); it has also been held that an agent may contract for a principal on the express terms that he is himself to incur no personal liability, whether the principal is, or is not, bound by the contract (*i*).

Exemption of public officers—Contract under seal.—When upon the face of a contract under seal it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract (*k*), unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should be liable (*l*).

Execution of deeds by agents not rendering them personally

(*e*) *Moore* v. *Bushell*, 27 L.J. Ex. 3; *Hill* v. *Royds*, L.R. 8 Eq. 290; 38 L.J. Ch. 538; *New Zealand Land Co.* v. *Watson*, 7 Q.B.D. 374; 50 L.J. Q.B. 433. See *Kaltenbach* v. *Lewis*, 10 App.Cas. 617; 55 L.J. Ch. 58.

(*f*) *Appleton* v. *Binks*, 5 East, 148; 1 Smith, 361; *Talbot* v. *Godbolt*, Yelv. 137; 5 Bacon's Abr. 372; *Hancock* v. *Hodgson*, 12 Moore, 504; 5 L.J. (O.S.) C.P. 170.

(*g*) *Furnivall* v. *Coombes*, 5 M. & Gr. 736; 12 L.J. C.P. 265.

(*h*) *Williams* v. *Hathaway*, 6 Ch.D. 544.

(*i*) *Wake* v. *Harrop*, 6 H. & N. 678; 30 L.J. Ex. 273; in err. 1 H. & C. 202; 31 L.J. Ex. 451.

(*k*) *Unwin* v. *Wolseley*, 1 T.R. 674; *Allen* v. *Waldegrave*, 2 Moore, 621; 8 Taunt. 566.

(*l*) *Cunningham* v. *Collier*, 4 Dougl. 233.

liable.—There is a wide distinction between entering into a deed for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorized by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding, "for B." (the principal), or he signs the name of B., adding "by A., his attorney." When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority under seal to warrant his acts, there is no binding contract at all; the principal cannot be bound, as he has not legally sanctioned the contract, and the agent cannot be made liable upon it, as he has not contracted in his own name (*m*).

Rights of partners upon contracts with third parties.—The law upon the subject of partnership has been declared and consolidated by the Partnership Act, 1890 (*n*). The Act does not exhaust the whole subject of the law of partnership; and by sect. 46 the rules of equity and of common law applicable to partnership are to continue in force, except so far as they are inconsistent with the provisions of the Act.

If a contract is entered into with one partner in his individual capacity, and apparently on his own account, but in reality on behalf of the firm of which he is a member, and the joint interest and joint consideration are not disclosed upon the face of the writing, the partner so contracting stands in the position of an agent dealing on behalf of an undisclosed principal; and either that partner, or the firm, as the parties really interested in it, may enforce it (*o*), the defendant being entitled, in the latter case, to set up against the firm any defence that he would have had to an action brought by the one partner alone (*p*). Thus, if a written contract for the sale of goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may enforce it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction (*q*).

(*m*) *Frontin* v. *Small*, 2 Ld. Raym. 1418; *White* v. *Cuyler*, 6 T.R. 176; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L.J. (O.S.) K.B. 184.

(*n*) 53 & 54 Vict. c. 39.

(*o*) *Alexander* v. *Barker*, 2 Cr. & J 133; 1 L.J. Ex. 40.

(*p*) *Stracey* v. *Deey*, 7 T.R. 361, n.; *Gordon* v. *Ellis*, 13 L.J. C.P. 179; 2 C.B. 821.

(*q*) *Skinner* v. *Stocks*, 4 B. & Ald. 437.

On the other hand, a partner who purchases on his own account property which is not within the scope of the partnership, nor in any way connected with, nor detrimental to it, acting on information which he has not acquired through his position as partner, cannot be compelled to account to his co-partners (*r*).

Implied contracts with firms in partnership.—If a service or benefit, in respect of which the law implies a promise, moves from a firm in partnership, the promise is a joint promise in favour of all the partners (*s*). If on the other hand, it moves from one partner separately and individually on his own account, it is a private contract in which the partnership has no concern (*t*); and a firm has thus no implied authority to receive payment of a debt due to one of the partners as an individual (*u*). Whenever the services have been rendered by the one partner on the partnership account, and the remuneration for such services belongs to the joint purse, all the partners are jointly interested in the consideration (*x*). When the money of the partnership has been lent by the one partner alone, there is an implied promise of repayment in favour of all the partners (*y*); but, if they permit one partner to deal with the partnership property in his own name, as the sole owner of it, or as the sole party interested, they cannot stand in a better situation than the one partner who has been permitted so to act (*z*). And when one partner lends money in his own name, and nominally on his own account, but really on account of, and as the loan of, the firm, the firm, if it sues for the money, must show clearly and distinctly that the advance was made on its account, and as a loan from the partnership, although the fact might at the time be unknown to the borrower (*a*).

Trust services by partners.—If one of the partners is a trustee, and work is done by the firm in the execution of the trust, the firm cannot charge for their trouble and services (*b*).

Contracts with trustees or directors of co-partnership (*c*).—In order to obviate the inconvenience arising from deaths and changes in a firm, when a large number of persons are associated

(*r*) *Trimble* v. *Goldberg*, (1906) A.C. 494; 75 L.J. P.C. 92; and see *Cassels* v. *Stewart*, 6 App.Cas. 64; *Dean* v. *McDowell*, 8 Ch.D. 345; 47 L.J. Ch. 537.

(*s*) *Bond* v. *Pittard*, 3 M. & W. 357; 7 L.J. Ex. 78; *Lambert's case*, Godb. 244; and see *post*, p. 361.

(*t*) *Brandon* v. *Hubbard*, 4 Moore, 367.

(*u*) *Powell* v. *Brodhurst*, (1901) 2 Ch. 160; 70 L.J. Ch. 587.

(*x*) *Arden* v. *Tucker*, 4 B. & Ad. 815; 2 L.J. K.B. 137.

(*y*) *Alexander* v. *Barker*, *supra*.

(*z*) *Lucas* v. *De la Cour*, 1 M. & S. 249; *Gordon* v. *Ellis*, 2 C.B. 821; 13 L.J. C.P. 182; *Robson* v. *Drummond*, 2 B. & Ad. 303; 9 L.J. (O.S.) K.B. 187.

(*a*) *Sims* v. *Bond*, 5 B. & Ad. 389; 2 N. & M. 608.

(*b*) *Mathison* v. *Clark*, 3 Drew. 3; 24 L.J. Ch. 202.

(*c*) And see *post*, p. 372.

together in partnership, recourse has been had to trustees, who have been appointed to conduct the business of co-partnerships, and enter into contracts for the general benefit of the concern (*d*). When a number of persons are associated together in partnership in this manner, the trustees have the general conduct and management of the co-partnership, and form the acting partners of the concern, whilst the others contribute merely their capital, and receive accruing profits in proportion to their interests, and stand, consequently, in the position of dormant partners. All simple contracts entered into with the co-partnership by name, or with one or more of the trustees are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the co-partnership (*e*). They are also, as the acting partners, jointly interested in all implied contracts arising out of partnership transactions (*f*).

Liabilities of partners—Power of partner to bind the firm.—By sect. 5 of the Partnership Act, 1890 (*g*), every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (*h*). By sect. 7, where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner. By sect. 8, if it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect

(*d*) *Metcalf* v. *Bruin*, 12 East, 404—408; *Clay* v. *Southern*, 21 L.J. Ex. 202; 7 Exch. 717.

(*e*) *Phelps* v. *Lyle*, 10 Ad. & E. 113; 8 L.J. Q.B. 236.

(*f*) *Lefevre* v. *Boyle*, 3 B. & Ad. 880; 1 L.J. K.B. 199; *Megginson* v. *Harper*, 2 Cr. & M. 322; 3 L.J. Ex. 50.

(*g*) 53 & 54 Vict. c. 39.

(*h*) By sect. 6, *post*, p. 370, an act or instrument done in the name of the firm and intended to bind the firm is binding, subject to a proviso as to deeds and negotiable instruments. By sect. 10, partners are made liable for wrongs or omissions of any partner; and by sect. 11 for misapplication of money, and by sect. 12 they are made so liable jointly and severally. By sect. 13, a partner being a trustee who employs the trust property in the business improperly, is personally liable to the *cestui que trusts*, but this does not affect a partner with notice of breach of trust, nor prevent the trust money from being followed if still under the control of the firm.

to persons having notice of the agreement. By sect. 9, every partner in a firm is liable jointly (*i*) with the other partners for all debts and obligations of the firm incurred while he is a partner: and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts. The estate of a deceased partner is not liable for the price of goods ordered by the partnership before, but not delivered until after the death of the partner (*k*).

Admission by one partner.—By sect. 15, an admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to one partner.—By sect. 16, notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Partnership for particular purpose.—The implied general authority of a partner to enter into contracts and to do other acts on behalf of the firm and of his co-partners for the purposes of the partnership business (*l*), is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions, or to restricted partnerships in profits, where the partner has no interest in the capital stock. Thus, where an author and publisher agree that the author is to write a book, and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for any other matter necessary for the purposes of the publication (*m*). Where several coach proprietors divide the road into districts, and each proprietor horses and conveys the coach over his own district, finding his own horses, harness and servants, stables, hay, straw, and horse-keepers for the execution of his share of the undertaking, one has no authority to bind the others by contracts for any of these things, or any

(*i*) By agreement, it is presumed, the liability may be made joint and several.

(*k*) *Bagel* v. *Miller*, (1903) 2 K.B. 212; 72 L.J. K.B. 495. See *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L.J. Ch. 737.

(*l*) 53 & 44 Vict. c. 39, ss. 5—8, *ante*, p. 359; and see *Ernest* v. *Nicholls*, 6 H.L.C. 418; *Cox* v. *Hickman*, 8 H.L.C. 268; 30 L.J. C.P. 125; *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L.J. Q.B. 220. See 53 & 54 Vict. c. 39, *post*, p. 361.

(*m*) *Wilson* v. *Whitehead*, 10 M. & W. 503; 12 L.J. Ex. 43.

other thing necessary for the carriage of the passengers (*n*). But they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance, and all, consequently, may be bound thereby (*o*); and, if one of them, whose business it is to hire coaches, contracts with a coachmaker for the supply of coaches to run throughout along the whole line of road, and not merely for his particular district, this is a contract with the whole partnership, and all are jointly responsible upon it (*p*). Where partners simply agree to carry on a partnership of which the term is not fixed, one of those partners has no authority to take a lease so as to bind the others (*q*).

Inchoate and incomplete partnerships.—If several persons agree to unite together in partnership, and to raise a joint stock, and one borrows money, and another procures goods, to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the co-partnership, but on his own private account (*r*). But, as soon as the partnership has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become complete partners in the undertaking, and impliedly accord to each other all such powers as are responsibly necessary to enable them to carry the common object into effect.

Execution for separate debt of one partner.—Formerly, a creditor who had obtained judgment for the separate debt of one partner, could levy execution upon the property of the firm, although under such execution he could only obtain the separate partner's share in the property; but it is provided by sect. 23, sub-sect. 1, of the Act of 1890 that a writ of execution shall not issue against any partnership property, except on a judgment against the firm; and by sub-sect. 2, the Court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property with payment of the amount of the judgment debt, and may also appoint a receiver of that partner's share of profits and of any other money which may be coming to him

(*n*) *Barton* v. *Hanson*, 2 Taunt. 49.

(*o*) *Helsby* v. *Mears*, 8 Dowl. & R. 289; 4 L.J. (O.S.) K.B. 214.

(*p*) *Arthur* v. *Dale*, Collyer, Part. 330.

(*q*) *Sharp* v. *Milligan*, 22 Beav. 610.

(*r*) *Saville* v. *Robertson*, 4 T.R. 720; *Smith* v. *Craven*, 1 Cr. & J. 500; *Greenslade* v. *Dower*, 7 B. & C. 638; 6 L.J. (O.S.) K.B. 155; *Heap* v. *Dobson*, 15 C.B. N.S. 460.

in respect of the partnership (*s*). If goods are supplied to A. and B. (who are partners) after notice by A. that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A. or that he has derived benefit from the goods (*t*).

Dealings by one partner in fraud of co-partnership.—Every one of the partners is responsible for things done within the scope of their implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the co-partnership upon the fraudulent dealing of the single partner was himself a party, or privy, to the fraud. If a simple contract concerning the partnership business is entered into by one of several partners in the trading name of the firm, or on behalf of the firm, or in his own name without mention of the co-partnership, all the partners are individually liable upon the contract, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing in the name of an agent (*u*). But this liability is confined to contracts made in the execution of the ordinary business of the co-partnership, as one partner is not liable upon the contracts of another partner made by him for his own individual benefit, and which ought to have been known by the plaintiff at the time not to be a partnership transaction (*x*). But a bill accepted in the name of a firm in the hands of a *bonâ fide* holder for value is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent (*y*).

Transactions out of ordinary course of business.—If the trading name of the firm, or an adopted or acquired name, is used in dealings and transactions out of the ordinary scope and business of the co-partnership, such a user of the name will not bind the other partners unless they have expressly assented thereto. Thus the authority of one partner to bind the others by signing bills of exchange or promissory notes in the firm name, which is necessarily implied in the case of trade partnerships (*z*), does not extend to professional partnerships, for the

(*s*) See *Brown, Janson & Co.* v. *Hutchinson* (No. 1), (1895) 1 Q.B. 737; 64 L.J. Q.B. 359; *Same* v. *Same* (No. 2), (1895) 2 Q.B. 126; 64 L.J. Q.B. 619.

(*t*) *Willis* v. *Dyson*, 1 Stark. 164.

(*u*) *Ante*, p. 326; *Trueman* v. *Loder*, 11 Ad. & E. 589; 9 L.J. Q.B. 165; *Drake* v. *Beckham*, 11 M. & W. 315; 12 L.J. Ex. 486.

(*x*) *Darlington Joint Stock District Banking Co., Ex parte, Riches, In re*, 34 L.J. Bankr. 10.

(*y*) *Wiseman* v. *Easton*, 8 L.T. 637. See sects. 23, 24, 29, 54 of 45 & 46 Vict. c. 61, *post*, Bk. II., Ch. VI.

(*z*) *Hedley* v. *Bainbridge*, 3 Q.B. 316;

purposes of whose business the signing of such instruments is not usual or necessary (*a*). One joint tenant of a farm "has no power to bind the others by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted" (*b*). Nor can one of two partners bind the other by consenting to a reference or to an order for judgment in an action against himself and his co-partner (*c*). There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (*d*).

Bills and notes in the name of the firm, given by one partner to secure his private debt, cannot be enforced against the partnership by the party taking the security (*e*) unless he can show that the partner from whom he took it had the authority of his co-partners to pay his own private debt with the acceptance of the firm (*f*). But, if the bill passes into the hands of a *bonâ fide* holder, the latter may enforce payment from the firm (if it be a trading firm) without giving any such evidence (*g*).

Liabilities of dormant and secret partners.—Every person who secretly connects himself with a firm in partnership, furnishing capital, labour, and skill, and secretly participating in the profits of the business, stands in the position of an undisclosed principal (*ante*, p. 326) who has contracted in the name of an agent, and is liable for the performance of the contracts of the co-partnership, except in the case of bills and notes not drawn or made in the name of the firm. Sects. 5—9 of the Act (*ante*, pp. 359, 360) fix his liability by statute. The secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognized any con-

11 L.J. Q.B. 293; and see *Wheatley* v. *Smithers*, (1907) 2 K.B. 684; 76 L.J. K.B. 900, where the Court of Appeal found the partnership deed expressly contemplated bills should be signed by the partners, but abstained from deciding whether or not a firm of auctioneers was, as such, a trade partnership.

(*a*) *Hedley* v. *Bainbridge*, 3 Q.B. 316; 11 L.J. Q.B. 293.

(*b*) Littledale, J., *Dickinson* v. *Valpy*, 10 B. & C. 128; 8 L.J. (O.S.) K.B. 51; Holroyd, J., *Greenslade* v. *Dower*, 7 B. & C. 635; 6 L.J. (O.S.) K.B. 155.

(*c*) *Hambidge* v. *De La Crouée*, 3 C.B. 745; 16 L.J. C.P. 85.

(*d*) *Alliance Bank* v. *Kearsley*, L.R. 6 C.P. 433; 40 L.J. C.P. 249.

(*e*) *Shirreff* v. *Wilks*, 1 East, 48; *Jones* v. *Yates*, 9 B. & C. 532; 7 L.J. (O.S.) K.B. 217; *Ridley* v. *Taylor*, 13 East, 182; *May* v. *Chapman*, 16 M. & W. 355; see sect. 23 of 45 & 46 Vict. c. 61, *post*, p. 1301.

(*f*) *Leverson* v. *Lane*, 13 C.B. N.S. 278; 32 L.J. C.P. 10. As to whether a reasonable belief by the creditor that the partner had such authority is sufficient, see *Kendal* v. *Wood*, L.R. 6 Ex. 243, 248; 39 L.J. Ex. 167. It would seem on principle that such belief is not sufficient unless it has been induced by the acts of the other partners. See also *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339.

(*g*) *Wiseman* v. *Easton*, 8 L.T. 637; see *per* Bramwell, L.J., in *Hogarth* v. *Latham*, *supra*, at p. 648; *Garland* v. *Jacomb*, L.R. 8 Ex. at p. 219. See sect. 30 of 45 & 46 Vict. c. 61, *post*, p. 1257.

tracts made in his name alone as partnership contracts (*h*); but the existence of an actual partnership must be proved so as to confer on the one an authority to bind the other (*i*).

Private agreements exempting dormant partners from liability.—If several partners agree that the trade shall be carried on by one or more of them in their own names as the ostensible and acting partners, and that certain secret partners who contribute capital, skill, or labour shall not be liable for losses beyond a certain amount, the operation of the agreement cannot affect the liability of such secret partners as regards third persons (*k*), unless the limitation of liability is established and made notorious, in the mode presently pointed out (*post*, pp. 384, 389). And it matters not whether the party participates in and receives, or bargains for, a share in the accruing profits for his own benefit, or as a trustee or executor for others. Equally indifferent is it whether his share be large or small (*l*).

Persons suffering themselves to be held out to the world as partners.—By sect. 14 of the Act of 1890—(1.) Everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. (2.) Provided that where, after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Permitting their names to be used in the business or exhibited over a shop window, or to be written in invoices or prospectuses, or to be published in advertisements as the names of members of the firm, has been held sufficient to render persons chargeable as partners, although they are not in point of fact partners, and have no share or interest in the business (*m*). But it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure (*n*). If a person holds himself out to the world as a partner with

(*h*) *Drake* v. *Beckham*, 11 M. & W. 315; 12 L.J. Ex. 486.
(*i*) *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L.J. Q.B. 220.
(*k*) *Lloyd* v. *Rowland*, 2 B. & Ad. 23.
(*l*) *Wightman* v. *Townroe*, 1 M. & S. 412.
(*m*) *Guidon* v. *Robson*, 2 Campb. 302.
(*n*) *Bourne* v. *Freeth*, 9 B. & C. 632, 640, 641; 7 L.J. (O.S.) K.B. 292.

another in a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the course of that business (*o*). And, if a plaintiff has contracted with a firm, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no interest in the partnership, he cannot make the defendant responsible upon the contract (*p*). If a man's name is used without his knowledge and consent, he cannot be made responsible as a partner upon the strength of such false representation (*q*). A man may, however, be fixed with the liabilities of a partner through the medium of his own express admissions or representations (*r*); but a plaintiff seeking to found an action upon them must prove that he knew of, and acted upon, such representations, and dealt with, and credited, the firm, under the belief that they were true (*s*). No mistaken supposition of a party as to his being a partner will make him liable as such, unless it were communicated to the plaintiff so as to mislead him (*t*). Where judgment has been recovered against a firm, the plaintiff may obtain an order for an issue to determine whether a person who has not been served with the writ was, or has held himself out as, a partner so as to be liable to execution (*u*).

Liabilities of incoming and retiring partners—Novation.—By sect. 17—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner. (2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. (3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

An incoming partner cannot, for instance, be made responsible upon bills or notes accepted or made by his co-partners before he became a member of the firm; but, if a bill be accepted on

(*o*) *De Berkom* v. *Smith*, 1 Esp. 29.

(*p*) *Alderson* v. *Pope*, 1 Campb. 403, n.; and see now 53 & 54 Vict. c. 39, s. 14, *ante*, p. 364.

(*q*) *Fox* v. *Clifton*, 4 Moo. & P. 713; 9 L.J. (O.S.) C.P. 257.

(*r*) Parke, J., *Dickinson* v. *Valpy*, 10 B. & C. 128, 140; 8 L.J. (O.S.) K.B. 51; Ld. Kenyon, in *De Berkom* v. *Smith*, 1 Esp. 29, 30; and see now sect. 14 (1), *supra*.

(*s*) *Carter* v. *Whalley*, 1 B. & Ad. 11; 8 L.J. (O.S.) K.B. 340.

(*t*) *Vice* v. *Anson* (*Lady*), 7 B. & C. 411; 6 L.J. (O.S.) K.B. 24.

(*u*) *Davis* v. *Hymen*, (1903) 1 K.B. 854; 72 L.J. K.B. 426.

account of a debt which was incurred partly before, and partly after, such partner joined the firm, he is liable for so much of the debt for which the bill was accepted as accrued subsequently to his accession to the partnership (*x*). An incoming partner cannot be charged with the payment of the price of goods sold to the co-partnership before he became a member of it, although they may have been delivered subsequently thereto (*y*). Where a banking firm makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, and the firm afterwards admits new partners, the new firm is not liable to the customer for such payments, unless there is an agreement between the two firms and the customer that the new firm shall take upon themselves the actual liabilities of the old firm (*z*). If A. has a contract with B., who subsequently takes C. into partnership, and A. elects to abide by his contract with B., then C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business (*a*). The transfer of the accounts from the old to the new firm, and the acceptance by the creditor of a new simple contract security from the new firm for the debt due to him, is not of itself sufficient to discharge a retiring partner. There must be an agreement, either express or fairly to be inferred, to discharge the old firm (*b*). On the other hand, where a firm of bankers, consisting of two partners, with whom deposits had been made, admitted two new partners on notice to the depositors, and on the death of the two original partners the depositors, though aware of their deaths made no claim against their estates, and the business was carried on under the old name by the new partners from whom the depositors received interest, and on the bankruptcy of the new partners, the depositors proved for the amount of their deposits, it was held that there was a complete novation, and that the depositors were not entitled to prove against the old firm (*c*). If the creditor elects to sue the new firm he cannot afterwards sue a retired partner (*d*). Where a firm was newly constituted, but no altera-

(*x*) *Wilson* v. *Lewis*, 2 Sc. N.R. 118; 2 Man. & G. 197.

(*y*) *Wilson* v. *Bailey*, 9 Dowl. 20; 10 L.J. C.P. 17; *Whitehead* v. *Barron*, 2 M. & Rob. 248.

(*z*) *Craufurd* v. *Cocks*, 6 Exch. 287; 20 L.J. Ex. 169.

(*a*) *British Home Assur. Corporation* v. *Paterson*, (1902) 2 Ch. 404; 71 L.J. Ch. 872.

(*b*) *Harris* v. *Farwell*, 15 Beav. 31; 15 L.J. Ch. 185; *Brown* v. *Gordon*, 16 Beav. 302; 22 L.J. Ch. 65; *Kirwan* v. *Kirwan*, 2 Cr. & M. 617; 3 L.J. Ex. 187.

(*c*) *Bilborough* v. *Holmes*, 5 Ch.D. 255; 46 L.J. Ch. 446; and see *Hobson* v. *Cowley*, 27 L.J. Ex. 205.

(*d*) *Scarf* v. *Jardine*, 7 App.Cas. 345; 51 L.J. Q.B. 613; see *British Home Assur. Corporation* v. *Paterson*, (1902) 2 Ch. 404; 71 L.J. Ch. 872.

tion was made in the business, and the accounts were continued in the old books, and the existing liabilities were discharged from the assets of the old firm or from the funds of the new firm indiscriminately, it was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm (*e*). Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the whole firm, and accept the new firm as their debtor (*f*).

Assignment of share in partnership.—By the Act of 1890, sect. 31, (1) an assignment by a partner of his share either absolute or by mortgage does not as against the other partners entitle the assignee to interfere in the partnership business or in any accounts thereof; (2) in case of dissolution the assignee is entitled to receive the share of the assigning partner and to an account for the purpose of ascertaining it. Under this section, where a partner has mortgaged his share to the knowledge of his co-partners, an agreement among the partners for dissolution on the terms that the mortgagor partner shall sell his share to the other partners does not bind the mortgagee (*g*).

Dissolution of partnership.—The Act of 1890, sect. 32, provides for the dissolution of a partnership by expiration of time or notice by one partner to the others (*gg*); sect. 33, by the death or bankruptcy of a partner, or by his charging his share of the property; and sect. 34, by the partnership becoming illegal.

Notice of retirement of partners, and of dissolution of partnership.—If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as a partner, and he is bound by that representation (*h*).

By the Act of 1890, sect. 36, (1) where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change; (2) an advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in Scotland, and

(*e*) *Bank of Australasia* v. *Flower*, L.R. 1 P.C. 27; 35 L.J. P.C. 13.

(*f*) *Ibid.*

(*g*) *Watts* v. *Driscoll*, (1901) 1 Ch. 294; 70 L.J. Ch. 157. As to mortgagee's right to an account, see *Bonnin* v. *Neame*, (1910) 1 Ch. 732; 79 L.J. Ch. 388.

(*gg*) See *Moss* v. *Elphick*, (1910) 1 K.B. 846; 79 L.J. K.B. 631. As to notice under a deed, see *Green* v. *Howell*, (1910) 1 Ch. 495; 79 L.J. Ch. 549.

(*h*) *Goode* v. *Harrison*, 5 B. & Ald. 147.

in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised; (3) the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

The retirement of an ostensible partner ought to be made as notorious as the fact of his connexion with the firm. A notice in the *London Gazette* is insufficient, except in the case mentioned in sect. 36 (2), *supra*, unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm (*i*). And, even if the advertisement is inserted in a paper which a plaintiff who is suing a retired partner is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meagre evidence of the plaintiff's knowledge of the fact (*k*). The only certain way of putting an end to the continuing liability is to insert frequent advertisements of the retirement of the partner in all the papers having the greatest circulation in the immediate neighbourhood of the place where the partnership business is carried on, and to send express notice to every person residing at a distance who has been in the habit of dealing with the partnership during the time that the retiring partner was a member of the firm (*l*). A partnership having been dissolved by mutual consent, and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm-name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution (*m*).

Rights of partners on dissolution.—By sect. 38 after the dissolution the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far as may be necessary to wind up the partnership; provided the partner has not become bankrupt; and by sect. 39 on the dissolution every partner is entitled as agent of the partners to

(*i*) Ld. Kenyon, *Graham* v. *Hope*, Peake, 208.

(*k*) *Jenkins* v. *Blizard*, 1 Stark. 420.

(*l*) *M'Iver* v. *Humble*, 16 East, 169; *Newsome* v. *Coles*, 2 Campb. 617; *Hart* v. *Alexander*, 2 M. & W. 484; 6 L.J. Ex. 129; *Barfoot* v. *Goodall*, 3 Campb. 147; *Lacy* v. *Woolcott*, 2 Dowl. & R. 460; 1 L.J. (O.S.) K.B. 145.

(*m*) *Central Bank of London, Ex parte, Fraser, In re*, (1892) 2 Q.B. 633.

have the partnership property applied in payment of the debts of the firm, and the surplus assets to the partners respectively. Where a partnership between two persons is dissolved by the death of one partner, the surviving partner, for the purpose of realising the partnership property, may sell or mortgage the partnership estate, real or personal (*n*). Where in such a case the surviving partner who is indebted to the firm is, in an action for partnership accounts, appointed receiver by the Court, he is entitled to deduct his remuneration from the assets in his hands, and not merely to set it off against his debt to the partnership (*o*).

Retirement of dormant partners.—Dormant and secret partners may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal; but they are not liable upon the subsequent contracts of the firm and the debts and liabilities incurred after their retirement (*p*). But, if they are not strictly secret as well as dormant partners, notice of the termination of their connection with the co-partnership must be given (*q*).

Directors of trading associations.—When a partnership or trading association is under the management of trustees or directors, the common law power of one partner to bind another existing in ordinary trading partnerships ceases; and notice to a party that there are trustees or directors is notice to him that he is not dealing with an ordinary partnership (*r*). The shareholders or partners are liable only upon contracts made by the trustees or directors in the ordinary course of business, in the same manner as dormant partners in any ordinary partnership. But no private agreement between the shareholders and directors, restricting the apparent general authority of the latter to bind the former by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as against the claims of creditors of the partnership who have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority (*s*).

Authority of committeemen.—Where a review was established

(*n*) *Bourne, In re, Bourne* v. *Bourne*, (1906) 2 Ch. 427; 75 L.J. Ch. 779.

(*o*) *Davy* v. *Scarth*, (1906) 1 Ch. 55; 75 L.J. Ch. 22.

(*p*) *Carter* v. *Whalley*, 1 B. & Ad. 11; 8 L.J. (O.S.) K.B. 340.

(*q*) *Farrar* v. *Deflinne*, 1 Car. & K. 580.

(*r*) *Hallett* v. *Dowdall*, 21 L.J. Q.B. 98; 18 Q.B. 2.

(*s*) *Hawken* v. *Bourne*, 8 M. & W. 702; 10 L.J. Ex. 361; *Rex* v. *Dodd*, 9 East, 527; *Walburn* v. *Ingilby*, 1 Myl. & K. 61, 76.

by an association of shareholders, who passed certain written resolutions for its regulation and management, and appointed a committee of shareholders "to assist the editor in promoting the prosperity and circulation of the review, and to obtain literary contributions," it was held that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the review (*t*).

Liabilities of partners upon deeds.—In order to make a partner liable upon a deed, it must be shown that he actually sealed and delivered the deed in person, or that it was done by another for him, in his presence, and by his commandment (*u*); or, if executed by one partner on behalf of the firm generally, as the deed of the partnership, it must be shown that the partners sued upon it authorised their co-partner to execute the deed by a power of attorney under seal, and the authority under seal, when it exists, must be produced and proved (*x*). Where one of two partners caused a bond to be made out in the name of the firm and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners, as they had given their co-partner no authority under seal to enter into and execute deeds on their behalf, or on behalf of the firm (*y*). But the bond, being joint and several, would bind the partner who signed it (*z*); and a deed purporting to be made by all the partners of the firm, and only signed by one, binds that one, although the other partners afterwards decline to sign it (*a*). A general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power given for that purpose (*b*). By sect. 6 of the Act of 1890 (*c*), an act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners, provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments. Where one of two partners without authority purports to assign by deed, which he signs in the names of the partners or of the firm, a debt due to the firm, the instrument whether valid as a deed or not may by virtue

(*t*) *Heraud* v. *Leaf*, 17 L.J. C.P. 57; 5 C.B. 157.

(*u*) *Ball* v. *Dunsterville*, 4 T.R. 313, *ante*, p. 19.

(*x*) *Steiglitz* v. *Egginton*, Holt, N.P.C. 141.

(*y*) *Elliot* v. *Davis*, 2 Bos. & P. 338.

(*z*) *Elliot* v. *Davis*, *supra*.

(*a*) *Bowker* v. *Burdekin*, 11 M. & W. 128; 12 L.J. Ex. 329; *Cumberledge* v. *Lawson*, 1 C.B. N.S. 709; 26 L.J. C.P. 120.

(*b*) *Harrison* v. *Jackson*, 7 T.R. 207.

(*c*) 53 & 54 Vict. c. 39.

of this section operate as a valid equitable assignment of the debt (*d*).

Limited Partnerships.—By the Limited Partnership Act, 1907, limited partnerships may be formed after the commencement of the Act as therein provided. A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall, at the time of entering into such partnership, contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed (*e*). A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so, shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back (*e*). A body corporate may be a limited partner (*e*). Every limited partnership must be registered as such in accordance with the Act (*f*). A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm; and if he does take part in the business he shall be liable for all debts and obligations of the firm incurred while he does so (*g*). A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and his lunacy shall not be a ground for dissolution unless his share cannot otherwise be ascertained (*g*). On the dissolution of a limited partnership its affairs shall be wound up by the general partners, unless the court otherwise orders (*g*). Subject to any agreement expressed or implied between the partners any difference as to the business may be decided by a majority of the general partners; a limited partner may, with the consent of the general partners, assign his share in the property, whereupon the assignee shall become a limited partner with all the rights of the assignor; the other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt; a person may be introduced as a partner without the consent of the existing

(*d*) *Briggs, In re, Wright, Ex parte*, (1906) 2 K.B. 209; 75 L.J. K.B. 591; *Marchant* v. *Morton*, (1901) 2 K.B. 829; 70 L.J. K.B. 820.

(*e*) 7 Edw. 7, c. 24, s. 4.

(*f*) Sect. 5.

(*g*) Sect. 6.

limited partners; and a limited partner shall not be entitled to dissolve the partnership by notice (*g*). Subject to the provisions of the Act, the Partnership Act, 1890, and the rules of equity and common law, shall apply to limited partnerships (*h*). The Act contains full provisions as to the registration of limited partnerships (*i*), the registrar of joint stock companies being appointed the registrar of limited partnerships (*k*).

The Companies (Consolidation) Act, 1908, provides that in the case of a limited partnership the provisions of that Act with respect to winding up shall apply with such modifications, if any, as may be provided by rules made by the Lord Chancellor with the concurrence of the President of the Board of Trade, and with the substitution of general partners for directors (*l*).

Corporations aggregate.—The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights and liabilities of its members. This legal entity is, as it has been sagely remarked, without soul or conscience, and without any visible or outward form, and cannot, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer in an action at law by a *distringas* against its goods and chattels, and could only appear by attorney appointed under its common seal; and, if it had neither lands nor goods, there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members; and the latter, consequently, are not answerable either in their persons or property for the corporate debts; and, if there are no corporate effects whereon to levy judgments and execution is obtained against the body corporate, the creditors must go unpaid (*m*). Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any special provision or stipulation in the charter, is the power of making bye-laws for the government of the body politic, subject to the laws of the realm and subordinate thereto (*n*), and the power (in the case of ancient corporations) of electing its own members at corporate meetings and appointing its own officers; of suing and being sued in the corporate name; of holding and enjoying property in such name; of purchasing and parting with its

(*g*) Sect. 6.
(*h*) Sect. 7.
(*i*) Sects. 8—16.
(*k*) Sect. 15.
(*l*) 8 Edw. 7, c. 69, s. 268, sub-s. 1 (vii.).
(*m*) Bro. Abr. fol. 183—186; fol. 265, pl. 82; *Edmunds* v. *Brown*, 1 Lev. 237.
(*n*) *Reg.* v. *Wood*, 5 E. & B. 49.

possessions; of compromising claims against it (*o*); and of acting and speaking through a common seal, which is said to be "its hand and mouth-piece." Corporations cannot lawfully purchase or hold lands without the licence of the Crown, or the authority of Parliament (*p*); and they cannot, consequently, lawfully enter into or enforce real contracts concerning lands without a licence or authority to hold lands.

Contracts with corporations.—All contracts of importance entered into by corporations must, with some exceptions presently noticed, be made under the common seal of the body corporate, and in the corporate name. If the contract is made in the name of the head of the corporation, or in the names of the individual members thereof, the corporate body cannot in general sue or be sued upon the contract, although the common seal has been affixed to it (*q*). If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed are "the same in substance with the true name; it need not be the same in words or syllables" (*r*). There is a difference between ancient corporations and corporations made of late times; for ancient corporations may by usage have divers and several names, and leases, grants, &c., by any of them will be good enough (*s*). If, moreover, a corporation adopts any particular name or seal different from its true name or seal, and uses it in making contracts, it may be estopped from showing that the name and seal so adopted and used are not its true name and seal (*t*).

Want of mutuality of obligation.—If an executory simple contract, founded upon mutual promises and a mutuality of obligation and liability, is not binding upon a corporation by reason of its not being under the seal of the body corporate, it cannot, on the other hand, be enforced by the corporation by reason of the absence of reciprocity or mutuality of obligation and liability (*u*).

Incapacity.—Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, does not in any way affect the rights and liabilities of the corporation in respect of corporate acts (*x*).

(*o*) *Bath's case*, 8 Ch.D. 334; 47 L.J. Ch. 601; *Hesketh's case*, 13 Ch.D. 693; 49 L.J. Ch. 288.

(*p*) Co. Litt. 92, a, 2, b.

(*q*) Bro. Abr. CORPORATIONS, pl. 31; 15 E. 4, 1; Com. Dig. Franchises, F. 19.

(*r*) *Rex* v. *Haughley*, 4 B. & Ad. 650, 655; 2 L.J. M.C. 56; *Sidney Sussex College* v. *Davenport*, 1 Wils. 184; *Croydon Hosp.* v. *Farley*, 6 Taunt. 467.

(*s*) *Mayor, &c. of Lynne's case*, 10 Co. 123, a.

(*t*) *Elliot* v. *Davis*, 2 Bos. & P. 338.

(*u*) *Copper Miners of England* v. *Fox* 20 L.J. Q.B. 176; 16 Q.B. 229.

(*x*) 1 Kyd. 312; *Rex* v. *Carter*, Cowp. 220, 225; Bro. Abr. CORPORATIONS, 63.

An act done by the members of a municipal corporation in the absence of the head is not the act of the corporation. Thus if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But, if a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for, being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, as much as an individual is by his own deed. But, where corporations are created by Act of Parliament for particular purposes, with special powers, then their deed, though under their corporate seal, regularly affixed, will not bind them, if it plainly appears that the deed is *ultra vires* (*y*). If the common seal has not been affixed to the contract, the general rule is, that the contract is not the contract of the corporation, but of the individual members concerned in the making of it, who can alone sue and be sued thereon (*z*). But this rule has been subjected to numerous exceptions, and has been almost superseded in practice in the case of trading corporations, the end and object of whose existence could never be accomplished, if every corporate act was required to be authenticated under the common seal.

Contracts not under seal—Implied contracts.—If a person has had the benefit of the fulfilment of a contract which could not have been enforced against a corporation whilst it remained executory, the law will raise an implied promise in its favour, upon which it may sue in its corporate character (*a*). Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he will not be permitted to discharge himself from the ordinary liability on the ground that the contract was not entered into under the common seal of the corporate body (*b*). A municipal corporation, therefore, may sue for the use and occupation of tolls not granted to the occupier under the common seal (*c*); and for the use and occupation of houses and lands, the property of

(*y*) *Payne* v. *Brecon* (*Mayor*), 3 H. & N. 572; 27 L.J. Ex. 495.

(*z*) Bro. Abr. CORPORATIONS, pl. 47, 49, 50, 56, 63; 1 Roll. Abr. 514.

(*a*) *Beverley* v. *Linc. Gas Co.*, 6 Ad. & E. 839; 7 L.J. Q.B. 113; *Aust. R. M. St. N. Co.* v. *Marzetti*, 11 Exch. 228; 24 L.J. Ex. 273.

(*b*) *Fishmongers Co.* v. *Robertson*, 5 M. & Gr. 131, 192; 12 L.J. C.P. 185; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; 28 L.J. Ex. 122; *Melbourne Banking Corporation* v. *Brougham*, 4 App. Cas. 156; 48 L.J. P.C. 12.

(*c*) *Carmarthen Corporation* v. *Lewis*, 6 Car. & P. 608.

the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land (*d*). And one who enters upon, occupies, and pays rent for corporate property under a demise for a term of years made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy (*e*), and the corporation may distrain for the rent (*f*). The corporation is in like manner responsible upon the ordinary implied promise in respect of the use and occupation of houses and lands, during the period it actually occupied (*g*), but no longer, as it cannot be bound by an executory contract for an interest in land not made under its common seal (*h*). So, if there has been part performance of a contract for a lease by a corporation, specific performance will be decreed, though the contract was not under the corporate seal (*i*).

Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed under circumstances which render the equitable doctrines of part performance applicable, the contract will bind the corporation; but in other cases it is extremely doubtful whether the mere fact that a contract, not otherwise binding upon the corporation, has been wholly or partly performed, renders the corporation liable to be sued either on the contract or on a *quantum meruit* (*k*).

A corporation with a head, such as a municipal corporation, may also transact trifling matters of business, and enter into such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal (*l*). It has been laid down as a general rule of law that, wherever the purposes for which a corporation is created render it necessary that work should be done and goods supplied, and orders are given at a board regularly constituted, and having general authority to make contracts for such work or goods, and the

(*d*) *Rochester* (*Dean*) v. *Pierce*, 1 Campb. 466; *Stafford* (*Mayor*) v. *Till*, 12 Moore, 260; 5 L.J. (O.S.) C.P. 77; Vin. Abr. CORPORATIONS, K. p. 41.

(*e*) *Ecclesiastical Commissioners* v. *Merral*, L.R. 4 Ex. 162; 38 L.J. Ex. 93.

(*f*) *Wood* v. *Tate*, 2 B. & P.N.R. 247.

(*g*) *Lowe* v. *L. & N. W. Ry.*, 18 Q.B. 632; 21 L.J. Q.B. 361.

(*h*) *Finlay* v. *Bristol and Ex. Ry.*, 7 Exch. 409; 21 L.J. Ex. 117.

(*i*) *Steeven's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405; *Crook* v. *Seaford Corporation*, L.R. 19 Eq. 680; *ib.* 6 Ch. 551.

(*k*) *Hunt* v. *Wimbledon Local Board*, 3 C.P.D. 208; 47 L.J. C.P. 540, *per* Lindley, J., where the authorities are collected; and 4 C.P.D. 48; 48 L.J. C.P. 207. See also *Young* v. *Corporation of Leamington*, 8 App.Cas. 517; 52 L.J. Q.B. 713; *Scott* v. *Clifton School Board*, 14 Q.B.D. 500.

(*l*) *De Grave* v. *Monmouth* (*Mayor*), 4 Car. & P. 111; *Wells* v. *Kingston-upon-Hull* (*Mayor*), L.R. 10 C.P. 402; 44 L.J. C.P. 257.

work is done and the goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that the formality of a deed, or the affixing the seal, were wanting (*m*). It may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles without deed. "So, if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound" (*n*). If a municipal corporation has wrongfully got possession of the money of a stranger, or of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just as in the case of the wrongful receipt of money by a private individual (*o*). But in all matters of consequence and importance, and in respect of acts and contracts not coming within the scope of its ordinary, everyday functions, the corporation is not bound by the act done, unless it is a corporate act authenticated by writing under the common seal (*p*).

A resolution of the town council of a municipal corporation, entered in the corporation books, to increase the salary of the town clerk was held not to bind the corporate body, as it had not been made under the common seal (*q*). So, where the London Dock Company accepted by parol, through their clerk, a tender by a contractor to cleanse the docks for a year for a certain sum it was held that the company could not enforce the contract, as the offer had not been accepted under their common seal (*r*). And, where the guardians of a union entered into a contract under their common seal with the plaintiff for the making of a survey and map of one of the parishes in the union, which contract was duly fulfilled, and, subsequently, in consequence of a reduced plan being directed to be made, the plaintiff prepared an outline map on a reduced scale, which was

(*m*) *Pauling* v. *L. & N. W. Ry.*, 8 Ex. 867; 23 L.J. Ex. 105; *Sanders* v. *St. Neots Guard.*, 8 Q.B. 810; 15 L.J. M.C. 104; *Clarke* v. *Cuckfield Un.*, 1 Bail C.C. 81; 21 L.J. Q.B. 349; *Henderson* v. *Austral. St. Nav. Co.*, 5 E. & B. 409; 24 L.J. Q.B. 322; *Reuter* v. *Elect. Tel. Co.*, 6 E. & B. 341; 26 L.J. Q.B. 46; *Haigh* v. *North Bierley Un.*, E. B. & E. 873; 28 L.J. Q.B. 62; *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176; *Scott* v. *Clifton School Board*, 14 Q.B.D. 500; *Lawford* v. *Billericay Rural Council*, (1903) 1 K.B. 772; 72 L.J. K.B. 554; *Hodge* v. *Matlock Bath, &c. Urban Council*, 74 J.P. 374; 8 L.G.R. 958, 1157.

(*n*) See Kyd *on Corporations* (1794), vol. i. pp. 313, 314.

(*o*) *Hall* v. *Swansea* (*Mayor*), 5 Q.B. 526; 13 L.J. Q.B. 107.

(*p*) *Ludlow* (*Mayor*) v. *Charlton*, 6 M. & W. 815; 10 L.J. Ex. 75.

(*q*) *Reg.* v. *Stamford* (*Mayor*), 6 Q.B. 433; as to orders for the payment of money out of the borough fund, see *Reg.* v. *Warwick* (*Mayor*), 15 L.J. Q.B. 306; 8 Q.B. 926.

(*r*) *London Dock Co.* v. *Sinnot*, 1 E. & B. 347; 27 L.J. Q.B. 129; *Oxford* (*Mayor*) v. *Crow*, (1893) 3 Ch. 535.

used by the guardians, but no contract was entered into by them under their common seal to pay the price thereof, it was held that they were not responsible in their corporate capacity for the payment for this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated (*s*). So the contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians and render them liable for a wrongful dismissal, be under their seal (*t*).

The appointment of an attorney to conduct important suits affecting the rights and property of a municipal corporation must in general be under seal (*u*), except in the case of the city of London, who appoint an attorney by warrant of attorney in the King's Bench every year, without either sealing or signing, and are estopped by the record to say it is not their act (*u*). Where a municipal corporation retained solicitors by resolutions not under seal, and, after work had been done by the solicitors, affixed their seal to these resolutions, it was held that this confirmation under seal of the original retainer was binding on the corporation without any new consideration (*x*).

Corporations remain always the same as to debts and rights, so that, if an old corporation is incorporated by a new name, it may recover in its new name debts contracted with the old corporation (*y*). A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. Where a corporation is created by statute for particular purposes and with special powers, its deed, though under the corporate seal regularly affixed, does not bind it, if it appears by the express provisions of the statute or by reasonable inference from its enactments, that the deed was *ultra vires* (*z*). But a corporation is fully capable of binding itself by any contract, except where the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract between the parties (*a*).

(*s*) *Paine* v. *Strand Union*, 8 Q.B. 326 ; 15 L.J. M.C. 89 ; *Lamprell* v. *Billericay Union*, 3 Exch. 283 ; 18 L.J. Ex. 282 ; *Smart* v. *West Ham Union*, 10 Exch. 875 ; 24 L.J. Ex. 201.

(*t*) *Austin* v. *Bethnal Green Guardians*, L.R. 9 C.P. 91 ; 43 L.J. C.P. 100.

(*u*) *Mayor of Thetford's case*, 1 Salk. 192 ; 3 Salk. 103 ; 2 Raym. 848 ; *Arnold* v. *Poole* (*Mayor*), 5 Sc. N.R. 741, 776 ; 12 L.J. C.P. 97.

(*x*) *Brooks* v. *Torquay Corporation*, (1902) 1 K.B. 601 ; 71 L.J. K.B. 109.

(*y*) *Scarborough* (*Mayor*) v. *Butler*, 3 Lev. 237 ; *Colchester* (*Mayor*) v. *Brooke*, 15 L.J. Q.B. 173 ; 7 Q.B. 339.

(*z*) Parke, B., *South Yorkshire Ry.* v. *G. N. Ry.*, 22 L.J. Ex. 314 ; 9 Exch. 55, 84.

(*a*) *Scottish N. E. Ry.* v. *Stewart*, 3

Contracts with trading corporations.—Where corporations "have been established for the purpose of carrying on trading speculations, and the nature of their constitution has been such as to render the drawing of bills, or the making of any particular sort of contracts, necessary for the purposes of the corporation, the courts have held that they would imply, in those who are, according to the provisions of the charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist" (*b*), and to do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade are, of course, materially different from those of an institution established for municipal purposes (*c*); and, if a trading corporation were unable to contract in the ordinary course of its trade, except under the common seal, it would be unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which the company was incorporated, or for the non-acceptance of goods sold, and the non-delivery of goods purchased, by the corporation (*d*). It may also draw and accept bills of exchange and promissory notes (*e*).

Contracts by the officers of trading corporations are not binding upon the corporation, unless they are within the scope of their regular employment (*f*). A station-master, guard, or clerk of an incorporated railway company, for example, has no implied authority to employ surgeons and procure medical attendance for injured passengers (*g*); but the company are liable where their credit is pledged for such services by the general manager (*h*). A clerk charged with the payment of wages, or a secretary or law agent of a company, has no power

Macq. 382; *Newcastle* (*Mayor*) v. *Att.-Gen.*, (1892) A.C. 568; 62 L.J. Q.B. 72.

(*b*) *Ludlow* (*Mayor*) v. *Charlton*, 6 M. & W. 815; 10 L.J. Ex. 75; *South of Ireland Colliery Co.* v. *Waddle*, L.R. 4 C.P. 617; 38 L.J. C.P. 338.

(*c*) *Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48; 48 L.J. C.P. 207; see also *Eaton* v. *Basker*, 7 Q.B.D. 529; 50 L.J. Q.B. 444, where under the Public Health Act, 1875, s. 174, a contract which was intended to be under 50*l.*, but turned out more, was held not necessary to be under seal.

(*d*) *City of Lond. Gas Co.* v. *Nicholls*, 2 Car. & P. 365; *Church* v. *Imp. Gas Co.*, 6 Ad. & E. 859; 6 L.J. Q.B. 118; *East India Co.* v. *Glover*, 1 Str. 612; *Gibson* v. *East India Co.*, 5 Bing. N.C. 262, 270; 8 L.J. C.P. 193.

(*e*) *R.* v. *Bigg*, 3 P. Wms. 419; *Edie* v. *East India Co.*, 2 Burr. 1216. See sect. 22 of 45 & 46 Vict. c. 61, *post*, p. 1300.

(*f*) *Williams* v. *Chester & Holyhead Ry.*, 15 Jur. 828; *Cope* v. *Thames Haven, &c. Co.*, 3 Exch. 841; 18 L.J. Ex. 345.

(*g*) *Cox* v. *Mid. Counties Ry.*, 3 Exch 268; 18 L.J. Ex. 65.

(*h*) *Walker* v. *G. W. Ry.*, L.R. 2 Ex. 228; 36 L.J. Ex. 123.

to bind the company by statements or representations, acts or proceedings, beyond the scope of his regular employment (*i*). Where a contract for the performance of work and the supply of materials was entered into under the common seal, and extra work, not included in the contract, was performed, it was held that the company was not responsible for the payment of such extra work, as it could not be inferred they had ordered it (*k*).

Registered joint-stock companies.—The Companies (Consolidation) Act, 1908 (*l*), enables seven or more persons, or where the company to be formed will be a private company (*m*) within the meaning of the Act, any two or more persons, by subscribing their names to a memorandum of association, and complying with the requirements of the Act in respect of registration, to form themselves into an incorporated company, with unlimited liability, or with liability limited by shares or by guarantee (*n*), and provides that no company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under the Act, or formed in pursuance of some other Act (*o*), or of letters patent; and that no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business having for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof (*oo*), unless it is so registered or formed or is engaged in working mines within, and subject to the jurisdiction of, the stannaries. The leading purpose of this statute is to enable a permanent company consisting of changing members to make binding contracts, and sue and be sued and do all the usual acts necessary for carrying on trade. The first part provides for the formation of the company through the medium of a memorandum (*p*) and articles of association (*q*), the essential requisites of which relate almost exclusively to the rights and duties of directors and members *inter se*, regulating the name of the company, the objects for which the company is

(*i*) *Burnes* v. *Pennell*, 2 H.L.C. 479; *Olding* v. *Smith*, 16 Jur. 497.

(*k*) *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Exch. 137; 20 L.J. Ex. 193; *Lamprell* v. *Billericay Union*, 3 Exch. 283; 18 L.J. Ex. 282.

(*l*) 8 Edw. 7, c. 69.

(*m*) As to meaning of "private company," see s. 121.

(*n*) An unlimited company may register as a limited and a limited company may re-register under s. 57.

(*o*) *Womersley* v. *Merrit*, L.R. 4 Eq. 695; 37 L.J. Ch. 19.

(*oo*) Farming and grazing are businesses having gain for their object: *Harris* v. *Amery*, L.R. 1 C.P. 148; 35 L.J. C.P. 89.

(*p*) See ss. 2—9. As to alteration of the memorandum of association, see ss. 7, 9; *Cyclists Touring Club, In re*, (1907) 1 Ch. 269; 76 L.J. Ch. 172; *Jewish Colonial Trust, In re*, (1908) 2 Ch. 287; 77 L.J. Ch. 629.

(*q*) Sects. 10—13.

established, the limited or unlimited liability of the members, the amount of the capital, the number and amount of the shares, the transfer of shares, the registration of members, and the meetings and proceedings of the company. The articles of association form a contract between the shareholders *inter se*, or the shareholders and the directors, and do not create any contract between a person who is not a member of the company and the company (*r*). After registration of the memorandum of association, a certificate of the incorporation of the company is to be granted; and thereupon, by sect. 16 the company becomes incorporated, having perpetual succession and a common seal, with power to hold lands.

The certificate of incorporation is by sect. 17 conclusive evidence that all the requirements of the Act in respect of registration have been complied with (*s*).

The mere fact that a promoter has paid the registration fees and stamp duty on the registration of a company does not in itself entitle him to recover them from the company (*t*).

An assignment of future calls is bad; for calls should be made at the discretion of the directors; and an assignment of future calls prevents the exercise of such a discretion, but an assignment of a call already made although not collected is good (*u*).

Requisites of contracts with registered joint-stock companies.—Contracts on behalf of a joint-stock company registered under the Companies (Consolidation) Act, 1908, may be made as follows (*x*):—Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and may in the same manner be varied or discharged. If it is such a contract as is required by law to be in writing, and signed by the parties to be charged therewith, it may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. If it would by law be valid as between private persons, although made by parol, and

(*r*) *Eley* v. *Positive Assurance Co.*, 1 Ex. D. 88; 45 L.J. Ex. 451; *Rotherham Alum and Chemical Co., In re*, 25 Ch. D. 103; 53 L.J. Ch. 290; *Browne* v. *La Trinidad*, 37 Ch. D. 1; 57 L.J. Ch. 292.

(*s*) This was so even before the Act: *Oakes* v. *Turquand*, L.R. 2 H.L. 325; 36 L.J. Ch. 949; *Peel's case*, 36 L.J. Ch. 757; L.R. 2 Ch. 674.

(*t*) *National Motor Mail-Coach Co., In re*, (1908) 2 Ch. 515; 77 L.J. Ch. 790, overruling on this point Buckley, J., in *English and Colonial Produce Co., In re*, (1906) 2 Ch. 435; 75 L.J. Ch. 831; see 8 Edw. 7, c. 69, s. 244.

(*u*) *Sankey Brook Coal Co., In re*, L.R. 9 Eq. 721; 39 L.J. Ch. 223; *Sankey Brook Coal Co., In re* (No. 2), L.R. 10 Eq. 381.

(*x*) 8 Edw. 7, c. 69, s. 76.

not reduced into writing, it may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. All contracts so made are binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators (*y*).

The company may, by writing under its common seal, employ any person, either generally, or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situated in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, is binding on the company to the same extent as if it were under the common seal (*z*).

A company whose objects require the transaction of business in foreign countries may if authorised by its articles have in any place not in the United Kingdom an official seal which shall be a facsimile of its common seal with the addition of the name of every place where it is to be used; and the company may by writing under its common seal authorise any person in any such place to affix the seal to any document to which the company is party in that place (*a*).

Provisional contracts.—Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding (*b*).

Contracts by agents.—Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose, they cannot afterwards dispute acts done by him within the scope of such agency (*c*); but, where an advance has been made on the personal responsibility of the agents of the company, a subsequent adoption of their acts by the directors will not make the company liable (*d*).

Contracts in violation of provisions of articles of association.—Parties dealing with the directors of a joint-stock company are bound to take notice that they are dealing with parties having limited authority; and they are bound by the limitation of authority contained in the registered articles of association (*e*), unless the company at large, or the general body of the share-

(*y*) See *post*, p. 387.

(*z*) 8 Edw. 7, c. 69, s. 78.

(*a*) Sect. 79.

(*b*) Sect. 87 (3).

(*c*) *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241.

(*d*) *Scott* v. *Ebury* (*Lord*), L.R. 2 C.P. 255; 36 L.J. C.P. 161.

(*e*) *Balfour* v. *Ernest*, 5 C.B. N.S. 601; 28 L.J. C.P. 170; *Shrewsbury* (*Earl*) v. *North Staffordshire Ry.*, L.R. 1 Eq. 593; 35 L.J. Ch. 156; *Pooley Hall Co., In re*, 18 W. R. 201; *Hambro* v. *Hull and London Fire Insurance Co.*, 3 H. & N. 789; 28 L.J. Ex. 62; see *English Channel Co.* v. *Rolt*, 17 Ch. D. 715.

holders, have sanctioned acts and transactions by the directors in excess of the powers conferred upon them. If, on the other hand, the directors have power to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, the person contracting with the directors is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting lawfully in what they do (*f*). The ratification of a particular contract which has been entered into by the directors without authority under the articles is a different thing from altering the articles, and such contract may be ratified by an ordinary resolution of a general meeting (*g*). A limited company has no power to purchase its own shares even where its articles authorise it to do so (*h*). If a company has no power to do a particular thing, that power cannot be added to the company by the agreement of the shareholders (*i*); but, if a company has power to do a thing, and there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of the power, then acquiescence may be inferred from delay, and a knowledge of the transaction imputed to every shareholder (*k*); and an agreement originally *ultra vires* cannot be impeached after the lapse of considerable time (*l*). There may be a breach of duty on the part of the directors, in neglecting to comply with certain formalities, in respect of which they are responsible to the shareholders; but it does not follow that the contract is void as against the company (*m*).

The power of giving a bill of sale as a security for debts is

(*f*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327; 25 L.J. Q.B. 317; *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Irvine* v. *Union Bank of Australia*, 2 App.Cas. 366; 46 L.J. P.C. 87; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629; 64 L.J. Ch. 451; *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; 65 L.J. Ch. 536; *Premier Industrial Bank* v. *Carlton Manufacturing Co.*, (1909) 1 K.B. 106; 78 L.J.K.B. 103. Where by the articles the business is to be conducted by "not less than" a specified number of directors, the condition is imperative: *Bottomley's case*, 16 Ch.D. 681; 50 L.J. Ch. 167.

(*g*) *Grant* v. *United Kingdom Switchback Co.*, 40 Ch.D. 135; 58 L.J. Ch. 311.

(*h*) *Trevor* v. *Whitworth*, 12 App.Cas. 409; 57 L.J. Ch. 28. As to power of company to reduce its share capital, see 8 Edw. 7, c. 69, ss. 46 *et seq.*

(*i*) *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653; 44 L.J. Ex. 185; *Ashbury* v. *Watson*, 30 Ch.D. 376; 54 L.J. Ch. 985.

(*k*) *British Provident Life and Fire Ins. Soc.*, *In re*, *Grady*, *Ex parte*, 32 L.J. Ch. 326; 1 De G. J. & S. 488.

(*l*) *Brotherhood's case*, 31 L.J. Ch. 861; 4 De G. F. & J. 566; *Smallcombe's case*, L.R. 3 H.L. 249; 37 L.J. Ch. 793; *Houldsworth* v. *Evans*, L.R. 3 H.L. 263; 37 L.J. Ch. 800; *London Financial Association* v. *Kelk*, 26 Ch.D. 107, 152; 53 L.J. Ch. 1025; see, however, *Spackman's case*, L.R. 3 H.L. 171; 37 L.J. Ch. 752; *Stanhope's case*, L.R. 1 Ch. 161; 35 L.J. Ch. 296.

(*m*) *Agar* v. *Athenæum Life Assur. Soc.*, 3 C.B. N.S. 725; 27 L.J. C.P. 95; *Bonelli's Telegraph Co.*, *In re*, *Collie*, *Ex parte*, L.R. 12 Eq. 246; 40 L.J. Ch. 567; *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 183; 27 L.J. Q.B. 297.

incident to a trading company, although it is not expressly conferred by the articles of association (*n*). So also is the power of raising money or giving security for a past debt by deposit of title deeds (*o*). Articles empowering the directors to lend money were held to authorise the making of a loan to a trusted servant of the company (*p*).

Parties who have contracted with the directors of a registered trading company, in matters relating to the co-partnership business, are not bound, when seeking to enforce their contracts against the company, to show that the directors were authorised by the articles to enter into them. *Primâ facie* the directors have the necessary authority; and the burden of proving that they are restrained from making the particular contract on behalf of the company lies upon the defendants (*q*). But, if the contract sued upon has no relation to the business carried on by the company, and is not within the scope of any implied authority given for the purpose of managing and conducting the business thereof, the plaintiff is bound to prove affirmatively that the directors who profess to bind the company by the contract were duly authorised so to do. This may be done by showing that any particular course of dealing has been sanctioned by the directors and acquiesced in by the shareholders, or that the unusual contract has been sanctioned by a board meeting at which the requisite number of directors was present (*r*). Where a company has power to enter into a contract for the purchase of goods, it is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into (*s*). But, whenever a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, then the shareholders may very fairly deny their liability (*t*).

Debentures and floating charges.—The Companies (Consolidation) Act, 1908, provides that where a company has redeemed any debentures, the company, unless the articles or

(*n*) *Shears* v. *Jacobs*, L.R. 1 C.P. 513; 35 L.J. C.P. 241.

(*o*) *Patent File Co., In re*, L.R. 6 Ch. 83; 40 L.J. Ch. 190; see also *English Channel Steamship Co.* v. *Rolt*, 17 Ch.D. 715.

(*p*) *Rainford* v. *James Keith and Blackman Co.*, (1905) 2 Ch. 147; 74 L.J. Ch. 531.

(*q*) *Smith* v. *Hull Glass Co.*, 11 C.B. 897; 21 L.J. C.P. 106; *Allard* v. *Bourne*, 15 C.B. N.S. 468; *Green* v. *Nixon*, 27 L.J. Ch. 819; 3 Jur. N.S. 994.

(*r*) *Ridley* v. *Plymouth Baking Co.*, 2 Exch. 711; 17 L.J. Ex. 252; *Flitcroft's case*, 21 Ch.D. 519; 52 L.J. Ch. 217.

(*s*) *Contract Corporation, In re*, L.R. 8 Eq. 14.

(*t*) *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 183, 217; 27 L.J. Q.B. 297.

conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company (not being enforceable by the person to whom the debentures were issued or his assignee), shall have power to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power, it shall have power to re-issue the debentures either by re-issuing the same debentures, or by issuing other debentures in their place (*u*). Where with the object of keeping debentures alive for the purpose of re-issue they have been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue (*x*). Where a company has deposited any of its debentures to secure advances from time to time the debentures shall not be deemed to have been redeemed by reason only of the company having ceased to be in debt whilst the debentures remained so deposited (*y*). A contract with a company to take up and pay for debentures of the company may be enforced by an order for specific performance (*z*). Where a receiver is appointed on behalf of the debenture holders, provision is made for the payment of certain debts by the receiver in priority to claims under the debentures (*a*). A floating charge created within three months of the commencement of the winding-up of a company shall, unless the company was solvent, be invalid except to the amount of the cash paid to the company for the charge (*b*).

Liability of company and its officers.—Every company limited under the Act (sect. 63), must keep its name painted or affixed in a conspicuous position, and in letters easily legible, on the outside of its office or place of business, and must have its name in legible characters on its seal, and on all its notices, advertisements, and official publications, and in all its bills, notes, endorsements, cheques, orders, bills of parcels, invoices, receipts, and letters of credit. If the company does not comply with this direction of the Act, it is liable to a fine, and all officers of the company, and persons acting on its behalf, disobeying the statute, are subjected (sect. 63) to various personal liabilities in respect of their contracts and proceedings in the

(*u*) 8 Edw. 7, c. 69, s. 104 (1). For the state of the law prior to the passing of the Act, see *Routledge & Sons, In re*, (1904) 2 Ch. 474; 73 L.J. Ch. 843; *Tasker & Sons, In re*, (1905) 2 Ch. 587; 74 L.J. Ch. 643; *Perth Electric Tramways, In re*, (1906) 2 Ch. 216; 75 L.J. Ch. 534; *Russian Petroleum Co., In re*, (1907) 2 Ch. 540; 77 L.J. Ch. 21.

(*x*) Sect. 104 (2).

(*y*) Sect. 104 (3). For the law prior to the Act, see *Russian Petroleum Co., In re, supra*.

(*z*) Sect. 105.

(*a*) Sect. 107. This section will not apply if the receiver was appointed before the Act was passed: *Waverley Typewriter, In re*, (1898) 1 Ch. 699; 67 L.J. Ch. 360.

(*b*) Sect. 212.

matter (*c*). If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member during the time it carries on business after the six months and is cognisant of the facts, is liable (sect. 115) for the whole debts of the company then contracted.

Effect of winding-up order.—By the Companies (Consolidation) Act, 1908, in the case of voluntary winding up, every transfer of shares, except to or with the sanction of the liquidator made after the commencement of the winding up shall be void; and in the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, and every transfer of shares made after the commencement of the winding up, shall, unless the Court otherwise orders, be void (*d*). Where such dispositions are incomplete, and rest in contract at the time of the winding-up order, the Court has no discretionary power to order the contract to be fulfilled (*e*). An agreement for a general lien on the goods of a company is determined by the winding-up order, at all events as to after-acquired property (*f*). Where a customer of a trading company had *bonâ fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition, but before the winding-up order, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer (*g*).

By the Companies (Consolidation) Act, 1908, a company which is being wound up voluntarily shall from the date of the commencement of such winding up cease to carry on its business except in so far as may be required for the beneficial winding up thereof (*h*).

Contracts with official and other liquidators are regulated by the Companies (Consolidation) Act, 1908 (*i*). A liquidator appointed under a resolution to wind up voluntarily is not per-

(*c*) *Penrose* v. *Martyn*, 28 L.J. Q.B. 28; E. B. & E. 499; *Atkins* v. *Wardle*, 58 L.J. Q.B. 377.

(*d*) 8 Edw. 7, c. 69, s. 205. See *Ince Hall Mills Co.* v. *Douglas Forge Co.*, 8 Q.B.D. 179; 51 L.J. Q.B. 238.

(*e*) *Wiltshire Iron Co., In re, Pearson, Ex parte*, L.R. 3 Ch. 443; 37 L.J. Ch. 554. See *Oriental Bank Co., In re*, 28 Ch.D. 634; 54 L.J. Ch. 322.

(*f*) *Wiltshire Iron Co.* v. *G. W. Ry.*, L.R. 6 Q.B. 101, 776; 40 L.J. Q.B. 43, 776.

(*g*) *Wiltshire Iron Co., In re, supra.*

(*h*) Sect. 184. See *Hire Purchase Furnishing Co.* v. *Richens*, 20 Q.B.D. 387.

(*i*) 8 Edw. 7, c. 69, ss. 151, 186.

sonally responsible to the solicitor employed by him on the affairs of the liquidation for any of the costs of such liquidation (*k*). Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*l*). The appointment of a receiver and manager in a debenture holders' action, or the compulsory winding up of the company, operates to discharge the servants of the company (*m*), even though the liquidator, without continuing the business, employs the servants in analogous duties with a view to the reconstruction of the company (*n*). A voluntary winding up, however, has not that effect, inasmuch as it does not change the personality of the employer (*o*).

Power of liquidator to accept shares on sale of company's property.—Where a company is proposed to be or is in the course of being wound up voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, the liquidator of the transferor company may, with the sanction of a special resolution of that company receive in compensation or part compensation for the transfer or sale shares, policies or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may participate in the profits of or receive any other benefit from the transferee company (*p*); and any dissentient member of the transferor company on expressing his dissent from the resolution in the required manner may require the liquidator to purchase his interest (*q*).

Contracts with railway companies.—Where a public Act of Parliament limits and defines the authority of a railway company, and provides for the application of all the funds that

(*k*) *Trueman's Estate, In re, Hooke* v. *Piper*, L.R. 14 Eq. 278; 41 L.J. Ch. 585.

(*l*) *London and Mediterranean Bank, In re, Birmingham Banking Co., Ex parte*, L.R. 3 Ch. 651; 36 L.J. Ch. 807; *Agra and Masterman's Bank, Ex parte, Bolognesi's case*, L.R. 6 Ch. 206; 40 L.J. Ch. 26.

(*m*) *Reid* v. *Explosives Co.*, 19 Q.B.D. 264; 56 L.J. Q.B. 388.

(*n*) *MacDowall's case*, 32 Ch.D. 366; 55 L.J. Ch. 620.

(*o*) *Midland Counties District Bank* v. *Attwood*, (1905) 1 Ch. 357; 74 L.J. Ch. 286.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (1). For the law prior to the passing of the Act, see *Manners* v. *St. David's Gold, &c. Mines*, (1904) 2 Ch. 593; 73 L.J. Ch. 764; *Mason* v. *Motor Traction Co.*, (1905) 1 Ch. 419; 74 L.J. Ch. 273; *Bisgood* v. *Nile Valley Co.*, (1906) 1 Ch. 747; 75 L.J. Ch. 379; *Fuller* v. *White Feather Reward*, (1906) 1 Ch. 828; 75 L.J. Ch. 393; *Bisgood* v. *Henderson's Transvaal Estates*, (1908) 1 Ch. 743; 77 L.J. Ch. 486.

(*q*) Sect. 192 (2). And see *Bisgood* v. *Nile Valley Co.*, *supra*.

come into the hands of the corporation or the directors, a contract for the accomplishment of objects not sanctioned by the Act of Parliament is illegal and void (*r*); and the assent of all the shareholders to such a contract, though it may make them all personally liable to perform the contract, will not bind them in their corporate capacity, or render liable the corporate funds (*s*). Incorporated railway companies have no existence independently of the Acts which create them; and they are created by Parliament with special and limited powers and for limited purposes. When, therefore, they exceed, or attempt to exceed, their powers, they are acting in contravention of the law which established them, and in opposition to the intention of Parliament in their creation (*t*).

A railway company incorporated by a special Act of Parliament, containing the usual clauses inserted in such statutes, cannot draw, accept, or endorse bills of exchange (*u*).

Contracts by the promoters of a railway made before incorporation, for the purpose of procuring the act of Incorporation and establishing the undertaking, cannot be enforced against the company (*x*), if they are *ultra vires* of the company (*y*); but, if not *ultra vires*, they may be enforced, if they have been adopted and acted upon by the company after it has obtained its act of Incorporation (*z*), or if the engagement is embodied in the Act itself.

Contracts by directors and committees of directors on behalf of companies formed for carrying on undertakings of a public nature are made under sect. 97 of the Companies Clauses Act, 1845 (*a*), the language of which has been substantially followed by sect. 76 of the Companies (Consolidation) Act, 1908, above set out (*see ante*, p. 380), relating to contracts with registered companies. Directors exercising the powers given by these enactments must act together and as a board (*b*); but the enactments are affirmative only, and do not preclude the

(*r*) *Taylor* v. *Chichester and Midhurst Ry.*, L.R. 2 Ex. 356; 36 L.J. Ex. 201; L.R. 4 H.L. 628; 39 L.J. Ex. 217; *Att.-Gen.* v. *G. N. Ry.*, 1 Drew. & Sm. 154; 29 L.J. Ch. 794; *Att.-Gen.* v. *G. E. Ry.*, 5 App.Cas. 473; 49 L.J. Ch. 545; *Great North-West Central Ry.* v. *Charlebois*, (1899) A.C. 114; 68 L.J. P.C. 25.

(*s*) *Colman* v. *Eastern Counties Ry.*, 10 Beav. 1; 16 L.J. Ch. 73.

(*t*) *Shrews. and Birm. Ry.* v. *L. & N. W. Ry.*, 22 L.J. Ch. 682; 4 De G. M. & G. 115; *East Angl. Ry.* v. *Eastern Counties Ry.*, 11 C.B. 775; 21 L.J. C.P. 23; *Norwich (Mayor)* v. *Norfolk Ry.*, 4 E. & B. 397; 24 L.J. Q.B. 105; *Att.-Gen.* v. *Mersey Ry.*, (1907) A.C. 415; 76 L.J. Ch. 568.

(*u*) *Bateman* v. *Mid-Wales Ry.*, L.R. 1 C.P. 499; 35 L.J. C.P. 205.

(*x*) *Caledonian & Dumb. Ry.* v. *Helensburgh Magistrates*, 2 Macq. 390.

(*y*) *Shrewsbury (Earl)* v. *North Staff. Ry.*, L.R. 1 Eq. 593; 35 L.J. Ch. 156.

(*z*) *Williams* v. *St. George's Harbour Co.*, 27 L.J. Ch. 691; 2 De G. & J. 547.

(*a*) 8 & 9 Vict. c. 16, s. 97.

(*b*) *D'Arcy* v. *Tamar, &c. Ry.*, L.R. 2 Ex. 158; 36 L.J. Ch. 37; see *Wyoming State Syndicate, In re*, (1901) 2 Ch. 431; 70 L.J. Ch. 727.

enforcement against a company of the ordinary equity based on part performance (*c*).

Informal contracts for services by railway companies.—By sect. 91 of the Companies Clauses Consolidation Act, 1845, "the determination as to the remuneration of the auditors, treasurer, and secretary, shall be exercised only at a general meeting of the company." If, however, the company does not think fit to make its determination known at a general meeting, and the directors contract with a secretary to give him a certain salary, and the secretary serves the company under the contract, it is no answer to an action against the company for the stipulated remuneration to say that the remuneration he is to receive has never been determined by a general meeting of the company (*d*).

Contracts with co-partnerships and associations authorised to sue and be sued in name of secretary, treasurer, or public officer.—In order to obviate inconveniences ensuing from changes in the members, and technical objections arising from the non-joinder as plaintiffs in an action upon a contract of all who were partners at the time the contract was entered into, Acts of Parliament have from time to time been procured, empowering certain banking, trading, insurance, and other companies and co-partnerships, to sue and be sued in the name of their managing officer, or their treasurer or secretary for the time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending. The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders (*e*); and it is in general absolutely vested in him, so that the action upon all contracts entered into with the directors and trustees *must* be brought in his name, and not in the names of those who are the actual parties to the contract (*f*). Therefore, where a covenant was entered into with several of the co-partners of such a co-partnership *nominatim*, it was held that the action upon the covenant must nevertheless be brought by the public officer, and that the covenantees could not sue in their own names upon the covenant, the words "shall and may" in the Acts creating these co-partnerships and vesting the right of action in the public officer being obligatory and not merely permissive (*g*). But the power of entering into contracts on

(*c*) *Wilson* v. *West Hartlepool Ry.*, 34 L.J. Ch. 241; 2 De G. J. & S. 475.

(*d*) *Bill* v. *Dareuth Valley Ry.*, 1 H. & N. 305; 26 L.J. Ex. 81.

(*e*) *Wilson* v. *Craven*, 8 M. & W. 584; 10 L.J. Ex. 448.

(*f*) *Steward* v. *Greaves*, 10 M. & W. 719; 12 L.J. Ex. 109.

(*g*) *Chapman* v. *Milvain*, 5 Exch. 61; 19 L.J. Ex. 228; *Wills* v. *Sutherland*,

behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors in whose hands the management of the co-partnership is placed. The extent of the right of action of the public officer generally depends upon the construction of the Acts of Parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or interested," or which have been entered into "with any person in trust for the company," or "with any person for the use or benefit of the company" (*h*).

Liability of public officer.—The secretary, clerk, or public officer of a company authorised by Act of Parliament to be sued in the name of a clerk, secretary, public officer, or other nominal defendant, is not in general personally responsible upon a judgment obtained against him (*i*), unless he is a member of the company, and responsible as such upon the judgment (*k*).

Contracts with managers and shareholders of mining companies.—Shareholders in mining companies carried on on the cost-book principle are co-adventurers together; but they are not clothed with the ordinary liabilities of co-partners. One shareholder, for example, has no power of binding another by contract, unless he has been appointed a manager of the mine and authorised to do so. The shareholders, moreover, are not liable upon bills or notes drawn, accepted, or made by the managers, or directors of the company, or for money borrowed by them or their resident agent or manager, for the purpose of paying the wages of servants or workmen, or for the general purposes of the association (*l*). But a manager who accepts bills of exchange for the company will himself be responsible upon the acceptance, if he has accepted without any authority from the company on whose behalf he professed to act (*m*). Those persons, also, who take an active part in the management of the mine, who personally give orders for the supply of machinery, or who are present at meetings when machinery is ordered, or who receive a share of the profits of the mine, or

4 Exch. 211; 18 L.J. Ex. 450; as to the death or removal of the officer during the pendency of an action, see *Barnewall* v. *Sutherland*, 9 C.B. 380; 19 L.J. C.P. 298.

(*h*) *Skinner* v. *Lambert*, 5 Sc. N.R. 197; 11 L.J. C.P. 237; *Smith* v. *Goldsworthy*, 4 Q.B. 430; 12 L.J. Q.B. 192.

(*i*) *Wormwell* v. *Hailstone*, 4 Moo. & P. 512; 6 Bing. 668; *Harrison* v. *Timmins*, 4 M. & W. 510; 8 L.J. Ex. 94.

(*k*) *Harwood* v. *Law*, 7 M. & W. 203; 10 L.J. Ex. 30.

(*l*) *Ricketts* v. *Bennett*, 17 L.J. C.P. 17; 4 C.B. 686; *Hawtayne* v. *Bourne*, 7 M. & W. 595; 10 L.J. Ex. 224; *Brown* v. *Byers*, 16 M. & W. 252; 16 L.J. Ex. 112; *Dickinson* v. *Valpy*, 10 B. & C. 128; 8 L.J. (O.S.) K.B. 51; *Burmester* v. *Norris*, 6 Exch. 796; 21 L.J. Ex. 43; *Cunningham & Co., In re*, 36 Ch.D. 532; 57 L.J. Ch. 169.

(*m*) *Owen* v. *Van Uster*, 10 C.B. 318; 20 L.J. C.P. 61.

who agree to furnish capital and receive profits, if profits are realised, are responsible for the payment of the price of things ordered and consumed in the ordinary business of the company (*n*). The shareholders cannot by agreement among themselves empower their purser or manager to maintain an action against a member for calls or other contributions (*o*).

Who is a shareholder.—A written acceptance of shares in a mining company signed by the defendant is evidence against him of his being a shareholder (*p*). If his name is entered in the books of the company amongst the names of the shareholders with his knowledge and concurrence, or if he has admitted that he is a shareholder, there is proof against him of his being a shareholder, although it cannot be shown that he has actually received profits or obtained any dividend upon his shares (*q*). If, however, no share in the mine, or right to share in the profits thereof, has been actually transferred to him, and he is not in reality a holder of shares, and has no legal interest in the concern, and has not acted as an ostensible partner, he will not be responsible as a partner; and no acknowledgment made under a mistaken supposition of his own that he is a shareholder when he is not a shareholder, will make him liable, unless it were communicated to the plaintiff so as to mislead him (*r*). Although the property in mining shares may pass by delivery of the certificates of proprietorship, yet the holder of the certificates does not, in general, become a shareholder until his name is entered in the share register book; and the vendor of mining shares is not, in general, discharged from liability as a shareholder until his name has been expunged from the book (*s*).

Insurance companies are frequently constituted, and the policies issued by them framed, upon the terms that a certain specified, subscribed capital, and the property of the company, shall alone be liable to make good claims arising upon their policies, that the directors signing the policies shall not be responsible to any greater extent than the funds or property in their hands shall be competent to discharge, and that no proprietor shall, in any event whatever, be liable beyond the amount

(*n*) *Ellis* v. *Schmœck*, 3 Moo. & P. 220; 7 L.J. (O.S.) C.P. 231; *Steigenberger* v. *Carr*, 3 Sc. N.R. 466; *Trediven* v. *Bourne*, 6 M. & W. 465; 9 L.J. Ex. 220; *Hawken* v. *Bourne*, 8 M. & W. 703; 10 L.J. Ex. 361; *Peel* v. *Thomas*, 15 C.B. 714; 24 L.J. C.P. 86.

(*o*) *Hybart* v. *Parker*, 4 C.B. N.S. 209; 27 L.J. C.P. 120; *Gray* v. *Pearson*, L.R. 5 C.P. 568.

(*p*) *Toll* v. *Lee*, 4 Exch. 230; 18 L.J. Ex. 364.

(*q*) *Ralph* v. *Harrey*, 1 Q.B. 845; 10 L.J. Q.B. 337.

(*r*) *Vice* v. *Anson* (*Lady*), 7 B. & C. 411; 6 L.J. (O.S.) K.B. 24.

(*s*) *Humby, Ex parte*, 28 L.J. Ch. 875.

of the unpaid part of his share in the subscribed capital. When this limitation of liability is made an express term of the contract entered into between the company and third parties, these last are of course bound thereby (*t*); but it is otherwise when the third parties have no notice of the limitation (*u*). So long, however, as the shareholders have not paid up the whole of their shares, and the capital stock is not all expended, the directors who seal or sign the policy are liable thereon; and they must provide funds by making calls on the shareholders (*x*). Where certain directors of an insurance company, by policy under seal, ordered, directed, and appointed that the capital, stock, and funds of the company should stand charged with, and be liable to pay, 500*l.* to the plaintiff, it was held that this was a personal covenant on the part of the directors to pay if the funds proved adequate, and that they were individually liable thereon, unless they could show that the company was insolvent (*y*). In a contract of this kind the whole body are not made joint contractors; but each individual of the company is bound to make good the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and the individual proprietors are not responsible for any others than themselves (*z*). A policy under the seal of the company cannot be avoided merely by showing that some of the formalities required by the deed of settlement, in order to render the contract binding on the company, have not been complied with (*a*). But an ordinary local agent of an insurance company is not, without special authority, authorised to bind the company by a contract to grant a policy (*b*).

Contracts with banking co-partnerships.—The mere shareholders of a co-partnership under the management of trustees or directors have no authority to contract for one another, or to pledge the credit of the co-partnership (*c*); but the directors appointed to carry on the business have impliedly all such of the ordinary powers of partners in a common mercantile partnership as are necessary for carrying on the business for which

(*t*) *Halket* v. *Mercht. Trad. Ins. Assoc.*, 13 Q.B. 960; 19 L.J. Q.B. 59; *Hassell* v. *Mercht. Trad. Ins. Assoc.*, 4 Exch. 525; 19 L.J. Ex. 183; *Hickman* v. *Cambrian, &c. Ins. Co.*, 28 L.J. Ex. 379; *Prince of Wales Assur. Co., In re, Athenæum Soc., Ex parte*, 28 L.J. Ch. 335; 3 De G. & J. 660.

(*u*) *Gordon* v. *Sea Fire Assur. Soc.*, 1 H. & N. 599; 26 L.J. Ex. 202; *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

(*x*) *Andrews* v. *Ellison*, 6 Moore, 199.

(*y*) *Gurney* v. *Rawlins*, 2 M. & W. 87; 6 L.J. Ex. 7; *Dawson* v. *Wrench*, 3 Exch. 359; 18 L.J. Ex. 229.

(*z*) *Hallett* v. *Dowdall*, 18 Q.B. 2; 21 L.J. Q.B. 98; *Reid* v. *Allan*, 4 Exch. 326; 19 L.J. Ex. 39.

(*a*) *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 183; 27 L.J. Q.B. 297.

(*b*) *Linford* v. *Provincial Horse Ins. Co.*, 34 Beav. 291.

(*c*) *Burnes* v. *Pennell*, 2 H.L. Cas. 497, 521.

the company is formed; and, where a banking co-partnership is established, the directors are considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed, unless the power is excluded by the express provisions of the deed of settlement. They have authority, therefore, to give promissory notes, or to accept bills of exchange, so as to bind themselves and the other shareholders; and, if there is any objection in point of form to the validity of the bills or notes, the money obtained upon them by the directors may be recovered as money lent to the company. If there is any irregularity in the transaction, and the shareholders lie by and acquiesce in the irregularity, they will be deemed to have subsequently ratified the acts of the directors (*d*). If the manager of the bank is entrusted with a general power of accepting, making, and indorsing bills and notes, an innocent indorsee will not be prejudiced by any irregularity in his mode of exercising it; but, if he has only a special and limited authority, and the indorsement conveys an express intimation to that effect, the indorsee must, at his peril, make inquiry as to whether or not the authority has been properly exercised, before he advances his money upon, or gives credit to, the indorsement (*e*).

Banking co-partnerships established under 7 Geo. 4, c. 46 (*f*), are authorised (sect. 9) to sue and be sued in the name of one of the public officers as the nominal plaintiff or defendant; and every judgment and decree obtained against the public officer is to operate (sect. 12) as a judgment against the co-partnership, and execution may be issued thereon (sect. 13) against any co-partner for the time being; and, if the judgment is not satisfied, it may then be issued against any person who was a member of the co-partnership at the time when the contract on which such judgment was obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time such judgment was obtained, provided leave is granted by the court in which the judgment was obtained, after notice to the person sought to be charged, and before the expiration of three years from the time such person shall have ceased to be a member of the co-partnership (*g*).

(*d*) *Maclae* v. *Sutherland*, 3 E. & B. 1; 23 L.J. Q.B. 229; *Bank of Australasia* v. *Bank of Australia*, 12 Jur. 189.

(*e*) *Alexander* v. *Mackenzie*, 6 C.B. 766; 18 L.J. C.P. 94; *Eyre* v. *Macdowell*, 14 Ir. C.L.R. 332; *Stagg* v. *Elliott*, 12 C.B. N.S. 373; 31 L.J. C.P. 260.

(*f*) The Country Bankers Act, 1826.

(*g*) *Dodgson* v. *Scott*, 2 Exch. 457; 17 L.J. Ex. 321. 7 & 8 Vict. c. 32, s. 26, as to banking co-partnerships carrying on business within sixty-five miles of London. See also 27 & 28 Vict. c. 32,

Liabilities of provisional directors and committeemen.—All persons who take an active part in working out a project, render themselves in general jointly responsible for the orders so given (*h*). Every person, also, who holds himself out as one of the acting committeemen or managers of a projected company, may become chargeable to parties who, subsequently to such holding out, have dealt with the managing committee; and all the actual and publicly reputed managers may become responsible for the acts of the managing committee, but not for things done pursuant to orders given before they became acting members or managers, or after they have ceased to be so (*i*). Where a person signs a contract as agent for a proposed company which has no existence at the time, he is personally liable upon the contract, and the company when it comes into existence is not liable, and parol evidence is not admissible to show a contrary intention (*k*), and the company when formed cannot by subsequent adoption or ratification of the contract incur the liability or obtain the benefit thereof (*l*).

One member of a managing committee, has, in general, no authority to bind another member. If the business of the company has always been transacted through the medium of resolutions passed by a managing committee, and through orders given by some accredited officer of the committee, one committeeman would not be responsible for the private and individual orders and contracts of a co-committeeman, or of any of the projectors, or of the officer made without the knowledge of the board, and of which he has known nothing until a claim is made upon him in respect thereof. The act of a secretary not authorised by the board does not bind the board; and, if authorised by it, it binds only those members who were present and concurred in giving authority to the secretary (*m*). A committeeman is not responsible for things ordered by the solicitor of the company, unless it be proved that the solicitor acted under an express

as to banks which have discontinued the issue of their own bank notes.

(*h*) *Braithwaite* v. *Skofield*, 9 B. & C. 401; 7 L.J. (O.S.) K.B. 274; *Lake* v. *Argyll* (*Duke*), 6 Q.B. 477; 14 L.J.Q.B. 73; *Glenester* v. *Hunter*, 5 Car. & P. 65; *Kerridge* v. *Hesse*, 9 Car. & P. 200; *Burls* v. *Smith*, 5 Moo. & P. 735; 7 Bing. 705.

(*i*) *Bailey* v. *Macaulay*, 13 Q.B. 815; 19 L.J. Q.B. 73; *Horsley* v. *Bell*, Amb. 770; 1 Br. C. C. 101, n.; *Maudslay* v. *Le Blanc*, 2 Car. & P. 409, n.; *Doubleday* v. *Muskett*, 4 Moo. & P. 760; *Barnett* v. *Lambert*, 15 M. & W. 489; 15 L.J. Ex. 305; *Beale* v. *Mouls*, 16 L.J. Q.B. 410; 10 Q.B. 976; *Newton* v. *Belcher*, 12 Q.B. 921; 18 L.J. Q.B. 53; *Maitland*, *Ex parte*, 23 L.J. Ch. 140.

(*k*) *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94; *Northumberland Avenue Co.*, *In re*, 33 Ch.D. 16; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146; 71 L.J. Ch. 158; but see *Howard* v. *Patent Ivory Co.*, 38 Ch.D. 156; 57 L.J. Ch. 878.

(*l*) *Kelner* v. *Baxter*, *supra*; *Natal Land*, *&c. Co.* v. *Pauline Colliery*, *&c. Syndicate*, (1904) A. C. 120; 73 L.J. P.C. 22.

(*m*) *Burnside* v. *Dayrell*, 3 Exch. 224 19 L.J. Ex. 46; *Rennie* v. *Wynn*, 4 Exch. 697; 19 L.J. Ex. 2,

authority from the committee (*n*). If an authority to contract on behalf of the company or a committee is vested in eight persons, those who delegated to them the particular authority are not bound by the acts and contracts of six out of the eight (*o*). The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended. And, if parties employed by the managing committee or directors are expressly told that they must look to the deposits for remuneration for their services, and that the members of the committee will not hold themselves personally responsible for payment, these last will then be protected from personal liability (*p*). But, if an advance is made on the personal responsibility of the promoters, the subsequent adoption of their acts by the directors, after the company has been formed, will not relieve them from liability (*q*). Where the provisional directors of a projected company resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose, and the secretary accordingly applied to an advertising agent, to whom he showed the prospectus and resolutions, it was held that there was evidence that the directors were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him and that they would incur no liability, there being nothing to show that the secretary had acted beyond the scope of his actual or apparent authority as secretary (*r*). But, where A. consented to his name being inserted in a prospectus as a director of a projected company, and on the prospectus being sent to him by the secretary of the company suggested alterations, and also that the company should be advertised in a particular newspaper, it was held that there was no evidence that he authorised the secretary to pledge his credit for all the expenses of advertising the company (*s*).

Powers and responsibilities of provisional committeemen.—

(*n*) *Cooke* v. *Tonkin*, 16 L.J. Q.B. 153.

(*o*) *Brown* v. *Andrew*, 18 L.J. Q.B. 153.

(*p*) *Giles* v. *Smith*, 11 Jur. 334; *Rennie* v. *Clarke*, 5 Exch. 292; 19 L.J. Ex. 278; *Landman* v. *Entwistle*, 7 Exch. 632; 21 L.J. Ex. 208.

(*q*) *Scott* v. *Ebury* (*Lord*), L.R. 2 C.P. 255; 36 L.J. C.P. 161.

(*r*) *Maddick* v. *Marshall*, 16 C.B. N.S. 387; 17 C.B. N.S. 829; *Riley* v. *Pakington*, 36 L.J. C.P. 204; L.R. 2 C.P. 536; *Collingwood* v. *Berkeley*, 15 C.B. N.S. 145.

(*s*) *Burbidge* v. *Morris*, 3 H. & C. 664; 34 L.J. Ex. 131.

An association of persons who have agreed to act together as provisional committeemen is not a co-partnership; and one committeeman is not impliedly the agent of another for the purpose of carrying the common object into effect. The mere fact, therefore, of a person's having agreed to become a member of a provisional committee of a projected undertaking will not render him responsible upon the contracts and for the debts and engagements of such committee; and the mere announcement of the fact in printed papers and prospectuses, issued by his authority, will not make him liable. "If not responsible as being one of the committee, in fact, he cannot become so by the representation of that fact" (*t*). A provisional committeeman, who has not himself received the deposit paid on an allotment of shares, and who has taken no part in the management of the undertaking, is not responsible for the application of the deposits by the managers (*u*). But if the general management of the business of the company is vested in a provisional committee of management, every member of such committee who takes an active part in the management will be responsible upon the contracts entered into by such committee (*x*). If there is both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency (*y*). But, if a company starts with a provisional committee of management, consisting of a great number of persons, all of them taking a more or less active part in the management, and then another smaller managing committee is formed, so that there is both a provisional committee and a managing committee co-existing, and the provisional committee has the appointment of, and the control over, the managing committee, the members of the latter may become the agents of the former, authorised to act for them as well as on their own account (*z*).

Contracts with committees of clubs and eleemosynary institutions.—The members of the managing committee of a club or charity are personally responsible upon contracts, for the benefit of the club made by order of the committee, as the credit is deemed to have been given to the committee, rather than

(*t*) *Reynell* v. *Lewis*, 15 M. & W. 517; 16 L.J. Ex. 30; *Barker* v. *Stead*, 3 C.B. 946; 16 L.J. C.P. 160; *Patrick* v. *Reynolds*, 1 C.B. N.S. 727.

(*u*) *Burnside* v. *Dayrell*, 3 Exch. 224, 227; 19 L.J. Ex. 46.

(*x*) *Bailey* v. *Macaulay*, 13 Q.B. 815; 19 L.J. Q.B. 73.

(*y*) *Williams* v. *Pigott*, 2 Exch. 201; 17 L.J. Ex. 196; *Dawson* v. *Morrison*, 16 L.J. C.P. 240.

(*z*) *Tanner*, *Ex parte*, 21 L.J. Ch. 212; 5 De G. & S. 182.

to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons contracting (*a*). Subscribers to a club who pay an entrance fee and an annual subscription afterwards, for the purpose of forming a fund for the club's expenses, and who appoint a committee or trustees to administer the fund, are not themselves responsible upon the contracts of the committee or trustees or liable to indemnify the latter in respect of such contracts unless it can be shown that they individually concurred in, or assented to them (*b*). As members of the committee, therefore, in these cases, do not bind the subscribers at large by their contracts, or give to the persons whom they have employed a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction (*c*). If the managing committee allow an officer, or any one of the members of the committee, to discharge the functions of the whole body, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit (*d*). But members of a club are not responsible upon bills of exchange, or for the repayment of money lent, unless they have expressly sanctioned the drawing or acceptance of bills, or the borrowing of money (*e*); nor are they responsible upon contracts made by their secretary or one of their members out of the ordinary course of business, without their knowledge. It is a question for the jury to determine whether goods ordered by one only of the committee were furnished upon his individual credit, or on the credit of the whole body of persons managing the institution (*f*). The majority of the members of a club have no authority to alter the rules unless that authority is expressly given them by the rules (*g*); but, where such authority is given, it may, of course, be exercised by the requisite majority of members (*h*).

(*a*) *Queensbury* (*Duke*) v. *Cullen*, 1 Br. P.C. 396, 404.

(*b*) *Flemyng* v. *Hector*, 2 M. & W. 172; 6 L.J. Ex. 43; *Wise* v. *Perpetual Trustee Co.*, (1903) A.C. 139; 72 L.J. P.C. 31; and see *St. James's Club, In re*, 2 De G. M. & G. 383.

(*c*) *Burls* v. *Smith*, 7 Bing. 705; 5 Moo. & P. 735; *Glenester* v. *Hunter*, 5 Car. & P. 65.

(*d*) *Cockerell* v. *Aucompte*, 26 L.J. C.P. 194; 2 C.B. N.S. 440.

(*e*) *Mountcashel* (*Earl*) v. *Barber*, 15 C.B. 512; 24 L.J. C.P. 43.

(*f*) *Todd* v. *Emly*, 7 M. & W. 427; 10 L.J. Ex. 161; 8 M. & W. 505; 10 L.J. Ex. 262; *ante*, pp. 393, 395.

(*g*) *Harington* v. *Sendall*, (1903) 1 Ch. 921; 72 L.J. Ch. 396.

(*h*) *Thellusson* v. *Valentia* (*Viscount*), (1906) 1 Ch. 480; 75 L.J. Ch. 368.

Contracts with trustees and commissioners of public works.—Commissioners and trustees acting in the execution of statutory powers are generally exempted from all personal liability whilst acting within the scope of the statute they are authorised to execute, but are liable to be sued in the name of their clerk or treasurer for the time being; and the public funds in their hands, derived from rates they are authorised to impose, are subjected to the payment and satisfaction of claims proved against them (*i*).

But although trustees and commissioners of public works have a public fund at their disposal, or may be authorised to impose tolls or make rates and assessments, and so collect money for their purposes, they may nevertheless pledge their own personal credit. If they have borrowed money not in conformity with their borrowing powers, or have exceeded their borrowing powers, and have failed consequently to charge the fund at their disposal with the re-payment of the loan, and have given the lender no remedy against the rates, tolls, or assessments they are authorised to levy, they may become personally liable, either on the ground that the money was borrowed on their own personal credit, and not on the credit of the fund (*k*), or that they falsely represented to the borrower that they had funds at their disposal for the re-payment of the loan (*l*), or that they undertook to provide funds for the purpose. They may also contract under circumstances giving rise to an irresistible presumption that the personal credit of those who made the

(*i*) If a contract made by them is within the scope of the Act to be executed by them, the procedure for the breach of such contract must be against the clerk, and the amount recovered must be paid out of the public moneys in the hands or under the control of the commissioners. *Hall* v. *Taylor*, 1 E. B. & E. 107; 27 L.J. Q.B. 311. If judgment is recovered against the officer authorised to be sued, and the commissioners neglect to satisfy the judgment, they may be compelled by *mandamus* to make a rate and apply it in satisfaction and discharge of the judgment debt. *Reg.* v. *Rotherham Local Board*, 27 L.J. Q.B. 156; 8 E. & B. 906; *Ward* v. *Lowndes*, 29 L.J. Q.B. 40. Where a debt is due, the creditor is entitled to judgment, although there may be no funds for the payment of it, and the creditor may consequently never be able to enforce his judgment by execution. *Bush* v. *Martin*, 2 H. & C. 311; 33 L.J. Ex. 17. Where, by statute, a committee were empowered to contract for plans for a lunatic asylum, and were enabled to sue and be sued in the name of their clerk, and resolutions were passed by the committee offering premiums for plans and appointing an architect, it was held that the committee might be sued in the name of their clerk upon the contracts authorised by these resolutions (*Kendall* v. *King*, 17 C.B. 483; 25 L.J. C.P. 132; *Cane* v. *Chapman*, 5 Ad. & E. 647; 6 L.J. K.B. 49), but that the members of the committee could not be made personally liable upon such contracts (*Allen* v. *Waldegrave*, 8 Taunt. 566; 2 Moore, 621), nor could execution upon a judgment recovered against the clerk be issued against him. *Wormwell* v. *Hailstone*, 8 L.J. (O.S.) C.P. 264; 6 Bing. 668; but see *Cobbett* v. *Wheeler*, 30 L.J. Q.B. 64; 3 E. & E. 358. As to loans for Public Works, see 38 & 39 Vict. c. 89, amended by 39 & 40 Vict. c. 31, extended by 41 Vict. c. 18; 42 & 43 Vict. c. 77. As to County Councils, see 51 & 52 Vict. c. 41, ss. 64—72.

(*k*) *Parrott* v. *Eyre*, 10 Bing. 283; 3 L.J. C.P. 3.

(*l*) *Higgins* v. *Livingstone*, 4 Dow 355; *Eaton* v. *Bell*, 5 B. & Ald. 34, 41.

contract was pledged, and that the other party to the contract looked to them for payment, and not to the funds they were authorised to collect (*m*).

Salaries of public officers.—Public officers appointed by trustees and commissioners of public works, under the authority of Acts of Parliament, which provide that their salaries shall be paid out of the rates to be raised under the authority of the Act, cannot render the persons who make the appointment personally responsible for the payment of the salary, unless they have expressly contracted to pay it (*n*). The only claim of such officers is against the rates; and, these failing, they must go unpaid (*o*). When commissioners of public works, authorised by statute to appoint an officer, are directed to pay him a salary, they impliedly contract, on making the appointment, to pay the salary out of the funds they are directed to administer, so as to give the officer who has accepted the appointment a right to sue them in the name of their clerk or treasurer (*p*), and to proceed to obtain payment out of the appointed fund; but the commissioners do not incur any personal liability by virtue of the appointment, unless they have entered into an express contract to pay the salary. Whenever a public body is invested with a discretionary power respecting the amount of remuneration to be paid for a particular service, and no express contract has been entered into by the board to pay any particular sum, the court cannot interfere with the exercise of their discretion.

Contracts with Metropolitan Borough Councils.—By sect. 4 (1) of the London Government Act, 1899 (*q*), the powers and duties of every elective vestry and district board in the county, as well as their property and liabilities, were transferred to the council of the borough comprising the district within which those powers were exercised. Amongst the powers so transferred is the power to enter into contracts in their corporate capacity, and such contracts would have to be under seal in compliance with the common law doctrine which requires, subject to certain exceptions already referred to, *ante*, p. 373, contracts made by corporations to be under seal. In the case of Metropolitan borough councils exercising the powers of administrative vestries or district boards, and entering into con-

(*m*) *Horsley* v. *Bell*, Amb. 770; 1 Bro. C.C. 101, n.; *Lambert* v. *Knott*, 6 Dowl. & R. 122.

(*n*) *Bogg* v. *Pearse*, 10 C.B. 534; 20 L.J. C.P. 99; *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198.

(*o*) *Andrews* v. *Dally*, 4 Bing. 566; 1 M. & P. 490; 6 L.J. C.P. 117; *Smart* v. *West Ham Union*, 11 Exch. 867; 25 L.J. Ex. 210; *Addison* v. *Preston (Mayor)*, 12 C.B. 108; 21 L.J. C.P. 146.

(*p*) *Hall* v. *Taylor*, E. B. & E. 107; 27 L.J. Q.B. 311.

(*q*) 62 & 63 Vict. c. 14, s. 4 (1).

tracts for the purpose of carrying the Metropolis Management Act, 1855 (*r*), into execution, it is provided by sect. 149 of that Act that "every such contract for works or materials, whereof the value or amount exceeds ten pounds, shall be in writing or print, or partly in writing and partly in print, sealed with the seal of the board or vestry."

Contracts with parish councils.—Every parish council is, by sect. 3 (9) of the Local Government Act, 1894(*s*), constituted a body corporate, and ordinarily every contract made with it would have to be under seal; but the intention of sub-sect. 9 would seem to be that a contract may be signified by an instrument simply under the hands—or, if an instrument under seal is required, under the hands and seals—of the chairman presiding at the meeting and two other members of the council. Powers to acquire land for the purposes of the Local Government Act, 1894, or for allotments, are given by sect. 9 of that Act, which by the same section provides for the mode of holding inquiries by the Local Government Board and by a county council. Power is also given by sect. 12 to a parish council to borrow money for certain purposes set out in that section.

Contracts with district councils.—Urban district councils (*t*) and rural district councils (*u*) have now taken the place of the local authorities—urban sanitary authorities and rural sanitary authorities—created by the Public Health Act, 1875 (*x*). Every rural district council is a body corporate with perpetual succession and a common seal(*y*). Sect. 173 of the Public Health Act, 1875 (*z*), gives power to any local authority to enter into any contracts necessary for carrying the Act into execution, and, by sect. 174, as to contracts by urban authorities, if over 50*l.*, they shall be in writing sealed with the common seal (*a*), and shall specify the work, the price, the time, and the penalty (*b*). An estimate is to be obtained and a report made. Before a contract of 100*l.* is made, ten days' notice and tenders are to be given, and security to be taken. Such contracts duly made will be binding on such authority and their successors, and all other

(*r*) 18 & 19 Vict. c. 120, s. 149.
(*s*) 56 & 57 Vict. c. 73, s. 3 (9).
(*t*) *Ibid.*, s. 21.
(*u*) *Ibid.*, s. 25 (1), (5).
(*x*) 38 & 39 Vict. c. 55, s. 5.
(*y*) 56 & 57 Vict. c. 73, s. 24 (7).
(*z*) 38 & 39 Vict. c. 55, s. 173.
(*a*) *Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48; 48 L.J. C.P. 207; *Att.-Gen.* v. *Gaskill*, 22 Ch. D. 537; 51 L.J. Ch. 870; *ante*, pp. 375, 378.
(*b*) It would seem that these provisions are only directory and not imperative, and that their omission does not invalidate the contract: *Southill Upper Urban Council* v. *Wakefield Rural Council*, (1905) 2 Ch. 516; 74 L.J. Ch. 703—C. A., Williams, L.J., dissenting; not following *British Insulated Wire Co.* v. *Prescot Urban Council*, (1895) 2 Q.B. 463; 64 L.J. Q.B. 811; affirmed (1895) 2 Q.B. 538; 65 L.J. Q.B. 190; but without argument or judgments on consent of parties to treat the provisions as obligatory.

parties, subject to a proviso as to compounding. Power to purchase land is given by sects. 175—178, and the mode of reference to arbitration by sects. 179—181. Powers of borrowing money are given to any local authority by sects. 233—239 (*c*).

Contracts with parish officers.—Agreements entered into by churchwardens and parishioners will, under certain circumstances, be binding upon the parish (*d*). But, as churchwardens, overseers of the poor, and parish officers, have no power of contracting so as to give any right of action against the parish, it seems that they would be themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office (*e*), unless the party with whom they have contracted agrees to look exclusively to the funds of the parish for payment (*f*).

Overseers of the poor are bound to take care of casual poor within their parishes; and the law obliges them to reimburse a private individual for expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency (*g*). If an accident happens in the parish of A. to a pauper belonging to the parish of B., which disables the pauper, and he is then removed to his own place of abode in his own parish of B., and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A., where the accident happened, to recover a reasonable compensation for his medicine and attendance (*h*). But the law raises no implied promise from one parish to another in respect of relief and necessaries afforded to casual poor (*i*), unless the parish sued has, in some shape or another, sanctioned or authorised the relief (*k*). An agreement by the churchwardens, overseers, and surveyors of a parish for a lease of land to be converted into gardens for the occupation of the poor is a personal contract of their own upon which they are individually liable: and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers (*l*).

Friendly societies.—Contracts with friendly societies are regulated by the Friendly Societies Act, 1896 (*m*).

(*c*) See also the Local Loans Acts, 1875, 1887, 55 & 56 Vict. c. 58; 45 & 46 Vict. c. 30.

(*d*) *Mumford* v. *Watson*, 2 P. Wms. 241.

(*e*) *Kirby* v. *Banister*, 5 B. & Ad. 1030; 2 N. & M. 69; *Cheese* v. *Field*, 9 N. & M. 456.

(*f*) *Mayhew* v. *Eaton*, 1 Ex. D. 60; 17 L.J. Ex. 94.

(*g*) *Sanderson* v. *Whitehill*, 3 Esp. 91.

(*h*) *Tomlinson* v. *Bromell*, 5 B. & C. 744; 5 L.J. (O.S.) M.C. 7; *Lamb* v. *Bunce*, 4 M. & S. 275.

(*i*) *Ashby* v. *Steinwell*, 2 Esp. 705.

(*k*) *Paynter* v. *Williams*, 1 Cr. & M. 818; 2 L.J. M.C. 105.

(*l*) *Uthwatt* v. *Elkins*, 13 M. & W. 772, 777; 14 L.J. Ex. 161; 5 & 6 Vict. c. 57.

(*m*) 59 & 60 Vict. c. 25. As to contracts which are unauthorised but not

Loans to friendly societies.—Where money has been lent to the directors and recognised officers or agents of a friendly society, and the money has come to the use of the society, and the members have had the benefit of the loan, the society cannot exempt itself from responsibility by showing that the directors have exceeded their borrowing powers, or that certain prescribed formalities annexed to those borrowing powers have not been complied with (*n*).

Industrial and provident societies.—Contracts with industrial and provident societies are regulated by the Industrial and Provident Societies Act, 1893 (*o*). By sect. 23, sub-sect. 1, of that Act, all moneys payable by a member to the society shall be a debt due from such member to the society, and shall be recoverable as such, either in the County Court of the district in which the registered office of the society is situate, or that of the district in which such member resides, at the option of the society (*p*).

By sect. 35, contracts on behalf of the society may be made, varied or discharged as follows:—(a) Any contract, which if made between private persons would be by law required to be in writing, and if made according to the English law, to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may in the same manner be varied or discharged: (b) Any contract, which if made between private persons would be by law required to be in writing and signed by the persons to be charged therewith, may be made on behalf of the society in writing by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged: (c) Any contract under seal, which if made between private persons might be varied or discharged by a writing not under seal signed by any person interested therein, may be similarly varied or discharged on behalf of the society by any person acting under the express or implied authority of the society: (d) Any contract, which if made between private persons would be by law valid, though made by parol only and not reduced into writing, may be made by parol on behalf of the society by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged: (e) A signature purporting to be made by a person holding any office in the society attached to

illegal, see *Coltman, In re*, 19 Ch.D. 64; 51 L.J. Ch. 3.

(*n*) *Pare* v. *Clegg*, 30 L.J. Ch. 747: 29 Beav. 589.

(*o*) 56 & 57 Vict. c. 39.

(*p*) As to recovery of debt from past member, see *Gwendolen Land Society* v. *Wicks*, (1904) 2 K.B. 622; 73 L.J. K.B. 815.

a writing whereby any contract purports to be made, varied, or discharged by or on behalf of the society, shall *primâ facie* be taken to be the signature of a person holding at the time when the signature was made the office so stated. And all contracts which may be or have been made, varied, or discharged, according to the provisions contained in this section, shall, so far as concerns the form thereof, be effectual in law and binding on the society, and all other parties thereto, their heirs, executors or administrators, as the case may be.

The dissolution and winding-up of such societies is provided for by sects. 58—61.

It was held that under the former Acts an industrial and provident society was not liable to be sued in its corporate capacity for goods supplied before the registration, although the action was not brought until after registration (*q*). Such an action should have been brought against the committee of management (*r*). But a society formed under 15 & 16 Vict. c. 31 (repealed), and afterwards registered under the Acts subsequently in force, might sue in its corporate name upon a bond given to the trustees of the society before the passing of the latter Acts (*s*). Members of an unregistered society enrolled and certified under the old Act (15 & 16 Vict. c. 31), giving a promissory note in the following form for a debt of the society: "Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," &c., were held personally liable (*t*).

Contracts with benefit building societies are regulated by the 6 & 7 Will. 4, c. 32 (societies before 1874), and the 54 & 55 Vict. c. 39, s. 89 (stamps); and by the Building Societies Acts, 1874 to 1894 (*u*). A rule empowering the trustees to borrow a limited amount of money for the purposes of the society was held not illegal under the old Acts (*x*). But now these societies have power under the above Acts to borrow money (*y*). Parties who sign promissory notes, or expressly contract in their own names for the repayment of money advanced to a benefit building society, cannot exonerate themselves from personal liability upon

(*q*) *Linton* v. *Blakeney Industrial School*, 3 H. & C. 853; 34 L.J. Ex. 211.

(*r*) *Dear* v. *Mellard*, 32 L.J. C.P. 252; 15 C.B. N.S. 19; *Toutill* v. *Douglas*, 33 L.J. Q.B. 66.

(*s*) *Queensbury Industrial Soc.* v. *Pickles*, L.R. 1 Ex. 1; 35 L.J. Ex. 1.

(*t*) *Gray* v. *Raper*, L.R. 1 C.P. 694.

(*u*) 37 & 38 Vict. c. 42; 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; 57 & 58 Vict. c. 47.

(*x*) *Laing* v. *Reed*, L.R. 5 Ch. 4; 39 L.J. Ch. 1.

(*y*) See 37 & 38 Vict. c. 42, s. 15; *Murray* v. *Scott*, 9 App.Cas. 519; 53 L.J. Ch. 745; *Mutual Aid Society, In re*, 30 Ch.D. 434; 55 L.J. Ch. 111; *Brooks* v. *Blackburn Benefit Building Society*, 9 App.Cas. 857; 54 L.J. Ch. 376.

their contract merely by describing themselves on the face of it as "trustees" or "secretary" for the society (*z*). The total amount of the loan must not at any time exceed two-thirds of the amount secured by mortgages from its members (*a*). Formerly, even where there was a power given by the rules to borrow money, it must be limited; an unlimited power of borrowing is invalid (*b*).

Contracts with freehold land societies.—There is a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. A freehold land society, whose rules authorise the directors to make speculative investments of the funds of the society in the purchase of estates, to be partitioned and divided amongst the members, cannot be registered as a benefit building society, as its objects are totally different from those of a benefit building society; and both the directors or trustees who enter into contracts for the purchase of estates, and the members or shareholders who authorise them to be made, may become personally responsible for the fulfilment of such contracts (*c*).

Salaries of officers of friendly societies.—Surveyors, secretaries, solicitors, and officers of benefit building societies and industrial and provident societies generally, have notice by the rules of the society that the remuneration for their services to the society is to be paid out of the funds of the society, so that, if the society becomes insolvent, they have no right to resort for payment to individual members. Officers of this class generally have a much greater interest in the societies to which they are attached than the trustees or directors. In the great majority of cases, they are the promoters of the society, at whose request the directors consent to accept office and take upon themselves the liabilities and duties of their situation; and such officers generally discharge their duties, and perform the services rendered by them to the society, with the understanding, on all hands, that they are to be remunerated out of

(*z*) *Price* v. *Taylor*, 5 H. & N. 542; 29 L.J. Ex. 331; *Mare* v. *Charles*, 5 E. & B. 978; 25 L.J. Q.B. 119.

(*a*) 37 & 38 Vict. c. 42, s. 15.

(*b*) *Hill's case*, L R. 9 Eq. 605; 39 L.J. Ch. 628. As to liability of directors for money borrowed beyond the limit, see *Looker* v. *Wrigley*, 9 Q.B.D. 397.

(*c*) *Grimes* v. *Harrison*, 26 Beav. 435; 28 L.J. Ch. 823.

the funds of the society; and, if the funds fail, these officers must remain unpaid (*d*).

Contracts with loan societies are regulated by 3 & 4 Vict. c. 110.

Contracts with registered trade unions are regulated by 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22 (*e*).

Contracts with infants.—All individuals below the age of twenty-one years are clothed only with a qualified power of contracting. By the Infants' Relief Act, 1874 (*f*), all contracts by infants, whether by specialty or simple contract, for the repayment of money lent (*g*), or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void; but this enactment does not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as then by law were voidable (*h*). Nor can an infant, who has entered into a contract, and has paid under it for something which he has consumed, recover back the money on the ground that the contract was void under the section (*i*). An infant debtor trader cannot, after he has attained full age, be made a bankrupt upon an act of bankruptcy committed during infancy (*k*), except, perhaps, where the infant has expressly represented himself to be of full age (*l*). But no representation that an infant who is trading is of full age arises out of the mere fact of his carrying on trade (*m*).

The contracts of an infant are binding upon him during his minority, if they are necessary, and for his benefit and advantage, but, speaking generally, may be avoided by him on his coming of age. The contracts of an infant which are not necessary or for his benefit or advantage cannot be enforced against

(*d*) *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198.

(*e*) As to insurances on the lives of children, &c., see sects. 62—67 of 59 & 60 Vict. c. 25, and 8 Edw. 7, c. 67, s. 7. As to suing a trade union in its registered name, see *Taff Vale Ry.* v. *Amalgamated Railway Servants Society*, (1901) A.C. 426; 70 L.J. K.B. 905; and the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (2), as to the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871 (34 & 35 Vict. c. 31), s. 9.

(*f*) 37 & 38 Vict. c. 62, s. 1; at common law these contracts were not absolutely void, but might have been ratified by the infant on attaining full age.

(*g*) As to mortgage by infant for advances made by building society being void under the section, see *Nottingham Building Society* v. *Thurstan*, (1903) A.C. 6; 72 L.J. Ch. 134.

(*h*) *Duncan* v. *Dixon*, 44 Ch.D. 211; 59 L.J. Ch. 437.

(*i*) *Valentini* v. *Canali*, 24 Q.B.D. 166; 59 L.J. Q.B. 75.

(*k*) *Jones, Ex parte*, 18 Ch.D. 109; 50 L.J. Ch. 673; overruling *Lynch, Ex parte*, 2 Ch.D. 227; 45 L.J. Bankr. 48.

(*l*) *Per* Lush, L.J., *Jones, Ex parte*, *supra*, at p. 125; as to liability in equity for a representation of full age, see *post*, p. 406, context to note (*s*).

(*m*) *Per* Jessel, M.R., *Jones, Ex parte*, *supra*, at p. 121; *Unity Banking Association, Ex parte*, 3 De G. & J. 63; 27 L.J. Bankr. 33.

him during his minority; but at common law they might, if not by deed, have been ratified by the infant on his arriving at full age, and could then have been enforced against him, but such ratification must have been in writing signed by the party to be charged therewith (*n*). By section 2 of the Infants' Relief Act, 1874 (*o*), no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

In deciding whether a contract is or is not for the benefit and advantage of an infant, the court does not always consider the circumstances of each contract; for it has been laid down that certain contracts can under no circumstances be enforced against an infant during his minority. Thus, no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty (*p*). All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, or other writings under seal made by infants, are, as a general rule (subject to some few exceptions presently noticed), not binding (*q*); and an infant cannot be sued on his covenant to serve contained in an indenture of apprenticeship executed by him (*r*); nor on a contract not to accept professional engagements during apprenticeship (*s*); nor on a bill of exchange accepted by him, although the bill may have been accepted on account of necessaries furnished to such infant (*t*); nor on a contract of suretyship (*u*); nor for a breach of warranty made by him on the sale of a horse (*x*); nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy (*y*). If the infant has induced another party to contract with him by falsely repre-

(*n*) See 9 Geo. 4, c. 14, s. 5; repealed by 38 & 39 Vict. c. 66.

(*o*) 37 & 38 Vict. c. 62, s. 2.

(*p*) Co. Litt. 172, a; *Fisher* v. *Mowbray*, 8 East, 330; *Baylis* v. *Dinely*, 3 M. & S. 447; *Stikeman* v. *Dawson*, 16 L.J. Ch. 205; 1 De G. & S. 90; see, however, *Wood* v. *Fenwick*, 10 M. & W. 195; 11 L.J. M.C. 127.

(*q*) Co. Litt. 171, b; *Oliver* v. *Woodroffe*, 4 M. & W. 650; 8 L.J. Ex. 105.

(*r*) *Gylbert* v. *Fletcher*, Cro. Car. 179; but see *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*s*) *De Francesco* v. *Barnum*, 43 Ch.D. 165; 59 L.J. Ch. 151; 45 Ch.D. 430; 60 L.J. Ch. 63. But see *Gadd* v. *Thompson*, (1911) 1 K.B. 304; 80 L.J. K.B. 272, as to covenants taking effect after apprenticeship.

(*t*) *Williams* v. *Harrison*, Carth. 160; *Williamson* v. *Watt*, 1 Campb. 551; *Harrison* v. *Cotgreave*, 16 L.J.C.P. 198; 4 C.B. 562; *Soltykoff*, *In re*, (1891) 1 Q.B. 413; 60 L.J. Q.B. 339.

(*u*) *Maples* v. *Wightman*, 4 Conn. 376; *Allen* v. *Minor*, 2 Call. 70.

(*x*) *Howlett* v. *Haswell*, 4 Campb. 118; *Green* v. *Greenbank*, 2 Marsh. 485; *Grove* v. *Nevill*, 1 Keb. 778.

(*y*) Watson's Arbitr. 40, 41, 42; *Milner* v. *Harewood* (*Lord*), 18 Ves. 274.

senting that he was of age, he is, nevertheless, not precluded from setting up his infancy as an answer to any action founded on such contract (*z*). But an infant may be liable on equitable grounds for a fraudulent representation that he is of full age, made for the purpose of obtaining credit (*a*); and a lease of a furnished house has been declared void where there was an implied representation by the infant that he was of full age, and it was held that possession must be given up but that the infant was not liable for use and occupation (*b*).

Contracts also entered into by infants in the exercise of a trade cannot be enforced against them. An action, consequently, cannot be maintained against an infant who carries on trade, for work done for him, or for the rent of houses and buildings hired by him, in the course of that trade, although he gains his living thereby (*c*). An agreement with an infant workman which binds him to serve during a certain term, but leaves the master free to stop his work and wages whenever he chooses, is not beneficial to the infant (*d*); but a provision that the infant shall not be paid wages on days on which his master's business is at a standstill "through accident beyond the control of the master," is not so detrimental to the infant as to be invalid (*e*). The entire contract must be looked at, and if it contains stipulations so unfair as to be detrimental to the infant, it will be set aside; if, however, it is on the whole for the benefit of the infant, it will be enforced (*f*). Where an infant, in consideration of being employed as a milk-carrier, agreed not to compete in business within a radius of five miles for two years after leaving his employment, it was held that the contract was beneficial to him, and that the stipulation could, therefore, be enforced against him after attaining his majority (*g*). A plaintiff cannot convert a breach of duty arising out of a contract into a tort so as to charge an infant in an action *ex delicto*. Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy (*h*). And an infant innkeeper is not liable for

(*z*) *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L.J. Q.B. 57; *De Roo* v. *Foster*, 12 C.B. N.S. 272.

(*a*) *Unity Banking Association, Ex parte*, 3 De G. & J. 63; 27 L.J. Bankr. 33.

(*b*) *Lempriere* v. *Lange*, 12 Ch.D. 675.

(*c*) *Dilk* v. *Keighley*, 2 Esp. 480; *Whittingham* v. *Hill*, Cro. Jac. 494; *Whywall* v. *Champion*, 2 Str. 1083; *Lowe* v. *Griffith*, 1 Sc. 458; 4 L.J. C.P. 94.

(*d*) *Reg.* v. *Lord*, 12 Q.B. 757; 17 L.J. M.C. 181; see *Leslie* v. *Fitzpatrick*, 3 Q.B.D. 229; 47 L.J. M.C. 22; and *Meakin* v. *Morris*, 12 Q.B.D. 352; 53 L.J. M.C. 72; *Corn* v. *Matthews*, (1893) 1 Q.B. 310; 62 L.J. M.C. 61.

(*e*) *Green* v. *Thompson*, (1899) 2 Q.B. 1; 68 L.J. Q.B. 719.

(*f*) *Flower* v. *L. & N. W. Ry.*, (1894) 2 Q.B. 65; 63 L.J. Q.B. 547; *Clements* v. *L. & N. W. Ry.* (No. 2), (1894) 2 Q.B. 482; 63 L.J. Q.B. 837.

(*g*) *Evans* v. *Ware*, (1892) 3 Ch. 502; 62 L.J. Ch. 256.

(*h*) *Jennings* v. *Rundall*, 8 T.R. 335; *Green* v. *Greenbank*, 2 Marsh. 485.

the loss of the guest's goods (*i*). But, if the act of an infant is not an abuse of a contract, but a wrong actionable *per se*, he will not be protected from the consequences (*j*).

Land in possession of an infant is now deemed settled estate, and the Court will sell or lease it as such, and will manage the estate by trustees; see the Conveyancing Act, 1881 (*k*).

Rights ex contractu *of infants.*—"Infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age" (*l*). Therefore, in cases of promises of marriage, contracts of purchase and sale, and contracts for the performance of work, the adult contracting party is bound and may be sued by the infant, although the latter has incurred no corresponding legal obligation (*m*). But an infant cannot obtain a decree for a specific performance of a contract against an adult contracting party (*n*). An infant cannot be compelled to complete a contract for the purchase of an estate; but, if he has paid a deposit under such a contract, he cannot recover it back merely because he declines to complete the purchase (*o*). When an infant has brought an action by his next friend, and has recovered damages which have been received by the solicitor, the money is the money of the infant; and he may sue the solicitor for it (*p*).

Contracts binding upon infants.—Infants are not rendered absolutely incapable of contracting so as to bind themselves; for "the law, at the same time that it protects their imbecility and indiscretion from injury, enables them to do certain binding acts for their own benefit. They may grant leases when it is manifestly to their interest and advantage that leases should be granted; and they will not be permitted to avoid them when they come of age; for the privilege is given as a *shield*, not as a SWORD, and shall never be turned into an offensive weapon of fraud and injustice" (*q*). By 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16 and 17, infants are empowered to grant renewal of leases, and the Court of Chancery may authorise leases to be made of lands belonging to infants for the benefit of the estate. (And

(*i*) Rolle, Abr. 1, 2, Action sur. Cas. D. 3.

(*j*) *Burnard* v. *Haggis*, 14 C.B. N.S. 45; 32 L.J. C.P. 189.

(*k*) 44 & 45 Vict. c. 41, ss. 41, 42, 43.

(*l*) Bac. Abr. INFANTS (T.) 4; *Farnham* v. *Atkins*, 1 Sid. 446; *Holt* v. *Ward*, 2 Str. 937; 2 Barn. 178.

(*m*) *Warwick* v. *Bruce*, 2 M. & S. 205; 6 Taunt. 118; *Forrester's case*, 1 Sid. 41; 1 Keb. 1; *Davis* v. *Manington*, 2 Sid. 109.

(*n*) *Flight* v. *Bolland*, 4 Russ. 298.

(*o*) *Wilson* v. *Kearse*, Peake's Ad. Cas. 196.

(*p*) *Collins* v. *Brook*, 1 H. & N. 276; 28 L.J. Ex. 143; *Brocklebank, Ex parte*, 6 Ch. D. 358; 46 L.J. Bankr. 113.

(*q*) *Zouch* v. *Parsons*, 3 Burr. 1801; *Maddon* v. *White*, 2 T.R. 161; *Allen* v. *Allen*, 2 Dr. & W. 307, 340.

see now 44 & 45 Vict. c. 41, ss. 41—43, *ante*, p. 407.) If an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy as an answer to a fair claim for the payment of the price of the work so done (*r*). By the custom of gavelkind, an infant at the age of fifteen is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent him being defrauded. And by custom in some places, an infant seised of lands in socage may, at the age of fifteen years, make a lease for years which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose (*s*).

Contracts by infants for necessaries.—"If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessaries of life, the child cannot bind himself to a stranger even for what might otherwise be allowed as necessaries" (*t*). If he orders clothes of a tailor, and they are sent to the father's residence, and the latter disapproves of the proceeding, and sends the clothes back, the tailor cannot sue the parent for the price of them because he has not sanctioned or authorised the contract (*u*); nor can he sue the infant, because the latter, being provided for in the father's house, was under no necessity of contracting for the purchase of goods on his own credit. If, however, the parent was aware of the order and of the delivery of the goods, and saw the infant using and wearing the articles, and made no objection thereto, and did not exercise his parental authority and control to prevent further supplies of such articles, this will be strong evidence to show that the father authorised the order to be given, so as to render him responsible as the principal in the transaction, and the real purchaser of the articles through the medium of his child acting as his agent in that behalf (*x*). If an infant is placed at a boarding-school by a parent or guardian, the master has not in general any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction (*y*).

What are necessaries.—Infants not residing under the parental roof, and not provided by their parents with the neces-

(*r*) *Smith* v. *Low*, 1 Atk. 489; *Ashfield* v. *Ashfield*, Wm. Jones, 157.

(*s*) Bac. Abr. INF. A.; Co. Litt. 45, b.

(*t*) *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; *Cook* v. *Deaton*, 3 C. & P. 114; *Story* v. *Perry*, 4 *ib.* 526.

(*u*) *Blackburn* v. *Mackey*, 1 C. & P. 1; *Fluck* v. *Tollemache*, *ib.* 5; *Crantz* v. *Gill*, 2 Esp. 472; *Rolfe* v. *Abbott*, 6 C & P. 286; *Clements* v. *Williams*, 8 *ib.* 58.

(*x*) *Mortimore* v. *Wright*, 6 M. & W. 485; 9 L.J. Ex. 158.

(*y*) *Duncomb* v. *Tickridge*, Aleyn, 94; Bac. Abr. INFANCY (I.) 1.

saries of life, may bind themselves by contract to pay for their necessary meat, drink, apparel, physic, good teaching, and instruction (*z*). A deed to secure the repayment of money advanced for necessaries has been held voidable; although the infant was ordered to pay the money due (*a*). The infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them; for the law does not leave the determination of the amount to the infant, but intrusts it to the arbitration of a jury (*b*). From the earliest times down to the present the word "necessaries" has not been confined in its strict sense to such articles as are necessary for the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is (*c*). The expression "necessaries" in sect. 2 of the Sale of Goods Act, 1893 (*d*), means goods suitable to the condition of life of an infant, and to his actual requirements at the time of the sale and delivery (*e*); and where necessaries are sold and delivered to an infant, he must pay a reasonable price therefor (*f*). Thus, an infant may be made liable for the rent of a fit and proper lodging (*g*), also for lace, silks, and wedding garments, suitable for a person of his rank in life (*h*), for education for himself (*i*), and for food, clothing, groceries, nursing, attendance, and necessaries furnished to his wife and family and infant children residing with him (*k*); but not for premises hired to carry on trade (*l*).

Things held not to be necessaries.—The question as to what things are, and what things are not, necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an

(*z*) Bac. Abr. INFANCY (I.); *Cooper* v. *Simmons*, 7 H. & N. 707; 31 L.J. M.C. 138.

(*a*) *Martin* v. *Gale*, 4 Ch. D. 428; 46 L.J. Ch. 84.

(*b*) Cas. Law & Eq. 185.

(*c*) *Peters* v. *Fleming*, 6 M. & W. 46; 9 L.J. Ex. 81; *Hewlings* v. *Graham*, 70 L.J. Ch. 568.

(*d*) 56 & 57 Vict. c. 71, s. 2.

(*e*) Where in an action for goods sold and delivered the defendant pleads and proves infancy, the onus is on the plaintiff to prove that the goods were necessaries within the meaning of the section: *Nash* v. *Inman*, (1908) 2 K.B. 1; 77 L.J. K.B. 626; *Barnes* v. *Toye*, 13 Q.B.D. 410; 53 L.J. Q.B. 567; *Johnstone* v. *Marks*, 19 Q.B.D. 509; 57 L.J. Q.B. 6.

(*f*) 56 & 57 Vict. c. 71, s. 2.

(*g*) *Kirton* v. *Elliott*, 2 Bulstr. 69; *Evelyn* v. *Chichester*, 3 Burr. 1719.

(*h*) *Rainsford* v. *Fenwick*, Carth. 215; *Dalton* v. *Gib*, 5 Bing. N.C. 198; 8 L.J. C.P. 151; *Brayshaw* v. *Eaton*, 5 Bing. N.S. 231; 8 L.J. C.P. 153.

(*i*) *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*k*) Bacon's Maxims, R. 18, p. 67, ed. 1639; *Chapple* v. *Cooper*, 13 M. & W. 259; 13 L.J. Ex. 286.

(*l*) *Lowe* v. *Griffith*, 1 Sc. 458; 4 L.J. C.P. 94; *ante*, p. 406.

infant under any circumstances, and respecting which no valid contract can be entered into (*m*). Thus, articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the preliminary question whether there is evidence on which they may reasonably and properly conclude that the articles in question are necessaries (*n*). The infant may adduce evidence to show that at the time the order was given he was sufficiently supplied with articles of a similar description (*o*), and the fact that the tradesman was ignorant of this is immaterial (*p*). If the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, it will be considered necessary, and the infant will be bound to pay for it (*q*).

Things which may, or may not, be necessaries according to circumstances.—The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend upon his position in society (*r*). Expensive uniforms are necessary for infant officers in the guards (*s*), and the ordinary volunteer regimentals to infant members of a volunteer corps (*t*). Silks, furs, and velvets may be necessary for a young lady of rank and station in society, and a gold watch-chain and gold breast-pin for the use of the son of a gentleman of fortune (*u*). A proper marriage settlement also is necessary for a female infant of rank and station about to be married; and she may therefore retain a solicitor to draw it up (*x*). If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow who has given an order to an undertaker for the burial of a deceased

(*m*) *Brooker* v. *Scott*, 11 M. & W. 67; *Wharton* v. *Mackenzie*, 5 Q.B. 606; 13 L.J. Q.B. 130; *Burghart* v. *Angerstein*, 6 C. & P. 698; *Charters* v. *Bayntun*, 7 *ib.* 52.

(*n*) *Ryder* v. *Wombwell*, L.R. 4 Ex. 32; 38 L.J. Ex. 8. See *Barnes* v. *Toye*, 13 Q.B.D. 410; 53 L.J. Q.B. 567.

(*o*) *Johnstone* v. *Marks*, 19 Q.B.D. 509; 57 L.J. Q.B. 6; *Nash* v. *Inman*, (1908) 2 K.B. 1; 77 L.J. K.B. 626.

(*p*) *Barnes* v. *Toye*, *supra*.

(*q*) Coleridge, J., *Wharton* v. *Mackenzie*, 5 Q.B. 612, 613.

(*r*) Alderson, B., *Chapple* v. *Cooper*, 13 M. & W. 258; 13 L.J. Ex. 286; *Hands* v. *Slaney*, 8 T.R. 578; *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*s*) *Burghart* v. *Hall*, 4 M. & W. 730.

(*t*) *Coates* v. *Wilson*, 5 Esp. 152.

(*u*) *Dalton* v. *Gib*, 5 Bing. N.C. 198; 8 L.J. C.P. 151; *Brayshaw* v. *Eaton*, 5 Bing. N.C. 231; 8 L.J. C.P. 153; *Ford* v. *Fothergill*, Peake, 301.

(*x*) *Helps* v. *Clayton*, 17 C.B. N.S. 553; 34 L.J. C.P. 1.

husband, although the latter may have died in insolvent circumstances (*y*).

Infant purchasers of estates and railway shares.—An infant purchaser of real estate, who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive the purchase altogether, either during infancy or after full age (*z*). An infant who acquires railway shares is in the same situation as an infant acquiring real estate or any other permanent interest (*a*). A transfer to an infant of shares in a company which becomes insolvent before the infant attains his majority will be treated as a nullity, and the transferor will remain liable (*b*).

Avoidance of contracts made during infancy.—By sect. 2 of the Infants' Relief Act, 1874 (*c*), no action (*d*) shall be brought whereby to charge any person upon any promise made after full age, recognised the promise without expressly making a fresh ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. A judgment obtained by default, after majority, upon a bill of exchange given during minority, is a ratification within the Act, and cannot be enforced in bankruptcy (*e*). Where the defendant promised to marry, and afterwards, on coming of age, recognised the promise without expressly making a fresh promise, it was held that the Act applied, and the plaintiff was non-suited (*f*). But where an infant covenanted on his marriage to settle after-acquired property, and repudiated the marriage settlement five years after coming of age, it was held that the settlement was, as regarded him, voidable, and not void, and could only be repudiated by him within a reasonable time of his attaining his majority (*g*). As regards leases, however, if the infant accepts rent from the lessee, and does acts affirmatory of the contract, the lease will *primâ facie* be deemed to have been a necessary and beneficial lease, and will be valid and

(*y*) *Chapple* v. *Cooper*, 13 M. & W. 259; 13 L.J. Ex. 286.

(*z*) Co. Litt. 2 b.

(*a*) *Hamilton* v. *Vaughan Electrical Engineering Co.*, (1894) 3 Ch. 589; 63 L.J. Ch. 795.

(*b*) *Capper's case*, L.R. 3 Ch. 458; *Mann's case*, *ib.* 459, n.

(*c*) 37 & 38 Vict. c. 62, s. 2.

(*d*) See a doubt suggested in Dart's Vendors and Purchasers, as to whether the Act applies to *suits* for specific performance.

(*e*) *Kibble*, *Ex parte*, L.R. 10 Ch. 373; 44 L.J. Bankr. 63; *Smith* v. *King*, (1892) 2 Q.B. 543.

(*f*) *Coxhead* v. *Mullis*, 3 C.P.D. 439; 47 L.J. C.P. 761; as to what amounts to a fresh promise, however, see *Northcote* v. *Doughty*, 4 C.P.D. 385, and *Ditcham* v. *Worrall*, 5 C.P.D. 410; 49 L.J. C.P. 688.

(*g*) *Edwards* v. *Carter*, (1893) A.C. 360; 63 L.J. Ch. 100.

binding. If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be evidence the other way. Where the obligation is incident to a beneficial interest in property, the obligation cannot be avoided and the interest retained. If an infant lessee remains in possession of property demised to him, and pays rent after he attains his majority, he cannot afterwards repudiate the lease. He becomes chargeable, moreover, with all the arrears incurred during his minority, for, though at full age he might have departed from the bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made (*h*). So an infant who has taken possession of land under a contract of sale, and after coming of age has continued in possession, and exercised acts of ownership, cannot avoid payment of the consideration (*i*).

A person collaterally responsible for an infant cannot avail himself of the infancy of the principal debtor (*k*). It would seem that a person is not liable on a negotiable instrument drawn or indorsed by him as an infant, since by sect. 22 of the Bills of Exchange Act, 1882, capacity to incur liability as a party to a bill is co-extensive with capacity to contract. By the Betting and Loans (Infants) Act, 1892 (*l*), "If any infant who has contracted a loan which is void in law agrees after he comes of age to pay any money which in whole or in part represents, or is agreed to be paid in respect of, any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

Extortionate contracts with expectant heirs (*m*), by creditors

(*h*) *Baylis* v. *Dineley*, 3 M. & S. 477; Bac. Abr. INF. (A.); (K.) 8; *Smith* v. *Low*, 1 Atk. 489; *Ketsey's case*, Cro. Jac. 20; *Kirton* v. *Eliott*, 2 Bulstr. 69.

(*i*) *Henry* v. *Root*, 33 N.Y. 526.

(*k*) *Hartness* v. *Thompson*, 5 John. 160.

(*l*) 55 & 56 Vict. c. 4. As to presumption of knowledge of infancy under sect. 2, see 63 & 64 Vict. c. 51, s. 5.

(*m*) The doctrine extends to young people who are supposed to be well off, and where the money is lent in hope of extorting payment from the father: *Nevill* v. *Snelling*, 15 Ch. D. 679; 49 L.J. Ch. 777. As to reopening transactions with money-lenders, see 63 & 64

who take advantage of the pecuniary necessities of such heirs, will be set aside, and the jurisdiction of the courts is not taken away by 31 & 32 Vict. c. 4, s. 1, by which no purchase (which, by sect. 2, is to include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired), made *bonâ fide* and without fraud or unfair dealing (*n*), of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue (*o*).

Contracts with young persons—Undue influence.—The courts will prevent young persons, subject to undue influence, from entering into imprudent contracts without proper advice, and in respect of which they cannot appreciate the bearings (*p*), and a volunteer or any person with notice taking an assignment of such contract will be liable to have the same set aside (*q*).

Obligation of parents to provide for their children.—The liability for the support of children is *primâ facie* on the father, though by the Married Women's Property Act, 1882 (*r*), a mother, during coverture, who is possessed of separate property, may have this burden cast upon her. But there is no legal obligation apart from the Poor Laws on the parent to support his children or to pay their debts unless he contract to do so (*s*). He is no more liable than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person" (*t*); but by sect. 7 of the Poor Relief Act, 1601 (*u*), the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall

Vict. c. 51, s. 1; *Debtor, In re*, (1903) 1 K.B. 405; 72 L.J. K.B. 382; and *Samuel* v. *Newbold*, (1906) A.C. 461; 75 L.J. Ch. 705, overruling *Wilton* v. *Osborne*, (1901) 2 K.B. 110; 70 L.J. K.B. 507.

(*n*) This means an unconscientious use of the power arising out of the circumstances and conditions of the parties. *Aylesford (Earl)* v. *Morris*, L.R. 8 Ch. 484, 491; 42 L.J. Ch. 146; *Brenchley* v. *Higgins*, 70 L.J. Ch. 788; *Beynon* v. *Cook*, L.R. 10 Ch. 389; *Fry* v. *Lane*, 40 Ch.D. 312; 58 L.J. Ch. 113. See *James* v. *Kerr*, 40 Ch.D. 449; 58 L.J. Ch. 355.

(*o*) *Miller* v. *Cook*, L.R. 10 Eq. 641; L.J. Ch. 11; *Tyler* v. *Yates*, L.R. 6 Ch. 665; 40 L.J. Ch. 768; see, however, *O'Rorke* v. *Bolingbroke*, 2 App.Cas. 814, as to the effect of the statute, *per* Ld. Blackburn; see also *Beynon* v. *Cook*, *supra*; *Slater's Trusts, In re*, 11 Ch.D. 227; 48 L.J. Ch. 473.

(*p*) *Kempson* v. *Ashbee*, L.R. 10 Ch. 15; 44 L.J. Ch. 195; see *Green* v. *Thompson* (1899) 2 Q.B. 1; 68 L.J. Q.B. 719; *Bromley* v. *Smith*, (1909) 2 K.B. 235; 78 L.J. K.B. 745.

(*q*) *Bainbrigge* v. *Browne*, 18 Ch.D. 188; 50 L.J. Ch. 522.

(*r*) 45 & 46 Vict. c. 75, ss. 20, 21.

(*s*) *Cooper* v. *Martin*, 4 East, 84.

(*t*) Ld. Abinger, *Mortimore* v. *Wright*, 6 M. & W. 487; 9 L.J. Ex. 158; see *Ruttinger* v. *Temple*, 33 L.J. Q.B. 1; 4 B. & S. 491; where the child is living with its mother, under an order of the Court of Chancery, see *Bazeley* v. *Forder*, L.R. 3 Q.B. 559; 37 L.J. Q.B. 237.

(*u*) 43 Eliz. c. 2, s. 7.

at their own charges relieve and maintain every such poor person; and by sect. 56 of the Poor Law Act, 1834 (*x*), all parish relief given to the wife, or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (sect. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (sect. 59). A child left to starve, therefore, must apply to the parish, and the parish will compel payment of subsistence money from the parent (*y*). Any local education authority is entitled to recover summarily from parents the cost of medical treatment of their children attending public elementary schools (*z*). Further, a parent shall, if able to do so, contribute to the maintenance of a youthful offender or child sent to or detained in a school certified under Part IV. of the Children Act, 1908 (*a*).

Contracts with executors.—An executor may sell or pledge the assets of the testator (*b*), and may also sell part of the assets at a fixed price to a creditor of the testator to clear the debt (*c*). He has, in fact, absolute control over the property of the testator (*d*), notwithstanding it may be affected with some peculiar equity in his hands; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which his property is legally liable before all other claims. But, if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside (*e*). Thus, if a creditor of the executor buys or receives in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his debt, he is, generally speaking, a party to the breach of trust by the executor, because this sale or pledging is *primâ facie* inconsistent with the duty of an executor (*f*).

If an executor or administrator takes a bond or contract under seal in his representative character, this is an obligation strictly personal to himself, upon which he can recover only in his own right. But, if the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued, and the money when recovered would be assets, they may sue in their representative

(*x*) 4 & 5 Will. 4, c. 76, s. 56.

(*y*) *Shelton* v. *Springett*, 11 C.B. 452; see 45 & 46 Vict. c. 75, ss. 20, 21.

(*z*) 9 Edw. 7, c. 13, s. 1.

(*a*) 8 Edw. 7, c. 67, s. 75.

(*b*) *Scott* v. *Tyler*, 2 Dick. 712. 725.

(*c*) *Hepworth* v. *Heslop*, 6 Hare, 561; 18 L.J. Ch. 352.

(*d*) *Vane* (*Earl*) v. *Rigden*, L.R. 5 Ch. 663; 39 L.J. Ch. 797; *Basset* v. *Nosworthy*, 2 W & T. L.C. 150 (ed. 7); see, however, *Oceanic Steam Nav. Co.* v. *Sutherberry*, 16 Ch.D. 236; 50 L.J. Ch. 308.

(*e*) *Elliot* v. *Merryman*, 2 W. & T. L.C. 896 (ed. 7).

(*f*) *Keane* v. *Robarts*, 4 Madd. 357.

capacity (*g*). Thus, where executors carry on the business of their testator, the money recovered by them upon contracts effected in carrying on the business, will be assets in their hands, and they may therefore sue for it in their representative capacity (*h*), and it makes no difference that the materials supplied under the contract never belonged to the testator (*i*). They may also maintain an action in their representative character upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally, or individually, if the amount when recovered will be assets in their hands. If, by mistake, they pay away the money, or if they sell the goods, of their testator, or carry on his business for the benefit of his personal estate and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity, or in their individual character, not naming themselves executors (*k*). They should, however, upon such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts (*l*). The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And, if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration (*m*).

Interest of executors or administrators.—As the executors unitedly represent the person of the testator, they are all jointly interested in contracts entered into with the deceased, although some of them be infants under the age of seventeen years (*n*), unless they have renounced probate, in which case the right of representation devolves upon the others, just as if the parties making the renunciation had never been appointed executors (*o*).

(*g*) *Heath* v. *Chilton*, 12 M. & W. 632; 13 L.J. Ex. 228.

(*h*) *Moseley* v. *Rendell*, L.R. 6 Q.B. 388; 40 L.J. Q.B. 111; *Abbott* v. *Parfitt*, L.R. 6 Q.B. 346; 40 L.J. Q.B. 115; explaining *Bolingbroke* v. *Kerr*, L.R. 1 Ex. 222; 35 L.J. Ex. 137.

(*i*) *Abbott* v. *Parfitt*, *supra*.

(*k*) *Aspinall* v. *Wake*, 10 Bing. 51; 2 L.J. C.P. 227; *Grissell* v. *Robinson*, 3 Sc. 335; 5 L.J. C.P. 313; *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341.

(*l*) *Clark* v. *Hougham*, 2 B. & C. 155; 1 L.J. (O.S.) K.B. 249. See Ord. XVIII. r. 5, which does not apply to counterclaims: *Macdonald* v. *Carington*, 4 C.P.D. 28; 48 L.J. C.P. 178.

(*m*) *Foster* v. *Bates*, 12 M. & W. 226; 13 L.J. Ex. 88; *Welchman* v. *Sturgis*, 13 Q.B. 552; 18 L.J. Q.B. 211; *Bodger* v. *Arch*, 10 Exch. 333; 24 L.J. Ex. 19.

(*n*) *Foxwist* v. *Tremaine*, 2 Saund. 212.

(*o*) 20 & 21 Vict. c. 77, s. 79.

But two of three co-executors may recover lands of their testator in ejectment on a joint demise by the two (*p*). In contracts which have been entered into with the personal representatives themselves in the course of their administration, all are jointly interested if the contract has been made on behalf of all: but where three out of four executors undertook the management of the testator's concerns, and possessed themselves of his property, and directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth, it was held that the action was well brought by the three who had authorised the sale, and were the actual parties to the contract (*q*).

Liabilities of executors and administrators on their own contracts.—A promise by an executor to pay a debt due from his testator will not make him personally liable *de bonis propriis*, unless there be some new and valid consideration for the promise. He is chargeable only thereon in his representative character to the extent of the assets in his hands, although the promise has been put into writing and signed by him, pursuant to the Statute of Frauds (*r*). But if the executor binds himself by deed, without any fresh consideration, or if he gives a written undertaking or promise to pay the debt, founded on a new and valid consideration, he will then be personally liable *de bonis propriis* upon the contract (*s*).

If an executor signs a promissory note as executor, whereby he promises to pay a sum of money with interest to the promisee, he cannot escape from his liability for the payment of the money to the latter by showing that the amount promised to be paid was a debt due from his testator, or that it was a legacy bequeathed to the promisee, and that he, the executor, has fully administered, &c.: for the giving of such a security by the personal representative to the creditor or legatee imports an agreement for forbearance, and binds him individually, and supersedes the necessity of proving assets (*t*). If executors have effected a policy of insurance to insure the estate against loss, they will be responsible if they allow the policy to drop without

(*p*) *Doe* v. *Wheeler*, 15 M. & W. 623; 16 L.J. Ex. 312.

(*q*) *Brassington* v. *Ault*, 9 Moore, 340; 3 L.J. (O.S.) C.P. 243.

(*r*) *Nelson* v. *Serle*, 4 M. & W. 795; 8 L.J. Ex. 305; 2 Wms. Saund. 137, n. a): *Hamilton* v. *Terry*, 21 L.J. C.P. 132.

(*s*) *Wheeler* v. *Collier*, Cro. Eliz. 406; *Hamilton* v. *Incledon*, 4 Bro. P.C. 4; *Johnson* v. *Whitechott*, 1 Roll. Abr. 24; *Hawes* v. *Smith*, 2 Lev. 122; *Fish* v. *Richardson*, Yelv. 55; *Bradly* v. *Heath*, 3 Sim. 543; *Davis* v. *Reyner*, 2 Lev. 3; 1 Ventr. 120; 2 Wms. Saund. 137, n. (d).

(*t*) *Childs* v. *Monins*, 5 Moore, 282; 2 B. & B. 460; *Barnard* v. *Pumfret*, 5 Myl. & Cr. 63; 10 L.J. Ch. 124; *Ridout* v. *Bristow*, 1 Cr. & J. 231; 9 L.J. (O.S.) Ex. 48.

consulting the parties beneficially interested, or resorting to the court (*u*). If they give orders for the funeral of their deceased testator, or adopt or sanction the acts of those who have given such orders, they will themselves be personally responsible *de bonis propriis* to the parties who have fulfilled the orders (*x*). If the executor continues the trade of the testator, he will of course be personally responsible *de bonis propriis* upon all contracts entered into by him in carrying on such trade, although he receives no part of the profits, and acts strictly as trustee (*y*); and, by the law of England, executors and trustees taking shares in joint-stock companies make themselves personally liable as partners, even though they describe themselves as trustees; and they are deemed to have intended to bind themselves absolutely; for, if it were held that persons entering into contracts with a trustee were really contracting, not with the individual but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate, and the powers of the trustee; and it could not afterwards be dealt with or disposed of until the consequences of the contract were ascertained (*z*). If an executor, after the death of the testator, borrows money, although for the purposes of the estate, he is only liable personally, and the lender cannot prove against the estate (*a*). But, when there is a promise by an executor, founded upon a previous contract made by the testator, the executor may be sued in his representative character so as to charge the assets (*b*). So he may be sued in his representative capacity for money paid to his use, but only when the matter arises out of a contract with, or something done by, the testator (*c*).

Liability of executors and administrators for the acts of each other.—Each of joint executors acts on behalf of all in disposing of the personal estate, the payment of debts and legacies, and the general administration of the personal estate of the testator (*d*). But one cannot make a new contract to bind the others (*e*). And all executors who have proved the will are required to join in the transfer of public stocks (*f*); and as

(*u*) *Garner* v. *Moore*, 24 L.J. Ch. 687; 3 Dr. 777.

(*x*) *Brice* v. *Wilson*, 3 N. & M. 512; 3 L.J. K.B. 93.

(*y*) *Whitman* v. *Townroe*, 1 M. & S. 412; *Garland, Ex parte*, 10 Ves. 119; see *Moore* v. *M'Glynn*, (1904) 1 Ir.R. 334; *Hodges* v. *Hodges*, (1899) 1 Ir.R. 480.

(*z*) *Lumsden* v. *Buchanan*, 4 Macq. 953; *Muir* v. *City of Glasgow Bank*, 4 App.Cas. 337; *Cuninghame* v. *City of Glasgow Bank*, 4 App.Cas. 607; *Cree* v. *Somervail*, 4 App.Cas. 648; *Gillespie* v. *City of Glasgow Bank*, 4 App.Cas. 632.

(*a*) *Farhall* v. *Farhall*, L.R. 7 Ch. 123; 41 L.J. Ch. 146.

(*b*) *Dowse* v. *Coxe*, 3 Bing. 20; 3 L.J. (O.S.) C.P. 127; *Farhall* v. *Farhall*, *supra*; *Powell* v. *Graham*, 7 Taunt. 581.

(*c*) *Farhall* v. *Farhall*, *supra*.

(*d*) Shep. Touch. 484.

(*e*) *Turner* v. *Hardey*, 9 M. & W. 770; 11 L.J. Ex. 277.

(*f*) 33 & 34 Vict. c. 71, s. 23.

shareholders in public companies they must all join in executing a transfer of shares (*g*). An infant executor is not liable upon contracts made by the personal representatives themselves in the course of their administration (*h*).

Rights of husband upon contracts made with wife during coverture.—By the common law the husband was entitled to the benefit of all contracts executed by the wife, and of all executory contracts made by her without his knowledge but for his benefit (*i*). In the case of all simple contracts made with the wife, except bills of exchange and promissory notes, the husband alone took the benefit, unless there was an express promise made to the wife, and unless the consideration upon which the promise was founded moved from her (*k*); for, if the wife rendered services without any express promise of remuneration having been made to her, the husband alone was entitled to the benefit of the contract, because he was entitled to the fruits of her labour (*l*); and, where the personal skill of the wife did not alone form the consideration for the promise, but materials were provided which were the property of the husband, he alone could enforce the contract (*m*).

In the case of bills and notes made payable to the wife during the coverture, the husband might take the sole benefit (*n*), or he might at his option give his wife an interest therein by joining her with him as a co-plaintiff (*o*). And the law was the same in the case of bonds and other personal contracts under seal entered into during the coverture with the wife separately, or with the husband and wife jointly (*p*). The wife, indeed, might sue alone and recover upon a contract under seal made with her during coverture, if the coverture was not pleaded (*q*). The position of a husband with regard to his wife's contracts has, however, been entirely altered by the Married Women's Property Act, 1882 (*r*). By that Act a married woman is made capable of acquiring, holding, and disposing, by will or otherwise, of any

(*g*) *Barton* v. *N. Staffs. Ry.*, 38 Ch.D. 458; 57 L.J. Ch. 800; *Barton* v. *L. & N. W. Ry.*, 24 Q.B.D. 77; 59 L.J. Q.B. 33.

(*h*) See Williams on Executors, Vol. II., p. 1611 (n.) (ed. 10).

(*i*) *Millard* v. *Harvey*, 34 Beav. 237.

(*k*) *Buckley* v. *Collier*, 1 Salk. 114.

(*l*) *Brashford* v. *Buckingham*, Cro. Jac. 77, 205; *Fountain* v. *Smith*, 2 Sid. 128; Roll. Abr. 32, pl. 12.

(*m*) *Holmes* v. *Wood*, 1 Barn. 75, 249; *Abbot* v. *Blofield*, Cro. Jac. 644; *King* v. *Bassingham*, 8 Mod. 199; *Bidgood* v. *Way*, 2 W. Bl. 1236; *Johnson* v. *Lucas*, 1 E. & B. 659; 22 L.J. Q.B. 174; *Bond* v. *Nurse*, 16 L.J. Q.B. 196; 10 Q.B. 244.

(*n*) *Burrough* v. *Moss*, 10 B. & C. 558; 6 L.J. (O.S.) K.B. 287.

(*o*) *Phillis Kirk* v. *Pluckwell*, 2 M. & S. 393.

(*p*) *Howell* v. *Maine*, cited 2 M. & S. 396; *Ankerstein* v. *Clarke*, 4 T.R. 616; *Arnold* v. *Revoult*, 4 Moore, 66; 1 B. & B. 443; *Hellyer* v. *Grace*, Styles, 9.

(*q*) *Bendix* v. *Wakeman*, 12 M. & W. 97; 13 L.J. Ex. 15; *Guyard* v. *Sutton*, 3 C.B. 153; 15 L.J. C.P. 225; *Dalton* v. *Mid. Ry.*, 13 C.B. 474; 22 L.J. C.P. 177.

(*r*) 45 & 46 Vict. c. 75.

real or personal property as her separate property as if she were a *feme sole* (*s*). She can enter into and render herself liable in respect of and to the extent of her separate property, on any contract, and can sue or be sued in all respects as if she were a *feme sole* (*t*). Her husband need not be joined with her as plaintiff or defendant, or be made a party to any legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action are her separate property, and any damages or costs recovered against her in any such action are payable only out of her separate property (*u*). By the Married Women's Property Act, 1893 (*x*), sub-sects. 3 and 4 of sect. 1 of the Act of 1882 are repealed, and the following provisions substituted: "Every contract hereafter entered into by a married woman otherwise than as agent (1) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (2) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (3) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." The separate estate of a married woman will not be bound when in fact she has entered into a contract as an agent (*y*); and where in fact she contracts by her husband's authority it is immaterial whether or not the other contracting party was aware she was acting as her husband's agent (*z*). If she carries on a trade separately from her husband she may, in respect of her separate property, be made bankrupt as if she were a *feme sole* (*a*). She may effect a policy of insurance on her own life or that of her husband for her separate use (*b*), and she has in her own name against all persons, including her husband, the

(*s*) Sect. 1 (1).

(*t*) See *Whittaker* v. *Kershaw*, 45 Ch.D. 320; 60 L.J. Ch. 9. As to joint contract by her, see *Hoare* v. *Niblett*, (1891) 1 Q.B. 781; 60 L.J. Q.B. 565.

(*u*) Sect. 1 (2).

(*x*) 56 & 57 Vict. c. 63, s. 4. This section abrogates the decisions in *Stogdon* v. *Lee*, (1891) 1 Q. B. 661; 60 L.J. Q.B. 669; *Palliser* v. *Gurney*, 19 Q.B.D. 519; 56 L.J. Q.B. 546; *Beckett* v. *Tasker*, 19 Q.B D. 7; *Shakespear*, *In re*, 30 Ch.D. 169.

(*y*) See 56 & 57 Vict. c. 63, s. 1. For the purposes of this Act there must be a contract entered into by the married woman for the first time after the date of the Act and supported by a fresh consideration to pay the debt: *Wheeler*, *In re*, (1904) 2 Ch. 66; 73 L.J. Ch. 576.

(*z*) *Paquin, Ltd.* v. *Beauclerk*, (1906) A.C. 148; 75 L.J. K.B. 395.

(*a*) 45 & 46 Vict. c. 75, s. 1 (5).

(*b*) Sect. 11. See *Parker's Policies*, *In re*, (1906) 1 Ch. 526; 75 L.J. Ch. 297.

same civil remedies for the protection of her separate property as if she were a *feme sole* (*c*). She may act as executrix or trustee, and sue and be sued in that capacity without her husband (*d*), and her legal personal representative has the same rights and liabilities in respect to her separate estate as she would have if she were living (*e*).

Rights and liabilities of married women. Contracts during coverture.—A married woman is, as we have seen, capable, as if she were a *feme sole*, of entering into and rendering herself liable in respect of and to the extent of her separate property. The qualification is of importance. She cannot render herself personally liable, and she can only bind her separate property which she is not restrained from anticipating (*f*). Since she is not personally liable, she cannot be the subject of a committal order under sect. 5 of the Debtors Act, 1869, as that is limited to debts which a judgment debtor is under a personal obligation to pay (*g*). So, too, a judgment obtained against her on a contract debt is not, if she is not carrying on a trade separately from her husband, an act of bankruptcy (*h*). (If she is carrying on a trade separately from her husband, she is subject to the bankruptcy laws as if she were a *feme sole* (*i*). Where judgment was obtained against a single woman on a bill of exchange, and she committed an act of bankruptcy, but married between the presentation of the petition and the making of the receiving order, it was held that, as she was not carrying on a trade separately from her husband, the receiving order must be discharged (*k*). The judgment may, however, be made the foundation of garnishee proceedings (*l*).

The liability of the married woman being only in respect of her separate property (*m*), it becomes important to consider what is included in the term "separate property." Before any legislative recognition of the separate estate of married women,

(*c*) 45 & 46 Vict. c. 75, s. 12.

(*d*) Sect. 18.

(*e*) Sect. 23. *Surman* v. *Wharton*, (1891) 1 Q.B. 491 ; 60 L.J. Q.B. 233.

(*f*) *Barnett* v. *Howard*, (1900) 2 Q.B. 784 ; 69 L.J. Q.B. 955 ; *Brown* v. *Dimbleby*, (1904) 1 K.B. 28 ; 73 L.J. K.B. 35.

(*g*) *Draycott* v. *Harrison*, 17 Q.B.D. 147 ; *Meager* v. *Pellew*, 14 Q.B.D. 973 ; *Scott* v. *Morley*, 20 Q.B.D. 120 ; 57 L.J. Q.B. 43 ; 32 & 33 Vict. c. 62, s. 5.

(*h*) *Gardiner*, *In re*, 20 Q.B.D. 249 ; 57 L.J. Q.B. 149.

(*i*) 45 & 46 Vict. c. 75, s. 1 (5) ; *Lester*, *Ex parte*, (1893) 2 Q.B. 113; 62 L.J. Q.B. 372 ; *Helsby*, *In re*, 63 L.J. Q.B. 261 ; *Dagnall*, *In re*, (1896) 2 Q.B. 407 ; 65 L.J. Q.B. 666 ; *Worsley*, *In re*, (1901) 1 Q.B. 309 ; 70 L.J. Q.B. 93.

(*k*) *Debtor*, *In re*, (1898) 2 Q.B. 576 ; 67 L.J. Q.B. 820.

(*l*) *Holtby* v. *Hodgson*, 24 Q.B.D. 103 ; 59 L.J. Q.B. 46 ; *Pelton* v. *Harrison*, (No. 2), (1892) 1 Q.B. 118 ; 61 L.J. Q.B. 144 ; *Softlaw* v. *Welch*, (1899) 2 Q.B. 419 ; 68 L.J. Q.B. 940.

(*m*) The form of judgment to be adopted against a married woman is given in *Scott* v. *Morley*, 20 Q.B.D. 120 ; 57 L.J. Q.B. 43 ; and see *Birmingham Excelsior Discount Society* v. *Haywood*, 73 L.J. K.B. 28, as to form in the case of a wife's ante-nuptial debt.

courts of equity, by means of trusts, created and enforced certain rights in favour of married women (*n*). The effect of the Married Women's Property Act, 1882, has been to render all property possessed by a married woman (married after the Act) at the date of her marriage, or acquired by her during coverture, separate estate. A woman married since Jan. 1st, 1883, takes as her separate property all real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage (*o*). A woman married before that date takes as her separate property all real and personal property, her title (*p*) to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue (*q*) after that date, including any wages, earnings, or money, gained or acquired by her (*r*). The separate property of a married woman may, however, be subject to restraint upon anticipation, and if it is so subject, whether it consist of capital or income (*s*), it cannot be made available for the debts of a married woman contracted during coverture (*t*), unless the restraint exists under a settlement or agreement for a settlement of her own property made by herself (*u*), since sect. 19 of the Married Women's Property Act, 1882 (*x*), provides that nothing in the Act shall interfere with or render inoperative any restriction against anticipation attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument (*y*). It seems doubtful whether moneys in the hands of a married woman derived from an income which she cannot anticipate can be taken in execution under a judgment against her (*z*); they certainly cannot be attached while in the hands of her trustees (*a*). The restraint on anticipation of a married woman's separate estate ceases to attach to such income as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled (*b*); but a receiver cannot be appointed of, and judg-

(*n*) *Ashworth* v. *Outram*, 5 Ch.D. 923; 46 L.J. Ch. 687.

(*o*) 45 & 46 Vict. c. 75, s. 2.

(*p*) See *Parsons, In re*, 45 Ch.D. 51; 59 L.J. Ch. 666.

(*q*) See *Reid* v. *Reid*, 31 Ch.D. 402; 55 L.J. Ch. 294; *Whitaker, In re*, 34 Ch.D. 227; 56 L.J. Ch. 251; *Hancock* v. *Hancock*, 38 Ch.D. 78; 57 L.J. Ch. 396.

(*r*) 45 & 46 Vict. c. 75, s. 5. As to damages recovered in an action of tort, see *Beasley* v. *Roney*, (1891) 1 Q.B. 509; 60 L.J. Q.B. 408.

(*s*) See *Grey's Settlements, In re*, 34 Ch.D. 712; 56 L.J. Ch. 511.

(*t*) *Pike* v. *Fitzgibbon*, 17 Ch.D. 454; 50 L.J. Ch. 394.

(*u*) *Bursill* v. *Tanner*, 13 Q.B.D. 691; (*x*) 45 & 46 Vict. c. 75, s. 19.

(*y*) See 7 Edw. 7, c. 18, s. 2, as to settlements of a married woman's separate property.

(*z*) See *Draycott* v. *Harrison*, 17 Q.B.D. 147; and *Ellis* v. *Johnson*, 31 Ch.D. 532; 55 L.J. Ch. 325.

(*a*) *Chapman* v. *Biggs*, 11 Q.B.D. 27.

(*b*) *Hood-Barrs* v. *Heriot*, (1896) A.C. 174; 65 L.J. Q.B. 352.

ment cannot be enforced against, arrears of such income which have accrued due after the date of the judgment (*c*). It has been held that income of property vested in trustees for the separate use of a married woman subject to a restraint against anticipation, although paid into her hands after the determination of the coverture, is not since the Married Women's Property Act, 1893 (*d*), available to satisfy an obligation arising out of a contract entered into by her during coverture (*e*). By sect. 2 of the Married Women's Property Act, 1893 (*f*), the court may order the costs of an action or proceeding instituted (*g*) by a woman, or her next friend, to be paid out of property subject to a restraint upon anticipation, and may enforce such payment by the appointment of a receiver (*h*).

Property over which a married woman has a general power of appointment becomes, upon the execution of the power, liable for her debts as her separate property (*i*). But she cannot be compelled to exercise the power, and until it is exercised the property is not available for her debts (*k*). In the case of bequests to a husband and wife and a third person, the old rule that the husband and wife take one moiety, and the third person the other, still exists, but the wife takes a quarter of the bequest as her separate property (*l*).

By the Married Woman's Property Act, 1870, all moneys earned by a married woman's own exertions and skill are her separate property, and whatever is bought by her with such money becomes also her separate property (*m*).

As to the authority of a married woman to pledge her husband's credit, see *post*, p. 425. A married woman can contract with her husband so as to bind her separate estate (*n*). But he cannot maintain any action against her for money lent to her by him before the marriage (*o*). She may prove as a

(*c*) *Whiteley* v. *Edwards*, (1896) 2 Q.B. 48 ; 65 L.J. Q.B. 457 ; *Lumley, In re*, (1896) 2 Ch. 690 ; 65 L.J. Ch. 837 ; *Bolitho & Co.* v. *Gidley*, (1905) A.C. 98 ; 74 L.J. K.B. 430.

(*d*) 56 & 57 Vict. c. 63, s. 1.

(*e*) *Barnett* v. *Howard*, (1900) 2 Q.B. 784 ; 69 L.J. Q.B. 955 ; *Brown* v. *Dimbleby*, (1904) 1 K.B. 28 ; 73 L.J. K.B. 35.

(*f*) 56 & 57 Vict. c. 63, s. 2.

(*g*) As to the meaning of "proceeding instituted," see *Hood-Barrs* v. *Cathcart*, (1894) 3 Ch. 376 ; 63 L.J. Ch. 793 ; *Crickitt* v. *Crickitt*, (1902) P. 177 ; 71 L.J. P. 65 ; *Gordon* v. *Gordon*, (1904) P. 163 ; 73 L.J. P. 41.

(*h*) *Nunn* v. *Tyson*, 70 L.J. K.B. 854 ; *Drexel* v. *Ellis*, (1905) 1 K.B. 574 ; 74 L.J. K.B. 401 ; *Pawley* v. *Pawley*, (1905) 1 Ch. 593 ; 74 L.J. Ch. 344 ; *Huntley (Marchioness)* v. *Gaskell*, (1905) 2 Ch. 656 ; 75 L.J. Ch. 66.

(*i*) 45 & 46 Vict. c. 75, s. 4.

(*k*) *Gilchrist, Ex parte, Armstrong, In re*, 17 Q.B.D. 521 ; 55 L.J. Q.B. 578.

(*l*) *Jupp, In re*, 39 Ch.D. 148 ; 57 L.J. Ch. 774.

(*m*) *Weldon* v. *De Bathe*, 14 Q.B.D. 339 ; 54 L.J. Q.B. 113.

(*n*) *Hewison* v. *Negus*, 16 Beav. 594 ; 22 L.J. Ch. 655 ; *Woodward* v. *Woodward*, 3 De G. J. & S. 672 ; *Butler* v. *Butler*, 16 Q.B.D. 374 ; 55 L.J. Q.B. 55 ; *Hastings (Lady), In re*, 35 Ch. D. 94 ; 56 L.J. Ch. 631.

(*o*) *Butler* v. *Butler*, 14 Q.B.D. 831.

creditor in her husband's bankruptcy for any sums lent by her to him, if all claims of his other creditors have been satisfied (*p*), and if she has lent money to a partnership of which he is a member she may prove in the bankruptcy in competition with the other creditors (*q*). A widow, who is executrix of her late husband, is entitled to retain out of assets coming into her hands the amount of a loan made by her out of her separate estate to her husband for the purpose of his business (*r*). A widow's common-law right of retainer is not affected by the joint operation of sect. 3 of the Married Women's Property Act, 1882 (*s*), and sect. 10 of the Judicature Act, 1875 (*t*), in cases where the husband's estate is insolvent (*u*).

Inability of married women to bind themselves or their husbands by deed.—The husband cannot be sued upon any contract under seal entered into and executed by the wife in his name or on his behalf, unless he has given her a power of attorney under seal to contract for him by deed, or unless the deed is sealed and delivered by her in his name, in his presence, and by his commandment. Neither was the wife herself liable upon the deed by reason of her coverture (*x*). But where work had been performed, or services rendered, or goods supplied for the use of the husband upon the faith of a covenant by the wife for payment or remuneration, the husband was held liable for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence (*y*). Where the marriage has taken place since August 9th, 1870, and before January 1st, 1883, the wife cannot pass the fee simple of real estate descended upon her by an unacknowledged deed (*z*). Under the Married Women's Property Act, 1882, a woman, married after the latter date, has full power of disposition over her property (*a*); and under the Act of 1907 is able, without her husband, to dispose of or to join in disposing

(*p*) 45 & 46 Vict. c. 75, s. 3; *Genese, In re*, 16 Q.B.D. 700; 55 L.J. Q.B. 118; *Clark, In re*, (1898) 2 Q.B. 330; 67 L.J. Q.B. 759; *Cronmire, In re*, (1901) 1 K.B. 480; 70 L.J. K.B. 310.

(*q*) *Taff, In re*, 19 Q.B.D. 88; 56 L.J. Q.B. 440.

(*r*) *Ambler, In re*, (1905) 1 Ch. 697; 74 L.J. Ch. 367.

(*s*) 45 & 46 Vict. c. 75, s. 3.

(*t*) 38 & 39 Vict. c. 77, s. 10.

(*u*) *Leng, In re*, (1895) 1 Ch. 652; 64 L.J. Ch. 468; *May, In re*, 45 Ch.D. 499; 60 L.J. Ch. 34.

(*x*) *Lambert* v. *Atkins*, 2 Campb. 272.

(*y*) *White* v. *Cuyler*, 6 T.R. 176.

(*z*) *Johnson* v. *Johnson*, 35 Ch.D. 345; 56 L.J. Ch. 326.

(*a*) See *Drummond's Contract, In re*, (1891) 1 Ch. 524; 60 L.J. Ch. 258. By 56 & 57 Vict. c. 53, s. 16, a married woman in whom is vested any freehold or copyhold hereditament as a bare trustee may convey or surrender it as if she were a *feme sole*; see *Doewra, In re*, 29 Ch.D. 693; 54 L.J. Ch. 1121; *Brooke's Contract, In re*, (1898) 1 Ch. 647; 67 L.J. Ch. 272, which distinguished *Harkness' Contract, In re*, (1896) 2 Ch. 358; 65 L.J. Ch. 726; *West's Contract, In re*, (1904) 1 Ch. 145; 73 L.J. Ch. 91. A verbal agreement by a wife to convey lands to her husband will not bar the heir-at-law: *Williams* v. *Walker*, 9 Q.B.D. 576.

of real and personal property held by her solely or jointly with any other person as trustee or personal representative as if she were a *feme sole* (*b*).

Authority of wife to sign writings for husband.—The liability of the husband upon simple contracts made or signed by the wife during the coverture depends upon the nature of such contracts, and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears to have expressly or impliedly sanctioned what she has done (*c*). The wife is not the agent of the husband in respect of the management of his estate and business (*d*), unless he has intrusted her with the general management of it, in which case he makes her his general agent for the carrying it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose; and he is consequently responsible for the fulfilment of all contracts that may be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter (*e*). Formerly, bills of exchange or promissory notes drawn, accepted, or indorsed by a married woman in her own name with her husband's authority were held to bind him (*f*); but now that a married woman may contract as if she were a *feme sole*, she would probably herself be held liable, since no person is liable on a bill, as drawee, indorsee or acceptor, who has not signed it as such in his own name (*g*). It has been held that a wife who has the conduct of her husband's business, and who is in the habit of drawing, accepting, and indorsing bills and notes in his name, may draw and indorse by the hand of her daughter (the daughter being in her presence and acting under her immediate direction) without violating the rule *delegatus non potest delegare* (*h*).

Loans of money to wife.—A married woman has in general no implied authority to borrow money and charge the husband with the repayment of it (*i*). But such small amounts as a wife may require upon an emergency for her household expenses,

(*b*) 7 Edw. 7, c. 18, s. 1 (1); and see *Howgate's Contract, In re*, (1902) 1 Ch. 451; 71 L.J. Ch. 279, decided on 56 & 57 Vict. c. 53, s. 16.

(*c*) *M'George* v. *Egan*, 7 Sc. 112.

(*d*) *Meredith* v. *Footner*, 11 M. & W. 202; 12 L.J. Ex. 183.

(*e*) *Petty* v. *Anderson*, 10 Moore, 577; 3 L.J. (O.S.) C.P. 223.

(*f*) *Prestwick* v. *Marshall*, 5 Moo. & P. 513; 7 Bing. 565; *Cotes* v. *Davis*, 1 Campb. 185; *Lindus* v. *Bradwell*, 5 C.B. 583; 17 L.J. C.P. 123.

(*g*) See 45 & 46 Vict. c. 61, ss. 23, 91, *post*, pp. 1242, 1301.

(*h*) *Lord* v. *Hall*, 8 C.B. 631; 19 L.J. C.P. 47.

(*i*) *Knox* v. *Bushell*, 3 C.B. N.S. 334.

medicines, or necessaries, a third party would be justified in lending her (*k*); and a person who has advanced money to the wife for necessaries may be entitled to stand in the place of the person who actually supplied the necessaries (*l*).

Sale of goods to married women.—Every married woman residing with her husband, and having the general management of his house and household affairs, is presumed to be his general agent in all matters connected with the domestic economy of the house and family. She is, therefore, clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband, and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband and the position in society which he allows her to assume (*m*). But a wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live (*n*). This presumption of the wife's authority may be rebutted by proof that the husband had furnished her with ready money to pay for what was necessary, and had forbidden her to pledge his credit (*o*), or that the wife had, during the husband's absence and without his knowledge, placed herself under the protection of a man with whom she was living in adulterous intercourse (*p*). The implied authority, however, to bind the husband, resulting from cohabitation, "may be discharged by the prohibition and countermand of the husband" (*q*). The wife has no implied authority to run into extravagance, and to give orders which are beyond the husband's means; and where she has given such orders there must be reasonable evidence to show that she has made the contract with the knowledge and assent of the husband (*r*). If a tradesman finds a wife giving extravagant orders, unsuited to the

(*k*) *Harris* v. *Lee*, 1 P.Wms. 482.

(*l*) *Jenner* v. *Morris*, 29 L.J. Ch. 923; 1 Dr. & Sm. 218; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L.J. Ch. 400; and see *post*, p. 427.

(*m*) *Etherington* v. *Parrot*, 1 Salk. 118; *Waithman* v. *Wakefield*, 1 Campb. 120; *Clifford* v. *Laton*, 3 C. & P. 16; *Jolly* v. *Rees*, 15 C.B. N.S. 628; 33 L.J. C.P. 177.

(*n*) *Phillipson* v. *Hayter*, L.R. 6 C.P. 38; 40 L.J. C.P. 14; *Debenham* v. *Mellon*, 6 App.Cas. 24; 50 L.J. Q.B. 155.

(*o*) *Jolly* v. *Rees*, *supra*; *Debenham* v. *Mellon*, *supra*; *Morel Brothers* v. *Westmorland* (*Earl*), (1903) 1 K.B. 64; 72 L.J. K.B. 66; affirmed in H.L., (1904) A.C. 11; 73 L.J. K.B. 93.

(*p*) *Atkyns* v. *Pearce*, 2 C.B. N.S. 763; 26 L.J. C.P. 252.

(*q*) *Manby* v. *Scott*, 1 Lev. 5; 1 Bac. Abr. 717; 2 Smith's L.C. 446 (11th ed.); see also cases cited, *supra*, note (*o*).

(*r*) *Metcalfe* v. *Shaw*, 3 Campb. 22; *Spreadbury* v. *Chapman*, 8 C. & P. 371; *Rencaux* v. *Teakle*, 8 Exch. 680; 22 L.J. Ex. 241; *Reid* v. *Teakle*, 13 C.B. 627; 22 L.J. C.P. 161.

husband's estate and apparent condition of life, he ought, if he intends to look to the husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it (*s*); and where the latter disapproved of her extravagance as soon as he was aware of it, it was held that he was not responsible for the price of the things supplied to her (*t*). If a married woman obtains silks on credit and pawns them before they are made into clothes, the husband is not bound to pay for them, as they never came to his use (*u*). As a married woman is now able to contract as if she were a *feme sole*, a question will arise whether credit was given to her as her husband's agent or not. If she contracts otherwise than as agent, her separate estate will be liable (*v*); so also if credit is given to her, even though she lives with her husband, and he sees her in possession of some of the goods (*w*). If she assumes to pledge her husband's credit, but has no authority in fact to do so, she will, it seems, probably be liable in an action on the implied warranty of authority (*x*). If the creditor elects to sue the husband and wife jointly for goods supplied to the wife, and recovers against the wife under Order XIV., the evidence showing there was no joint liability but that the wife acted as her husband's agent, the creditor cannot afterwards proceed against the husband as principal (*y*).

Proof of assent of husband to wife's contracts.—When a husband living under the same roof with his wife sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation by any active interference or opposition, making no inquiry as to where the articles come from, and giving no intimation to the tradesmen who supply them of his intention not to pay for them, he will be presumed to assent to the wife's acts and proceedings in accordance with the maxim *qui non prohibet quod prohibere potest, assentire videtur* (*z*). "If the husband," observes Lord Ellenborough, "has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts"

(*s*) *Montague* v. *Benedict*, 3 B. & C. 631; 3 L.J. (O.S.) K.B. 94; 2 Smith's L.C. 476 (11th ed.); *Lane* v. *Ironmonger*, 13 M. & W. 368; 14 L.J. Ex. 35; *Seaton* v. *Benedict*, 5 Bing. 28; 6 L.J. (O.S.) C.P. 208; 2 Smith's L.C. 482 (11th ed.).

(*t*) *Atkins* v. *Curwood*, 7 C. & P. 756.

(*u*) *Etherington* v. *Parrot*, 1 Salk. 118; 2 Ld. Raym. 1006.

(*v*) 56 & 57 Vict. c. 63, s. 1, and *ante*, p. 419; *Paquin, Ltd.* v. *Beauclerk*, (1906) A.C. 148; 75 L.J. K.B. 395.

(*w*) *Bentley* v. *Griffin*, 5 Taunt. 356; *Freestone* v. *Butcher*, 9 C. & P. 643; *Taylor* v. *Brittan*, 1 C. & P. 14 (n.); *Metcalfe* v. *Shaw*, 3 Campb. 22.

(*x*) See *Drew* v. *Nunn*, 4 Q.B.D., *per* Brett, L.J., at p. 666; 48 L.J. Q.B. 591.

(*y*) *Morel Brothers* v. *Westmorland* (*Earl*), (1904) A.C. 11; 73 L.J. K.B. 93.

(*z*) Parke, B., *Morgan* v. *Thomas*, 8 Exch. at pp. 304, 307; 22 L.J. Ex. 152; 2 Instit. 305, a.; *Morton* v. *Withers*, Skin. 348.

his wife's "act, and renders himself answerable. Nor is it any excuse in law, that the wife is unmanageable and disobedient, as he must be supposed to exercise his marital rights and to regulate her conduct;" where, therefore, the goods have not been eloigned, but are in the house with the knowledge and sanction of the husband, it is his duty to compel their redelivery to the tradesman (*a*). The mere circumstance, however, of the husband seeing the wife wearing some of the things ordered by her, and not objecting to them, will be no proof of his assent to the whole of the extravagant order. The fact that the wife has ordered goods of a similar description from the tradesman with the assent of the husband would be evidence that she had the husband's authority to deal with him (*b*). If the tradesman, at the time he deals with and trusts the wife, does not know her to be a married woman, he cannot be said to have given credit to the husband; and, if articles sold to the wife under such circumstances are not necessary for the use of the wife, and have not been used by the wife with the knowledge of the husband, and have not been consumed in the husband's household, or come in any shape or way to his use, and he has not subsequently sanctioned or adopted the wife's contract, he cannot be made responsible for the payment of the price of them (*c*).

Non-liability of husband upon wife's contracts after separation.—Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery have no claim against the husband in respect thereof, whether they had notice of the adultery or not at the time they furnished their goods; for the implied authority of a wife who is not living with her husband to bind her husband by her contracts for necessaries is put an end to by her adultery (*d*). The previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife (*e*). But, if a condonation takes place (*f*), and the husband receives the wife back again, all her original rights are restored; and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery (*g*). And if the husband connives at the adultery of the wife, whether he permits her to remain under his roof or turns her out of

(*a*) *Waithman* v. *Wakefield*, 1 Campb. at p. 121.

(*b*) *Per* Thesiger, L.J., in *Debenham* v. *Mellon*, 5 Q.B.D. 403; see also 6 App.Cas. 24; 50 L.J. Q.B. 155.

(*c*) *Clifford* v. *Laton*, 1 Moo. & M. 102; 3 C. & P. 16.

(*d*) *Cooper* v. *Lloyd*, 6 C.B. N.S. 519, 524.

(*e*) *Govier* v. *Hancock*, 6 T.R. 603; and see *Needham* v. *Bremner*, L.R. 1 C.P. 583; 35 L.J. C.P. 313.

(*f*) *Keats* v. *Keats*, 28 L.J. P. & M. 78; 1 Swa. & Tr. 334.

(*g*) *Harris* v. *Morris*, 4 Esp. 41.

doors, he cannot refuse to maintain her(*h*). If, however, during the husband's absence abroad, the wife places herself and her husband's children under the protection of a man with whom she carries on an adulterous intercourse, without the knowledge of the husband, the husband is not responsible for things furnished to the children by the wife's order, if he has supplied her with money adequate for the maintenance of the children (*i*),

Desertion of husband by wife.—If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere at his expense. If she has returned to a sense of duty after a short absence, the husband would be bound to receive her back; and, if he refused to do so, his liability for necessaries supplied to her would be revived from the time of such refusal. But, if she has deserted her husband for a lengthened period, he is not bound to receive her back or maintain her (*j*). If tradesmen, therefore, part with their goods to a wife living separate from her husband, and then seek to charge the husband with the payment of them, the burden of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter falls upon their shoulders (*k*). "The mischief," observes Abbott, C. J., "of allowing the ordering of goods by a married woman living apart from her husband to be *primâ facie* evidence, so as to charge him for them, would be incalculable" (*l*).

Desertion of wife by husband (*m*).—If the husband separates from his wife, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law gives her a right to support herself upon the credit, and at the expense, of her husband; and any tradesman who at her request supplies her with necessaries suitable to her station in life, in contemplation of law supplies them to the husband himself, and may recover the amount as a debt due to him from the latter (*n*). The wife may also pledge the husband's credit for necessaries for the maintenance of their

(*h*) *Norton* v. *Fazan*, 1 Bos. & P. 227; *Robison* v. *Gosnold*, 6 Mod. 172; *Wilson* v. *Glossop*, 20 Q.B.D. 354; 56 L.J. Q.B. 434.

(*i*) *Atkyns* v. *Pearce*, 2 C.B. N.S. 763; 26 L.J. C.P. 252.

(*j*) *Manby* v. *Scott*, 1 Lev. 5.

(*k*) *Clifford* v. *Laton*, 1 Moo. & M. 102; 3 C. & P. 16; *Edwards* v. *Towels*, 6 Sc. N.R. 641; 12 L.J. C.P. 239.

(*l*) *Mainwaring* v. *Leslie*, 1 Moo. & M. 18.

(*m*) Courts of summary jurisdiction have power in cases of assault, desertion, or persistent cruelty by the husband, to grant the wife a separation order and to make an order on the husband for her maintenance: 58 & 59 Vict. c. 39. As to the meaning of "desertion," see *Piper* v. *Piper*, (1902) P. 198; 71 L.J. P. 100; *Frowd* v. *Frowd*, (1904) P. 177; 73 L.J. P. 60; *Dodd* v. *Dodd*, (1906) P. 189; 75 L.J. P. 49; *Harriman* v. *Harriman*, (1909) P. 123; 78 L.J. P. 62, overruling *Smith* v. *Smith*, (1905) P. 249; 74 L.J. P. 113; and *Failes* v. *Failes*, (1906) P. 326; 75 L.J. P. 95.

(*n*) *Harris* v. *Morris*, 4 Esp. 41; *Bolton* v. *Prentice*, 2 Str. 1214.

children of tender years, living with her against his will, by the order of the court (*o*). A person who advances to a deserted wife money to enable her to supply herself with necessaries has an equitable claim against the husband for so much of the money as is actually applied by the wife in paying for necessaries (*p*); but, if the wife has separate income of her own, adequate to her support, the husband is not then bound to maintain her (*q*); and, if the husband offers to support her, he does not "refuse to maintain her" under sect. 3 of the Vagrancy Act, 1824 (*r*); but her authority to support herself at his expense is not at an end (*s*). The law does not of course sanction a wife in running into extravagance (*t*). Where a wife, being violently turned out of doors and threatened by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of the attorney's charges (*u*); for, whenever the husband by his conduct compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceedings as much as for the necessary food or raiment (*v*), and her solicitor may sue for his necessary costs (*w*). But an indictment against the husband is not necessary for the protection of the wife; and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband (*x*). The husband is not liable for expenses incurred by the wife without his sanction in procuring a deed of separation (*y*), nor for the costs of a suit instituted on her behalf for a judicial separation where proper care has not been taken to ascertain that the suit was rightly instituted (*z*). But a husband has been held liable for preliminary expenses incidental to a suit for restitution of conjugal rights, and for the expenses of obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, and of obtaining

(*o*) *Bazeley* v. *Forder*, L.R. 3 Q.B. 559; 37 L.J. Q.B. 237.

(*p*) *Jenner* v. *Morris*, 3 De G. F. & J. 45; 30 L.J. Ch. 361; *Deare* v. *Soutten*, L.R. 9 Eq. 151.

(*q*) *Liddlow* v. *Wilmot*, 2 Stark. 86; *Johnston* v. *Sumner*, 3 H. & N. 261, 266; 27 L.J. Ex. 341.

(*r*) 5 Geo. 4, c. 83, s. 3; *Flannagan* v. *Bishopwearmouth Overseers*, 8 E. & B. 455; 27 L.J. M.C. 46.

(*s*) *Emery* v. *Emery*, 1 Y. & J. 501.

(*t*) *Emmett* v. *Norton*, 8 C. & P. 506, 510; *Lane* v. *Ironmonger*, 13 M. & W. 368; 14 L.J. Ex. 35.

(*u*) *Turner* v. *Rookes*, 10 Ad. & E. 47, *Shepherd* v. *Mackoul*, 3 Campb. 327.

(*v*) *Brown* v. *Ackroyd*, 5 E. & B. 819, 826; 25 L.J. Q.B. 193.

(*w*) *Ottaway* v. *Hamilton*, 3 C.P.D. 393; 47 L.J. C.P. 725.

(*x*) *Grindell* v. *Godmond*, 5 Ad. & E. 755; 6 L.J. K.B. 31.

(*y*) *Ladd* v. *Lynn*, 2 M. & W. 265; 6 L.J. Ex. 373.

(*z*) *Hooper, In re*, 33 L.J. Ch. 305; 2 De G. J. & S. 91.

professional advice as to the proper mode of dealing with tradespeople who were pressing her for payment for necessaries supplied by them to her since the desertion, and of preventing a threatened distress for rent (*a*), and for the costs necessarily incurred by the wife in filing a petition for a judicial separation, although the petition was not proceeded with, and although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs was not pursued (*b*).

What amounts to expulsion of wife by husband.—If by cruelty the husband renders it morally impossible for the wife to continue to reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force (*c*). If the husband brings home a loose woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him; and so is the existence and continuance of an adulterous intercourse on the part of the husband with another woman (*d*). Whenever the wife has once left her husband under justifiable circumstances, she is not bound to return upon the invitation of the latter; and the husband's liability for necessaries furnished to her cannot be determined by a request on his part that she will again return to his protection (*e*).

Liability of husband for necessaries supplied to wife during separation by mutual consent.—The husband is responsible for necessaries furnished to the wife during the continuance of a separation by mutual consent, unless she has competent provision from him or from funds at her own disposal; if she has such a provision, it lies on the husband to show it (*f*), and on the creditor to prove that it is insufficient (*g*). If the wife leaves her home in consequence of a quarrel with her husband in which they are mutually to blame, and obtains lodging and the necessaries of life at the hands of a third party, the husband will be responsible for the board and lodging and necessaries provided for her (*h*). Where a wife voluntarily left her husband's house, and the person, in whose house she resided apart from her husband until her death many years after, without any communication with her husband, buried her in a suitable manner, it was held that the husband was liable for the expenses

(*a*) *Wilson* v. *Ford*, L.R. 3 Ex. 63; 37 L.J. Ex. 60.

(*b*) *Rice* v. *Shepherd*, 12 C.B. N.S. 332.

(*c*) *Baker* v. *Sampson*, 14 C.B. N.S. 383.

(*d*) *Houliston* v. *Smyth*, 3 Bing. 127; 3 L.J. (O.S.) C.P. 201; *Brown* v. *Ackroyd*, 5 E. & B. 819; 25 L.J. Q.B. 193.

(*e*) *Emery* v. *Emery*, 1 Y. & J. pp. 505, 506.

(*f*) *Dixon* v. *Hurrell*, 8 C. & P. 719.

(*g*) *Johnston* v. *Sumner*, 3 H. & N. 261, 266; 27 L.J. Ex. 341.

(*h*) *Reed* v. *Moore*, 5 C. & P. 200.

of the funeral (*i*). But in all cases of voluntary separation, unaccompanied by cruelty, the husband may put an end to his liability for necessaries by requiring the wife to return to him, and prohibiting parties from continuing to give her credit (*j*); and his liability is in all cases dependent upon the pecuniary means at the wife's disposal (*k*). A mere covenant or agreement to make an allowance for the wife's maintenance will not of itself exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid, and that it is sufficient, or has been accepted by the wife as sufficient, for her suitable support (*l*). Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, although the allowance is inadequate, for the consent to the separation is given upon the terms that she agrees to the adequacy of the allowance (*m*).

Effect of decree for judicial separation.—By the Matrimonial Causes Act, 1857 (*n*), in every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contracting and suing and being sued, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any costs she may incur as plaintiff or defendant; but, where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he is then liable for necessaries supplied for the wife's use (*o*). By sect. 8 of the Matrimonial Causes Act, 1858 (*p*), no discharge, variation, or reversal of any decree for a judicial separation is to prejudice or affect any rights or remedies which any person would otherwise have had in respect of any debts, contracts or acts of the wife incurred, entered into, or done, between the making of the decree and the discharge, variation, or reversal thereof (*q*).

Orders for the protection of the property and earnings of a deserted wife place the wife during the continuance of the order

(*i*) *Bradshaw* v. *Beard*, 12 C.B. N.S. 344; 31 L.J. C.P. 273.

(*j*) *Hindley* v. *Westmeath*, 6 B. & C. 200; 5 L.J. (O.S.) K.B. 115.

(*k*) *Mizen* v. *Pick*, 3 M. & W. 481; 7 L.J. Ex. 153; *Tod* v. *Stokes*, 12 Mod. 245; as to the liability of a lunatic husband, see *post*, p. 436.

(*l*) *Nurse* v. *Craig*, 2 B. & P. N.R. 148; *Burrett* v. *Booty*, 8 Taunt. 343.

(*m*) *Biffin* v. *Bignell*, 7 H. & N. 877; 31 L.J. Ex. 189; *Eastland* v. *Burchell*, 3 Q.B.D. 432; 47 L.J. Q.B. 500.

(*n*) 20 & 21 Vict. c. 85, s. 26.

(*o*) *Hunt* v. *De Blaquiere*, 5 Bing. 550; 7 L.J. (O.S.) C.P. 198; *Wingfield & Blew, In re*, (1904) 2 Ch. 665; 73 L.J. Ch. 797; and the same would hold under a magistrate's separation order, under 58 & 59 Vict. c. 39, ss. 4, 5 (a).

(*p*) 21 & 22 Vict. c. 108, s. 8.

(*q*) See also 20 & 21 Vict. c. 85, ss. 25, 26; *Poole* v. *Soady*, L.R. 3 Ch. 220; 37 L.J. Ch. 246; *Nicholson* v. *Drury Buildings Co.*, 7 Ch.D. 48; 47 L.J. Ch. 192.

and the desertion in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree for a judicial separation (*r*). Such orders are, however, confined to money or property acquired by lawful industry, and do not extend to property acquired by keeping a brothel (*s*).

Imprisonment of the husband for a term of years operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment (*t*). But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife. If the husband has been banished for the term of his natural life, he is civilly dead (*u*). If the husband is an alien enemy, he has no legal existence in this country; and, so long as he remains in that position, his wife, resident here, is looked upon as a *feme sole;* and she is, consequently, liable to be sued upon all contracts entered into by her, just the same as if she were a widow (*v*). But if he is an alien *ami,* his wife is in the same plight as any other married woman.

Death of husband—Rights and liabilities of surviving wife.—The death of the husband did not render the wife responsible upon any contracts made by her during coverture; nor was she responsible upon any promise, made after the death of the husband, to pay for things furnished her in his lifetime, as such a promise was without consideration (*w*). A contract entered into by the wife after the death of her husband, but before it was known, was held not to be binding on her (*x*).

If the wife survives the husband, she is entitled to the benefit of all contracts under seal entered into during the coverture with herself alone, or with her husband and herself jointly (*y*), but she may waive her right to the instrument; and it then becomes the obligation of the husband alone. To a debt due on a joint judgment recovered by herself and husband during the coverture, the wife is also entitled by survivorship (*z*). The surviving wife is entitled also to all promissory notes and bills

(*r*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 6—10.

(*s*) *Mason* v. *Mitchell*, 3 H. & C. 528; 34 L.J. Ex. 68.

(*t*) *Franks, Ex parte*, 1 M. & Sc. 11; *Carroll* v. *Blencow*, 4 Esp. 28.

(*u*) Co. Litt. 133, a; *Portland* (*Countess*) v. *Prodgers*, 2 Vern. 104; *Franks, Ex parte, supra.*

(*v*) *Derry* v. *Mazarin* (*Duchess*), 1 Raym. 147; but see *De Wahl* v. *Braune*, 1 H. & N. 178; 25 L.J. Ex. 343.

(*w*) *Meyer* v. *Haworth*, 8 Ad. & E. 467; 7 L.J. Q.B. 211.

(*x*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Blades* v. *Free*, 9 B. & C. 167; 7 L.J. (O.S.) K.B. 211; but see now 56 & 57 Vict. c. 63, *ante*, p. 419.

(*y*) 1 Roll. Abr. 349 (B.); *Coppin* v. ——, 2 P.Wms. 496.

(*z*) Com. Dig. Bar. et Feme, F. 1; *Oglander* v. *Baston*, 1 Vern. 396.

of exchange made payable to her during the coverture, and to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her (*a*). Where a *feme covert* administratrix received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons payable to her with interest, and the husband died, it was held that the note was a *chose in action* surviving to the wife (*b*). As regards a simple contract, however, made with the husband and wife jointly during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If, in his lifetime, he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot, consequently, in this case, take it by survivorship (*c*). If he joins his wife as a party suing on the contract and dies, she may prosecute the suit to judgment for her own sole use; and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution has been levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use (*d*).

Death of wife—Husband's rights by survivorship.—If, after the death of the wife, the husband becomes tenant by the courtesy of her real estate, the interest in real contracts or covenants annexed to such estate pass to him; but he can maintain no action on covenants annexed to her estate of which he is not tenant by the courtesy (*e*). Where the wife dies without disposing of her separate personalty under the powers given to her by the Married Women's Property Acts, her husband's right to such undisposed-of personalty accrues as though her separate use had never existed (*f*).

Liabilities resulting from reputed marriages.—If parties have lived together as man and wife, and are commonly reputed to be married, this suffices to enable third parties to charge them with the duties and responsibilities that result from such a relationship (*g*); and, if it be proved that they have actually

(*a*) *Nash* v. *Nash*, 2 Mad. 133; *Gaters* v. *Madeley*, 6 M. & W. 423; 9 L.J. Ex. 173; *Fleet* v. *Perrins*, L.R. 4 Q.B. 500; 38 L.J. Q.B. 257.

(*b*) *Richards* v. *Richards*, 2 B. & Ad. 447; 9 L.J. (O.S.) K.B. 319.

(*c*) *Scarpellini* v. *Atcheson*, 7 Q.B. 864; 14 L.J. Q.B. 333.

(*d*) *Sherrington* v. *Yates*, 12 M. & W. 855, 865; *Bond* v. *Simmons*, 3 Atk. 21; *Nanney* v. *Martin*, 1 Ch.C. 27.

(*e*) *Blake* v. *Foster*, 8 T.R. 487.

(*f*) *Lambert's Estate, In re*, 39 Ch.D. 626; 57 L.J. Ch. 927; *Surman* v. *Wharton*, (1891) 1 Q.B. 491; 60 L.J. Q.B. 233.

(*g*) *Mace* v. *Cammell*, Lofft, 782; *Edwards* v. *Farebrother*, 2 Moo. & P. 293; 3 C. & P. 524.

gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved.

"If a man," observed Lord Kenyon, "has permitted a woman to whom he was not married to use his name (*h*), and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstance to be so or not. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family" (*i*). And it matters not whether the man so acting is a married man or a single man. If he lives with a woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liability (*k*). Having once held out the woman as his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious, in order to escape from the difficulties of his position (*l*).

As to the liability of the husband on contracts entered into by his wife before marriage, see *ante*, p. 261.

Contracts with bankrupts.—For the protection of persons having *bonâ fide* dealings with a bankrupt after the act of bankruptcy, but without notice of it, it is enacted by the Bankruptcy Act, 1883, that, subject to the provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and to the avoidance of certain settlements and preferences, nothing in the Act shall invalidate in case of a bankruptcy any payment by the bankrupt to any of his creditors, or any payment or delivery to the bankrupt, or any conveyance or assignment by the bankrupt for valuable consideration, or any contract, dealing, or transaction, by or with the bankrupt for valuable consideration, provided that the two following conditions are complied with: (1) That the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order, and (2) That the person to, by, or with whom such payment, &c., was made,

(*h*) As to liability for necessaries where a man has allowed a woman with whom he cohabits to assume his name, see *Hudson* v. *Brent*, Esp. N.P. 124; *Carr* v. *King*, 12 Mod. 372; and note to *Etherington* v. *Parrot*, 1 Salk. 118 (Evans' ed.).

(*i*) *Watson* v. *Threlkeld*, 2 Esp. 637.

(*k*) *Robinson* v. *Nahon*, 1 Campb. 245.

(*l*) *Ryan* v. *Sams*, 17 L.J. Q.B. 271; 12 Q.B. 460.

has not at that date notice of any available act of bankruptcy committed by the bankrupt before that time (*m*).

Liabilities of trustee in bankruptcy.—If the trustee of a bankrupt permit the bankrupt to carry on his trade for the benefit of the estate, he will be responsible for the payment of the price of goods ordered and used by him in the exercise of such trade (*n*).

Contribution between trustees in bankruptcy.—If, in the course of the administration of the estate, the trustees enter into joint contracts, and incur a joint liability thereon, and one alone is compelled to pay the whole amount due on such contracts, he has a right to an action for contribution against his co-trustee, whether the latter has or has not in his hands any funds from the bankrupt's estate (*o*).

Contracts with drunkards.—A party who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract by the other party who knew him to be in that state. A man who takes an obligation from another so circumstanced is guilty of actual fraud (*p*). But a contract made by a man in a state of drunkenness is voidable only and not void; and, therefore, if the drunken man ratifies it after he becomes sober, it will be binding upon him (*q*). It has been said that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a *complete* state of intoxication, cannot be enforced, as against the drunkard, by a *bonâ fide* holder who received and gave value for it on the credit of the acceptance or indorsement, or signature, in ignorance of the drunkenness (*r*); but this seems very doubtful, and it is clearly otherwise if the party was only partially intoxicated at the time he accepted or indorsed the instrument (*s*).

Contracts with lunatics.—If a party to a contract was, at the

(*m*) 46 & 47 Vict. c. 52, s. 49; as to what are protected transactions, see *Waugh, In re*, 4 Ch.D. 524; 46 L.J. Bankr. 24; *Jay, Ex parte*, 14 Ch.D. 19; *Richdale, Ex parte*, 19 Ch.D. 409; 51 L.J. Ch. 462; *Whitehead, Ex parte*, 14 Q.B.D. 419; 54 L.J. Q.B. 240; *Shears* v. *Goddard*, (1896) 1 Q.B. 406; 65 L.J. Q.B. 344; *Hirth, In re, Trustee, Ex parte*, (1899) 1 Q.B. 612; 68 L.J. Q.B. 287; *Powell* v. *Marshall, Parkes & Co.*, (1899) 1 Q.B. 710; 68 L.J. Q.B. 477; *Dunkley & Sons, In re, Waller, Ex parte*, (1905) 2 K.B. 683; 74 L.J. K.B. 963. As to notice, see *Warren, Ex parte*, 15 Q.B.D. 48; 54 L.J. Q.B. 320; *Revell, Ex parte*, 13 Q.B.D. 727; 54 L.J. Q.B. 89; *Ashton, In re, McGowan, Ex parte*, 8 Morr. 72. As to rescission of a contract induced by the fraud of the bankrupt, see *Eastgate, In re, Ward, Ex parte*, (1905) 1 K.B. 465; 74 L.J. K.B. 321; *Tilley* v. *Bowman*, (1910) 1 K.B. 745; 79 L.J. K.B. 547.

(*n*) *Kinder* v. *Howarth*, 2 Stark. 354. See 46 & 47 Vict. c. 52, s. 64.

(*o*) *Hart* v. *Biggs*, Holt, 245; *Bevan* v. *Whitmore*, 15 C.B. N.S. 433; 19 *ib.* 763. See 46 & 47 Vict. c. 52, s. 84.

(*p*) *Gore* v. *Gibson*, 13 M. & W. 623; 14 L.J. Ex. 152; *Cole* v. *Robins*, Bull. N.P. 172 a; *Pett* v. *Smith*, 3 Campb. 33; *Fenton* v. *Holloway*, 1 Stark. 126; *Hamilton* v. *Grainger*, 5 H. & N. 40.

(*q*) *Matthews* v. *Baxter*, L.R. 8 Ex 132; 42 L.J. Ex. 73.

(*r*) *Sentance* v. *Poole*, 3 C. & P. 1.

(*s*) *Shaw* v. *Thackray*, 1 Sm. & G 537; 17 Jur. 1045.

time, of unsound mind, and any advantage appears to have been taken of his infirmity by the other contracting parties, the contract will be void as having been procured by fraud; but, if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract (*t*). So, a deed entered into by a person of unsound mind will not bind him (*u*), unless it be shown that it was entered into during a lucid interval; and if it be a necessary and beneficial contract, such as a lease of lands at an advantageous rent, the nature of the contract may be *primâ facie* evidence of its having been made during a lucid interval (*x*). But when a person has been found lunatic by inquisition, so long as the inquisition continues in force, the management of the lunatic's estate is in the crown, and deeds by the lunatic are absolutely void (*y*). An action upon a contract cannot be defeated, however, by showing that the defendant had been found by inquisition to be a lunatic at the time he received the benefit of the contract (*z*); for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith (*a*). A party to a contract cannot plead as a ground for avoidance his own insanity at the time he contracted, unless his insanity was at the time known to the other contracting party. The burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract (*b*). Where there is an implied contract in respect of necessaries furnished to a wife the lunacy of the husband is no answer to an action brought against him (*c*). Where the husband whilst of sound mind had given the wife authority to deal with the plaintiff, and she, after he had become insane, ordered goods, and the plaintiff was not aware of the insanity of the husband, it was held that the husband upon his recovery might be sued for the goods (*d*). But the authority of a wife to pledge her husband's

(*t*) *Molton* v. *Camroux*, 4 Exch. 17; 18 L.J. Ex. 358; *Beavan* v. *M'Donnell*, 9 Exch. 309; 23 L.J. Ex. 94; *Brice* v. *Berrington*, 3 Mac. & G. 486; *Manby* v. *Bewicke*, 3 K. & J. 342; *Jenkins* v. *Morris*, 14 Ch.D. 674; 49 L.J. Ch. 392.

(*u*) *Yates* v. *Boen*, 2 Str. 1104; *Thomson* v. *Leech*, 3 Salk. 301; Vin. Abr. (LUNATIC); *Beverley's case*, 4 Co. 123 b.

(*x*) *Wright, Ex parte*, 1 Vern. 155; *Sergeson* v. *Sealey*, 2 Atk. 413; *Faulder* v. *Silk*, 3 Campb. 126; *Creagh* v. *Blood*, 2 Jones & Lat. 509.

(*y*) Lunacy Act, 1890, 53 & 54 Vict. c. 5, ss. 120, 341; *Walker, In re*, (1905) 1 Ch. 160; 74 L.J. Ch. 86.

(*z*) *Brown* v. *Jodrell*, 3 C. & P. 30; M. & M. 105; *Niell* v. *Morley*, 9 Ves. 478; *Dane* v. *Kirkwall*, 8 C. & P. 679; *Bagster* v. *Portsmouth* (*Earl*), 7 D. & R. 614; 5 B. & C. 170.

(*a*) *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L.J. Ch. 296.

(*b*) *Imperial Loan Co.* v. *Stone*, (1892) 1 Q.B. 599; 61 L.J. Q.B. 449.

(*c*) *Read* v. *Legard*, 6 Exch. 636; 20 L.J. Ex. 309; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L.J. Ch. 400.

(*d*) *Drew* v. *Nunn*, 4 Q.B.D. 661; 48 L.J. Q.B. 591.

credit is not greater in the case of a lunatic husband than in the ordinary case of husband and wife; and, therefore, if she has an income adequate to maintain her in her station of life, she cannot pledge the lunatic husband's credit (*e*). A contract by a lunatic is voidable; but if the committee of one so found has been directed to carry out a contract, that direction amounts to a ratification of the contract, and it cannot afterwards be set aside (*f*). There will be an implied contract enforceable against a lunatic or his estate, for monies expended for the necessary protection of person or estate (*g*).

Contracts with aliens.—Every subject of a friendly state resident in this country has the same power of entering into and enforcing personal contracts as the natural-born subjects of the realm (*h*). Formerly an alien could not purchase or hold or enter into or enforce any contract with reference to an estate of freehold or inheritance in lands or tenements, because such an interest in the soil was supposed to require a permanent allegiance (*i*). Now by 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. But nothing in that Act is to qualify an alien to be the owner of a British ship (*k*). If, after a contract has been made with an alien friend, a war breaks out with his country, his right of action on the contract is suspended until the return of peace (*l*). The crown may indeed, if it thinks fit, lay hands on all his debts and *choses in action*, and prevent him from afterwards putting them in suit; but, if it does not think fit so to do, his rights are restored on the return of peace (*m*).

Alien enemies, again, and all British subjects and subjects of neutral nations domiciled in an enemy's territory, or engaged in the service of a hostile power (*n*), are disabled from contracting with British subjects unless they have obtained a licence to trade. So long as hostilities last they are utterly disabled from suing in our courts of justice, although they may be sued if they reside within their jurisdiction. In one case it

(*e*) *Richardson* v. *Du Bois*, L.R. 5 Q.B. 51; 39 L.J. Q.B. 69.

(*f*) *Baldwyn* v. *Smith*, (1900) 1 Ch. 589; 69 L.J. Ch. 336.

(*g*) *Williams* v. *Wentworth*, 5 Beav. 325; *Stedman* v. *Hart*, Kay, 607; 23 L.J. Ch. 908; *Rhodes*, *In re*, 44 Ch.D. 94; 59 L.J. Ch. 298.

(*h*) Com. Dig. ALIEN, c. 5; *Openheimer* v. *Levy*, 2 Str. 1082.

(*i*) *Calvin's case*, 7 Co. 23 a; Co. Litt. 2 b; Roll. Abr. 194.

(*k*) 33 Vict. c. 14, s. 14.

(*l*) *Flindt* v. *Waters*, 15 East, 260; Co. Litt. 129 b; *Boussmaker*, *Ex parte*, 13 Ves. 71.

(*m*) 1 Rolle Abr. ALIEN, B. pl. 3; Bro. DENIZEN, pl. 16, 20.

(*n*) *Roberts* v. *Hardy*, 3 M. & S. 534; *M'Connell* v. *Hector*, 3 B. & P. 113; *O'Mealy* v. *Wilson*, 1 Campb. 482; *The Ocean*, 5 Rob. 90.

was held that a natural-born subject might sue in trust for an alien enemy (*o*); but this decision seems to be at variance with numerous authorities (*p*). If a subject of a state at war with this country resides here with the licence and permission of the crown, he has the same rights and privileges as an alien friend (*q*). But the mere fact of the residence of a party in this country without disturbance or interruption, is not evidence of a licence from the crown, unless it be shown that the government was cognizant of his being here, and sanctioned his stay (*r*). Alien enemies may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes on the return of peace (*s*).

Prisoners of war, remaining in the realm under the protection of the crown, may enter into and enforce personal contracts, unless the crown interferes to prevent them; and they appear to have the same civil rights and privileges as alien friends (*t*).

Disabilities of convicts.—When a person has been convicted of treason or felony, and has been sentenced to death or penal servitude, he is precluded from alienating or charging any property, or making any contract (*u*). A convict may, however, make contracts when he is lawfully at large under any licence, and may sue in respect thereof (*x*). And his disability ceases when he has suffered his punishment or received a pardon (*y*). The administrator of a convict's property, appointed in the manner prescribed by the Forfeiture Act, 1870 (*z*), may let, mortgage, sell, convey, or transfer any part of such property at his discretion (*a*); and all such contracts, *bonâ fide* made by the administrator under the powers of the Act, will be binding on the convict, and on all persons claiming an interest in the property by virtue of the Act (*b*).

Disabilities of outlaws.—A person who has been outlawed is

(*o*) *Daubuz* v. *Morshead*, 6 Taunt. 332.

(*p*) *Brandon* v. *Nesbitt*, 6 T.R. 23; *Bristow* v. *Towers*, *ib.* 35; *Brandon* v. *Curling*, 4 East, 413; *Warin* v. *Scott*, 4 Taunt. 605; *Albrecht* v. *Sussman*, 2 Ves. & B. 323; *Willison* v. *Patteson*, 7 Taunt. 447; *Kensington* v. *Inglis*, 8 East, 288.

(*q*) *Wells* v. *Williams*, 1 Ld. Raym. 282; 1 Salk. 46; *Casseres* v. *Bell*, 8 T.R. 166; Vin. Abr. ALIEN (I.), pl. 8.

(*r*) *Boulton* v. *Dobree*, 2 Campb. 162; *Alciator* v. *Smith*, 3 Campb. 244.

(*s*) *Antoine* v. *Morshead*, 6 Taunt. 237; *Duhammel* v. *Pickering*, 2 Stark. 92.

(*t*) *Sparenburgh* v. *Bannatyne*, 1 B. & P. 163, 170; *Maria* v. *Hall*, 2 B. & P. 236; 1 Taunt. 33, n.

(*u*) Forfeiture Act, 1870, 33 & 34 Vict. c. 23, s. 8. He can pay a debt claimed by a debtor's summons, and if he fails he will commit an act of bankruptcy. *Graves*, *Ex parte*, 19 Ch.D. 1; 51 L.J. Ch. 1.

(*x*) Sect. 30.

(*y*) Sect. 7.

(*z*) Sect. 9.

(*a*) Sect. 12.

(*b*) Sect. 17.

civilly dead, and is incapable of enforcing any contract he may have entered into (*c*), although he is liable to be sued thereon (*d*). An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country (*e*). The incompetency to contract and sue may be removed by means of a reversal of the outlawry.

Parties privileged from actions and suits.—A foreign sovereign cannot be sued in the courts of this country, unless he appears and consents to the action (*f*); and even then he retains his rights as a foreign sovereign (*g*); and the same privilege is possessed by the ambassadors and ministers of foreign reigning sovereigns, their secretaries, and domestic servants (*h*). A writ of summons in an action cannot be issued against, and, therefore, the Statute of Limitations does not commence to run in favour of, the ambassador of a foreign State whilst he is accredited to this country, or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country (*i*).

Mandamus to parties to contracts.—By the Judicature Act, 1873 (*k*), a mandamus may be granted by an interlocutory order of the court (*l*) in all cases in which it shall appear to be just or convenient that such order should be made, either unconditionally or upon terms. It was said by Brett, L.J., that the mandamus here spoken of "is not the prerogative writ, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie" (*m*): that is to say, that it is in the nature of specific performance on a mandatory injunction, and not of a writ issuing where there has been a positive refusal to perform a public duty or negligence amounting to a positive refusal (*n*).

(*c*) Hawk. P.C. lib. 2, c. 49, s. 9.

(*d*) *Macdonald* v. *Ramsey*, Foster, 61.

(*e*) *Kynnaird* v. *Leslie*, L.R. 1 C.P. 389; 35 L.J. C.P. 226.

(*f*) *Brunswick* (*Duke*) v. *Hanover* (*King*), 6 Beav. 1; 13 L.J. Ch. 107; *Wilson* v. *Church*, 13 Ch.D. 1; affirmed, 5 App.Cas. 177; *Twycross* v. *Dreyfus*, 5 Ch.D. 605; 46 L.J. Ch. 510; *Mighell* v. *Johore* (*Sultan*), (1894) 1 Q.B. 149; 63 L.J. Q.B. 593.

(*g*) *Vavasseur* v. *Krupp*, 9 Ch.D. 351.

(*h*) 7 Anne, c. 12, s. 3.

(*i*) *Musurus Bey* v. *Gadban*, (1894) 2 Q.B. 352; 63 L.J. Q.B. 621.

(*k*) 36 & 37 Vict. c. 66, s. 25 (8); cp. R.S.C., O. LIII.

(*l*) The King's Bench Division is the proper Court to issue such a writ: see *Glossop* v. *Heston Local Board*, 12 Ch.D. 102, *per* James, L.J., pp. 115, 116, *per* Brett, L.J., p. 122; 49 L.J. Ch. 89. A Chancery judge, however, has a co-extensive jurisdiction: see *Paris Skating Rink Co., In re*, 6 Ch.D. 731; 46 L.J. Ch. 831.

(*m*) *Glossop* v. *Heston Local Board*, 12 Ch.D. 102, 122; 49 L.J. Q.B. 89.

(*n*) *Per* Kennedy, J., in *Smith* v. *Chorley District Council*, (1897) 1 Q.B. 532, 539; 66 L.J. Q.B. 427.

Mandamus to public companies to make calls.—Where a public board or corporate body is clothed with certain defined statutory powers, and is authorized to enter into contracts, and has the power of creating, by calls on shareholders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors (*o*). But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits (*p*).

Mandamus to local boards, commissioners, trustees, and public officers to discharge pecuniary obligations.—Whenever judgment has been recovered in an action against the clerk of a local board, or of commissioners, or trustees, in respect of something done by such board or commissioners or trustees in execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt (*q*). So, if under authority of an Act of Parliament public officers enter into contracts for public works, employ subordinate salaried officers, and incur expenses, and there is no personal liability to pay, and the ordinary remedy by way of action is not available, the court will, by mandamus, compel them to make a rate and pay such expenses (*r*).

Under sect. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63 (*s*), a local board of health might be compelled by mandamus to make a rate for the purpose of satisfying a judg-

(*o*) *Rex* v. *St. Kath. Dock Co.*, 4 B. & Ad. 360. See *Webb* v. *Herne Bay Commissioners*, L.R. 5 Q.B. 642; 39 L.J. Q.B. 221.

(*p*) *Reg.* v. *Victoria Park Co.*, 1 Q.B. 288, 292.

(*q*) *Reg.* v. *Brancaster Churchwardens*, 7 Ad. & E. 458.

(*r*) *Reg.* v. *Hurstbourne Tarrant Churchwardens*, 27 L.J. M.C. 214; E. B. & E. 246; *Reg.* v. *Norfolk Sewers Commissioners*, 20 L.J. Q.B. 121; 15 L.J. Q.B. 549; *Bogg* v. *Pearse*, 10 C.B. 542; 20 L.J. C.P. 99.

(*s*) This Act is repealed, but there is a similar provision in the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 210.

ment against them within six months after the judgment had been obtained (*t*). The remedy is not, generally speaking, available after the six months have expired (*u*). But a rate may be ordered in aid of a judgment within six months after the judgment was obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is shown not to have been undue (*x*).

Actions in which claim for mandamus maintainable.—Wherever, by charter or Act of Parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may claim a mandamus (*y*). Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of shareholders had been established, in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register, averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for a mandamus (*z*). It is a case also where a prerogative writ would be granted independently of the statute (*a*).

(*t*) *Reg.* v. *Rotherham*, 8 E. & B. 906; 27 L.J. Q.B. 156.

(*u*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 L.J. Q.B. 17; 3 B. & S. 271; in other cases, the plaintiff is not concluded by delay. *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40; *Reg.* v. *Hurstbourne Tarrant Churchwardens*, 27 L.J. M.C. 214; E. B. & E. 246; see *Bush* v. *Martin*, 2 H. & C. 311; 33 L.J. Ex. 17.

(*x*) *Worthington* v. *Hulton*, L.R. 1 Q.B. 63; 35 L.J. Q.B. 51; see *Ringland* v. *Lowndes*, 33 L.J. C.P. 25; 15 C.B. N.S. 173.

(*y*) See *Morgan* v. *Metropolitan Ry.*, L.R. 4 C.P. 97; 38 L.J. C.P. 87.

(*z*) Ld. Campbell, *Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L.J. Q.B. 115; but a company is not bound to register a transfer not in accordance with the statutable form, *Reg.* v. *Gen. Cem. Co.*, 6 E. & B. 415; 25 L.J. Q.B. 342; *Copeland* v. *N. E. Ry.*, 6 E. & B. 277; *Swan* v. *N. Brit. Austr. Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *Ward* v. *S. E. Ry.*, 29 L.J. Q.B. 177; *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40.

(*a*) *Norris* v. *Irish Land Co.*, *supra*; *Rex* v. *Merchant Taylors' Co.*, 2 B. & Ad. 115; 9 L.J. (O.S.) K.B. 146.

Commissioners, or the members of a local board, appointed annually for executing the powers of a local Act of Parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party to be sued for services rendered them within the scope of the Act (*b*). But for the statute, the commissioners who retain or order the services to be rendered by the plaintiff would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund, they are usually expressly exempted from personal liability, and the burden of satisfying and discharging the debts they incur in the execution of the purposes of the Act is thrown upon the fund they are authorized to administer. An action to enforce payment of these debts must be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be resorted to for its satisfaction, and not the private property of the commissioners (*c*). If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment debt, and they neglect to provide themselves with funds, or to make the payment, an action for damages may be brought upon the judgment, and the claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment debt (*d*) as the bringing of a second action for a mandamus. If a second action is brought, it must, in many cases, be commenced within six months of the recovery of the judgment (*e*); and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the *bonâ fide* execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from personal liability (*f*); for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorized proceedings, upon the rates,

(*b*) *Allen* v. *Hayward*, 7 Q.B. 960; 15 L.J. Q.B. 99; *Bush* v. *Martin*, 33 L.J. Exch. 17; 2 H. & C. 311.

(*c*) *Hall* v. *Taylor*, E. B. & E. 107; 27 L.J. Q.B. 311; *Kendall* v. *King*, 17 C.B. 483; 25 L.J. C.P. 132. See Addison on Torts, p. 729 (ed. 7).

(*d*) *Ante*, p. 439.

(*e*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 L.J. Q.B. 17; 3 B. & S. 271, *ante*, p. 441.

(*f*) *Southampton Bridge Co.* v. *Southampton Local Board*, 8 E. & B. 801; 28 L.J. Q.B. 41.

and a mandamus cannot issue to compel them to do what they have no power or authority to do (*g*).

Actions in which claim for mandamus not maintainable.—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body, and there is nothing to exclude the personal liability of the defendants, and to show that a public duty is sought to be enforced, or that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained (*h*). Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners for putting into execution a local improvement Act, became indebted to the plaintiffs for certain salary, due to them for services rendered to the commissioners under the provisions of the Act upon the retainer and request of the commissioners, and also for work and labour, journeys and attendances, as solicitors for the commissioners upon their retainer, &c., and for fees, &c., money paid, &c., and on an account stated, and that these debts were a charge upon any monies and funds which might be in the hands of the commissioners, if the commissioners had funds, and, if not, then upon a rate leviable under the statute; that the plaintiffs were personally interested, &c.; that they demanded and were refused payment, and sustained damage, &c., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt (*i*). Where the performance of the duty is impossible by reason of insufficient funds the court will not issue a writ (*k*).

Declaration in an action for a mandamus.—When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown that it does not constitute a mere private debt, in respect of which the ordinary action of

(*g*) *Duncan* v. *Findlater*, 6 Cl. & F. 908; *Bush* v. *Beavan*, 32 L.J. Ex. 54; 1 H. & C. 100.

(*h*) *Benson* v. *Paull*, 6 E. & B. 273; 25 L.J. Q.B. 274; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L.J. Q.B. 115; *Bush* v. *Beavan*, *supra*; but see *Ward* v. *Lowndes*, 1 E. & E. 940; 28 L.J. Q.B. 265.

(*i*) *Bush* v. *Beavan*, 32 L.J. Ex. 54; 1 H. & C. 100.

(*k*) *Bristol Ry.*, *In re*, 3 Q.B.D. 10; 47 L.J. Q.B. 48.

debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action (*l*).

(*l*) *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40.

CHAPTER VIII.

KINDS OF CONTRACTS.

SECTION I.

EXPRESS CONTRACTS.

With certain exceptions men are free to make such contracts as they may deem to be for their own interest, and the law will ascertain and carry into effect the intention of the parties. This intention is generally expressed either by word of mouth or in writing, and in such cases the contract is called an express contract (*a*). An express contract is proved by an actual agreement; an implied contract by circumstances and the course of dealing between the parties. But whenever a contract is once proved the consequences resulting from the breach of it must be the same whether it be proved by direct or by circumstantial evidence (*b*). Express contracts are, of course, as various as the needs and wishes of mankind, but there are certain well-known and usual contracts which are so frequently made that the forms in which they are generally constructed, and the particular principles which govern the interpretation of them, have become familiar to all men, and have, in our own courts, been the subject of innumerable decisions. Such, for instance, are the contracts for the sale of land or goods, of letting between landlord and tenant, and the letting of chattels; contracts of security between mortgagor and mortgagee, pawner and pawnee; contracts for services, and work and labour, between employer and employed, between master and servant, between principal and agent, and between bailor and bailee or carrier; contracts of indemnity between principal and surety, insurer against perils of the sea or fire and the insured; contracts made

(*a*) Sect. 2, Black. Com. 443.

(*b*) *Marzetti* v. *Williams*, 1 B. & Ad. 415, 423; 9 L.J. (O.S.) K.B. 42; *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131; *Handford* v. *Palmer*, 5 Moore, 74.

by means of usual mercantile instruments; and finally, contracts of association, such as partnership, companies, and marriage. These will be found separately discussed in the different chapters of the Second Book of this work. Contracts may also be of a mixed character, partly expressed in words or writing and partly implied from circumstances. Many contracts, in order to be binding in law, are required to be authenticated by writing and by other formalities, and cannot be implied from circumstances, or be presumed by law; but the law will of itself, in certain cases, imply a contract without regard to the intention of the party.

SECTION II.

IMPLIED CONTRACTS.

Sub-section I.

GENERAL PRINCIPLES.

Implied contracts.—The law implies from men's conduct contracts as binding as those made by express words, and such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. Thus a promise to pay for services rendered or for goods received or money obtained, will be implied against a wrong-doer who never intended to pay, or intended deceptively to avoid payment (*c*). Although a contract may appear on the face of it to bind only one party, yet there are occasions on which the law will imply corresponding obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, the law will there imply a corresponding obligation to do the things necessary for the completion of the contract (*d*). If a man agrees to work and render services which necessitate a great outlay of money, time, and trouble, and he is only to be paid by the measure of

(*c*) *Foster* v. *Stewart*, 3 M. & S. 191; *Lightley* v. *Clouston*, 1 Taunt. 113; *Rumsey* v. *N. E. Ry.*, 32 L.J. C.P. 244; 14 C.B. N.S. 641; *Clark* v. *Gilbert*, 2 Sc. 520, 534; 5 L.J. C.P. 61.

(*d*) *Pordage* v. *Cole*, 1 Wms. Saund. 319, l.

the work he has performed, the contract necessarily implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration (*e*). "The only difference between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same" (*f*).

Implied contracts have sometimes been divided into inferred contracts, implied contracts properly so called, and constructive contracts. A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases the law enforces what it deems to have been the intention of the parties. It not unfrequently happens, however, that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice—that is, of general expediency—and according to what it is presumed their intention would have been, had they had those circumstances in their consideration when they made the contract. In a third class of cases the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities which exist in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all.

(*e*) *Churchward* v. *Reg.*, L.R. 1 Q.B. 195.

(*f*) Parke, J., *Marzetti* v. *Williams*, 1 B. & Ad. 415, 425; 9 L.J. (O.S.) K.B. 42.

Implied covenants.—Although the words of a contract under seal do not in themselves import any express covenant, yet the law, in order to promote good faith, will create, as a necessary result of the contract, certain obligations, which bind the parties as effectually as if they had been expressed in the most explicit terms in the deed itself (*g*). Thus, where, on the sale and transfer of the goodwill of a business, it was stipulated that the transferee should pay to the transferor one-fourth part of the earnings of the business for four successive years, it was held that the law would imply a covenant from the transferee to continue the business for four years, and endeavour to make it productive, if there was reasonable prospect of success (*h*). At common law, if one man granted to another any estate or interest or incorporeal right, the law implied a covenant from the grantor that he would do nothing to avoid such grant; if he granted a watercourse, a right of way, or estovers, there resulted from such grant, by inference of law, a covenant for the quiet enjoyment of the thing granted; and, if the grantor stopped up the watercourse or the road, or cut down the wood out of which the estovers were to be taken, the grantee was entitled to an action of covenant against him for the misfeasance (*i*). By 7 & 8 Vict. c. 76, s. 6, however, which extends to all estates, rights, and interests created between the 1st of January and the 1st of October, 1845, it is enacted that the word "grant" in a deed shall not have the effect of creating any covenant by implication, except in cases where by any Act of Parliament, it is or shall be declared that the word "grant" shall have such effect; and by 8 & 9 Vict. c. 106, s. 4, it is enacted that the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may, by force of any Act of Parliament, imply a covenant.

By the Conveyancing Act, 1881 (*k*), the use of the word "grant" is declared to be unnecessary in order to convey tenements or hereditaments corporeal or incorporeal; and by sect. 7 various covenants, such as "right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," are to be implied in conveyances, mortgages, &c., by persons who convey and are expressed to convey as beneficial owners or as trustee, mortgagee, &c.

(*g*) *Pordage* v. *Cole*, 1 Wms. Saund. 319, h.

(*h*) *McIntyre* v. *Belcher*, 14 C.B. N.S. 654; 32 L.J. C.P. 254; *Ogden's, Ltd.* v. *Nelson*, (1905) A.C. 109; 74 L.J. K.B. 433

(*i*) 1 Saund. 321; Bac. Abr. Covenant, B.

(*k*) 44 & 45 Vict. c. 41, s. 49.

It was formerly held, in the case of leases under seal, that the law would imply from the word "demise," or any equivalent words in the contract creating the lease, a covenant on the part of the lessor that he had a right to make the lease (*l*); but it has been determined that there is no implied covenant on the part of the lessor that he has "good title to demise," but only a covenant that he will put the lessee into possession of the thing demised (*m*), and that the lessee "shall quietly enjoy" during the term (*n*), or in the case of a tenancy from year to year, during the continuance of the lessor's interest (*o*). It seems that where there is an agreement to let which is to operate immediately, a covenant at law either for quiet enjoyment or for title cannot be implied from the agreement to let or from the use of the word "let" in the agreement; but whatever contract or covenant can be implied by the use of that word, an unlimited contract or covenant for quiet enjoyment or for title against acts of persons not claiming under the lessor cannot be implied (*p*). From the words "yielding" or "paying," or any equivalent words amounting to a reservation of rent, there is an implied covenant, on the part of the lessee, to pay the rent so reserved, although the words do not in themselves import any express covenant. In all assignments of leases and existing interests, there is an implied covenant on the part of the assignor that he has himself done nothing, and will do nothing, to prejudice or defeat the estate, title, or interest that he professes to assign (*q*). It has been said, however, that it does not follow "that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants" (*r*).

Implied promises.—An agreement for a lease to commence from a particular day does not amount to an agreement to give the intended lessee possession on that day (*s*); but if there be a

(*l*) *Holder* v. *Taylor*, Hob. 12; Shep. Touch. 165, 167; *Noke's case*, 4 Co. Rep. 80 b; 9 Ves. 330; *Line* v. *Stephenson*, 7 Sc. 69; 7 L.J. C.P. 263.

(*m*) *Coe* v. *Clay*, 5 Bing. 440; 7 L.J. (O.S.) C.P. 162; *Messent* v. *Reynolds*, 3 C.B. 194; 15 L.J. C.P. 226.

(*n*) *Bandy* v. *Cartwright*, 8 Exch. 913; 22 L.J. Ex. 285; *Williams* v. *Burrell*, 1 C.B. 428; 14 L.J. C.P. 98.

(*o*) *Penfold* v. *Abbott*, 32 L.J. Q.B. 67.

(*p*) *Jones* v. *Lavington*, (1903) 1 K.B. 253; 72 L.J. K.B. 98; *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787. The decision in *Budd-Scott* v. *Daniell*, (1902) 2 K.B. 351; 71 L.J. K.B. 706, in the Divisional Court on this point, would seem to be somewhat impaired by the views of the Court of Appeal in *Jones* v. *Lavington*, *supra*.

(*q*) *Seddon* v. *Senate*, 13 East, 63; *Deering* v. *Farrington*, 3 Keb. 304; Freem. 368.

(*r*) *Aspdin* v. *Austin*, 5 Q.B. 683, 684; but see *Emmens* v. *Elderton*, 4 H.L.Cas. 624, 647, 656; 13 C.B. 495; and *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L.J. M.C. 81.

(*s*) *Drury* v. *Macnamara*, 25 L.J. Q.B. 5; 5 E. & B. 612; see also *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 237.

lease or present demise, there is an implied promise from the lessor to put the lessee into possession of the thing demised, and to secure him the free use, possession, and enjoyment of it for the term for which he has agreed to let it, as against all persons claiming through the lessor or by title paramount (*t*). If apartments in the interior of a house are demised by parol, the law implies a promise from the lessor to allow the tenant the use of the door-bell and knocker, the benefit of the skylight on the staircase, the use of the water-closet, and the enjoyment of all such rights as are naturally incident to the subject-matter of the contract, and necessary for the comfortable enjoyment of it (*u*). In the case of an executory agreement for the sale of a lease, the law implies a promise from the vendor to make good his title to the lease which he proposes to sell and assign (*x*); and, when the purchaser has accepted the assignment, the law implies a promise from him to the assignor to pay the rent reserved in such lease, and perform the covenants therein contained (*y*). In a contract of sale of goods, unless the circumstances of the contract are such as to show a different intention, there is—(1) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass; (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (*z*).

The law also implies, from all persons who undertake any duty, office, or trust, a promise to act with diligence, and reasonable care in the execution thereof, and according to orders given and assented to (*a*). A banker who has in his hands sufficient funds of a customer impliedly undertakes to pay a cheque drawn by the latter, if the cheque be presented within banking hours (*b*); and a man who undertakes the office of an executor, and has assets sufficient for the purpose, impliedly promises to pay for a funeral suitable to the station in life

(*t*) *Post*, p. 665.

(*u*) *Underwood* v. *Burrows*, 7 C. & P. 29.

(*x*) *Souter* v. *Drake*, 5 B. & Ad. 992; 3 L.J. K.B. 31; *Hall* v. *Betty*, 5 Sc. N.R. 508; 11 L.J. C.P. 256.

(*y*) *Burnett* v. *Lynch*, 5 B. & C. 589, 602; 4 L.J. (O.S.) K.B. 274.

(*z*) 56 & 57 Vict. c. 71, s. 12.

(*a*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131.

(*b*) *Marzetti* v. *Williams*, 1 B. & Ad. 415; 9 L.J. (O.S.) K.B. 42; *Gray* v. *Johnston*, L.R. 3 H.L. at p. 14; *Rolin* v. *Steward*, 14 C.B. 595; 23 L.J. C.P. 148. As to banker claiming a lien, see *Agra Bank* v. *Hoffmann*, 34 L.J. Ch. 285.

of his testator, furnished by a third person in the absence of the executor, and without his concurrence; and the law implies a request from the executor to the stranger who has undertaken the necessary duty, to do what he has done, although in point of fact he gave no orders and made no promise (*c*). If a man voluntarily takes charge of the goods of another, the law implies a promise from him to take reasonable care of them (*d*). The law also implies a promise from a common innkeeper to secure his guest's goods in his inn, and to take all reasonable care of horses and cattle placed in his stables (*e*); from a common carrier, or cab proprietor, to be answerable for the goods he carries (*f*); from a ferryman, safely to transport things intrusted to him across a river, and deliver them on the opposite bank; from a common farrier, that he will shoe a horse without laming him; from a trainer of horses, that he will exercise reasonable skill in the riding of horses intrusted to him; from any artificer and handicraftsman, that he will exercise his art skilfully, as he ought; and from brokers, agents, solicitors, surgeons, and other professional men, that they will severally, in their respective callings, exercise competent skill and care in the service they undertake to perform, in which if they fail, an action lies to recover damages for the breach of their implied promise (*g*). An agent, however, is not bound to meet consequences which are not contemplated in the contract, and the probability of which is as well known to his principal as to himself (*h*).

When one man engages with another to supply him with a particular thing, to be applied to a certain use, in consideration of a pecuniary payment, he enters into an implied contract that the thing shall be reasonably fit for the purpose for which it is to be used, and shall not contain any defect unfitting it for such purpose which might have been discovered by the exercise of reasonable skill and diligence, or by ordinary enquiry and examination (*i*).

If a husband wrongfully discards his wife, any person may

(*c*) *Rogers* v. *Price*, 3 Y. & J. 28; *Tugwell* v. *Heyman*, 3 Campb. 298; *Corner* v. *Shew*, 3 M. & W. 350; 7 L.J. Ex. 105.

(*d*) *Southcote's case*, 4 Rep. 83 b, 84.

(*e*) *Post*, p. 766.

(*f*) *Post*, p. 1026.

(*g*) *Norris* v. *Staps*, Hob. 211; 1 Roll. Abr. 91, pl. 15; *Best* v. *Yates*, 1 Ventr. 268.

(*h*) *Commonwealth* v. *Portland Cement Co.* v. *Weber, Lohmann & Co.*, (1905) A.C. 66; 74 L.J. P.C. 25.

(*i*) See as to a building to view a public exhibition, *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291; a railway carriage, *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; as to a bridge, *Grote* v. *Chester and Holyhead Ry.*, 2 Ex. 251; as to a staircase in a public exhibition, *Brazier* v. *Polytechnic Institution*, 1 F. & F. 507. With regard to implied conditions as to quality or fitness of goods sold, see 56 & 57 Vict. c. 71, s. 14, and *post*, p. 564.

furnish her with raiment, food, lodging, and the necessaries of life; and the law will imply a promise from the husband to pay for the things so supplied, in the same way as if they had been supplied to himself at his express request (*k*). As a man is bound to support his wife whilst living as being part and parcel of himself, so he is bound by law to bury her when dead; and, if the husband has abandoned the wife and lives in a distant land, and is unable, or, being able, is unwilling, and neglects to bury her, any stranger may undertake the duty, and defray the expenses of a funeral suitable to her rank or fortune; and the law implies a request on the part of the husband to the stranger so to do, as well as a promise to repay the money so laid out, upon which implied promise an action is maintainable against the husband, though the burial was, in point of fact, undertaken, and the money paid, without his knowledge or consent (*l*). In a contract of service involving confidential relations there is an implied promise of fidelity on the part of the servant which is broken when the latter surreptitiously makes lists of his master's customers to use when he has set up a rival business (*m*).

When a servant binds himself to work for some certain period, and the master agrees to pay wages in proportion to the work done, there is an implied obligation on the part of the master to provide work. And, if a person contracts to pay a salary for services to be rendered for a certain time, there is an implied contract on his part to permit those services to be performed (*n*). Generally speaking, every workman who devotes his labour, his talents, and his time to the service of an employer, is entitled to a recompense; and the law implies a promise from the employer, in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered; and the right of action upon such implied promise or undertaking arises as soon as the work has been completed, and the employer is enabled to avail himself of the benefit of it (*o*). But the law raises no implied promise in respect of services rendered against the will of the recipient (*p*), or in respect of mere gratuitous services, such as voluntary assistance in saving property from fire, or securing property

(*k*) *Ante*, p. 428.

(*l*) *Jenkins* v. *Tucker*, 1 H. Bl. 94; *Chapple* v. *Cooper*, 13 M & W. 259; 13 L.J. Ex. 286; *Bradshaw* v. *Beard*, 12 C.B. N.S. 344; 31 L.J. C.P. 273.

(*m*) *Robb* v. *Green*, (1895) 2 Q.B. 315; 64 L.J. Q.B. 593.

(*n*) *Reg.* v. *Welch*, 2 E. & B. 357; 22 L.J. M.C. 145; *Emmens* v. *Elderton*, 4 H.L.Cas. 624; 13 C.B. 495; *Devonald* v. *Rosser*, 75 L.J. K.B. 688; (1906) 2 K.B. 728.

(*o*) *Hughes* v. *Lenny*, 5 M. & W. 183; 9 L.J. Ex. 177.

(*p*) *Stokes* v. *Lewis*, 1 T.R. 20; *British Empire Shipping Co.* v. *Somes*, E. B. & E. 353; 30 L.J. Q.B. 229.

found afloat, or beasts found astray, or voluntary and unsolicited supplies of food and lodging, or voluntary services in the management of the affairs of another; for that which is offered and accepted as a gratuity cannot afterwards be converted into a debt (*q*). The law raises no implied promise of remuneration in favour of a person who professes to render services of a purely honorary character (*r*). Where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, an action is not maintainable upon the statute for the recovery of any remuneration (*s*).

Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case and upon custom and usage (*t*). If a fund is to be collected, and a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand, there is no contract. If he does work on the order of another under such circumstances that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person (*u*). If a man wrongfully decoys away a servant or apprentice against his master's will, and makes use of his services, the law will imply a promise from the wrong-doer to render the master a fair equivalent in respect thereof (*x*). So, if a man takes luggage by an excursion train, knowing that the company do not carry luggage gratuitously for persons travelling by such train, a contract to pay for its carriage may be implied (*y*).

Part execution of special contract.—Where a workman had been induced to enter into a special contract to remove a quantity of rubbish by a fraudulent representation made by the employer, it was held that he might repudiate the contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labour (*z*); and, when a special contract for work and services has been abandoned and put an end to, and the employer has derived some benefit from work done under it, he may be made liable, upon an implied promise, to make a reasonable remuneration in respect thereof (*a*).

(*q*) *Nicholson* v. *Chapman*, 2 H. Bl. 354; *Taylor* v. *Brewer*, 1 M. & S. 290; *Roberts* v. *Smith*, 4 H. & N. 315; 28 L.J. Ex. 164.

(*r*) *Post*, p. 868.

(*s*) *Jones* v. *Carmarthen* (*Mayor*), 8 M. & W. 605; 10 L.J. Ex. 401.

(*t*) *Rigley* v. *Daykin*, 2 Y. & J. 83, 87.

(*u*) *Higgins* v. *Hopkins*, 3 Exch. 163, 166; 18 L.J. Ex. 113; *Earle* v. *Oliver*, 2 Ex. 71, 90.

(*x*) *Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 195.

(*y*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 641; 32 L.J. C.P. 244.

(*z*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199.

(*a*) *Burn* v. *Miller*, 4 Taunt. 745; *Hopkins* v. *Richardson*, 14 L.J. Q.B. 80; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15; *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145.

Implied contracts for sale.—Whenever a purchaser retains goods after a special contract for the sale of them has gone off, or has not been exactly performed by the vendor, the vendor may recover the value of the goods upon a new contract and promise which the law then implies from the retention of the goods (*b*). If goods have been obtained by fraud and deceit, the party defrauded of his goods may, if he thinks fit, waive the tort, and sue upon an implied contract, treating the wrongdoer as a purchaser of the goods (*c*). Where the defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterwards made over to the defendant himself, the Court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a fraud upon the plaintiff (*d*).

Implied contracts of indemnity.—When an act has been done by A., under the express directions of B., which occasions an injury to the rights of third persons; yet, if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with B.'s directions, he is bound to indemnify A. against the consequences (*e*). Thus, where the plaintiff, an auctioneer, had sold cattle at the direction of the defendant which, as it afterwards turned out, belonged to another person, who made the auctioneer responsible, it was held that the plaintiff was entitled to be indemnified by the defendant (*f*). So where the plaintiff, a sheriff who had received from the defendant a *fi. fa.* for execution, executed it on cattle which the defendant pointed out to him as being the debtor's, it was held that an indemnity might be applied (*g*). Where again the plaintiff at the request of the defendant had delivered to him certain goods which belonged to a third party it was held that a promise to indemnify might be applied (*h*).

Foreign judgments.—The law raises an implied contract to pay a sum of money adjudged to be due from one man to another

(*b*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264; *Mavor* v. *Pyne*, 11 Moore, 2; *Colonial Ins. Co.* v. *Adelaide Marine Ins. Co.*, 12 App.Cas. 128; 56 L.J. P.C. 19; and see also 56 & 57 Vict. c. 71, s. 30, *post*.

(*c*) *Biddle* v. *Levy*, 1 Stark. 20.

(*d*) *Hill* v. *Perrott*, 3 Taunt. 274; *Abbotts* v. *Barry*, 2 B. & B. 369; 5 Moore, 98; *Nicol* v. *Hennessey*, 44 W. R. 584.

(*e*) *Toplis* v. *Grane*, 5 Bing. N.C. 636; 9 L.J. C.P. 180.

(*f*) *Adamson* v. *Jarvis*, 4 Bing. 66; 5 L.J. (O.S.) C.P. 68.

(*g*) *Humphrys* v. *Pratt*, 5 Bli. N.S. 154.

(*h*) *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1; *Dugdale* v. *Lovering*, L.R. 10 C.P. 196; 44 L.J. C.P. 197.

by the sentence of a foreign or colonial court (*i*), provided the judgment is final, and a fixed and ascertained sum of money is thereby adjudged to be paid (*k*). But the pendency of an appeal is no bar to the action, although it may afford ground for an application to stay proceedings (*l*). Nor is it any answer to such an action that the judgment is erroneous on the merits or founded on a mistaken notion of English law (*m*); but it may be defeated by showing that the court had no jurisdiction (*n*), as, for instance, that the judgment was pronounced against a person behind his back, who was not subject to its jurisdiction (*o*), or that the judgment was obtained by fraud (*p*), or perhaps that it was given against good faith and natural justice (*q*).

Statutes.—Where a statute gives a right to a sum of money and provides no means of recovering it the law raises an implied contract to pay it, and an action may be maintained for the amount (*r*).

Sub-section II.

Of implied promises in respect of money paid for another.

Implied promise in respect of money paid for another.—Whenever one man has expended and laid out money for the use of another by his authority or at his request, the law implies, from the person on whose account and for whose use the money has been expended, a promise of repayment, in the absence of circumstances showing that the money was advanced as a gift (*a*). If a person who owes a debt to A., by any contrivance causes B. to pay it, an action will lie to recover back the amount, and the machinery by which the mischief was brought about is utterly immaterial (*b*). When several persons together

(*i*) *Williams* v. *Jones*, 13 M. & W. 633; 14 L.J. Ex. 145; *Philpott* v. *Adams*, 7 H. & N. 888; 31 L.J. Ex. 421.

(*k*) *Sadler* v. *Robins*, 1 Campb. 253; *Nouvion* v. *Freeman*, 15 App.Cas. 1; 59 L.J. Ch. 337.

(*l*) *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L.J. Q.B. 81.

(*m*) *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L.J. Ex. 238; *Castrique* v. *Imrie*, L.R. 4 H.L. 414; 39 L.J. C.P. 350; *Godard* v. *Gray*, L.R. 6 Q.B. 139; 40 L.J. Q.B. 62.

(*n*) *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341.

(*o*) *Buchanan* v. *Rucker*, 9 East, 192; *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155; 40 L.J. Q.B. 73; see, however, *Copin* v. *Adamson*, 1 Ex.D. 17; 45 L.J. Ex. 15; *Rousillon* v. *Rousillon*, 14 Ch.D. 351. See *Feyerick* v. *Hubbard*, 71 L.J. K.B. 509.

(*p*) *Bowles* v. *Orr*, 1 Y. & C. Ex. 464; *Bank of Australasia* v. *Nias*, 16 Q.B. 717; 20 L.J. Q.B. 284; even if the foreign court has decided that there was no fraud, *Abouloff* v. *Oppenheimer & Co.*, 10 Q.B.D. 295; 52 L.J. Q.B. 1; *Vadala* v. *Lawes*, 25 Q.B.D. 310.

(*q*) *Simpson* v. *Fogo*, 1 H. & M. 195; 32 L.J. Ch. 249; 2 Smith, L.C. 767 (ed. 10).

(*r*) *Richardson* v. *Willis*, L.R. 8 Ex. 69; 42 L.J. Ex. 68.

(*a*) *Brittain* v. *Lloyd*, 14 M. & W. 762; 15 L.J. Ex. 43; *Barber* v. *Butcher* 8 Q.B. 863; 15 L.J.Q.B. 289; *Alexander* v. *Vane*, 1 M. & W. 511; 5 L.J. Ex. 187.

(*b*) *Cross* v. *Cheshire*, 7 Exch. 43; 21 L.J. Ex. 3; *Driver* v. *Burton*, 17 Q.B. 989; 21 L.J. Q.B. 157.

consent to share a common responsibility, there is in the absence of an express agreement to the contrary, an understood authority from all to each of them to discharge the common burthen and liability; and if any one of them pays the whole amount, or more than his own proportion, the money paid by him above his own proportion is money paid for the use of the others, at their request (*c*). The same rule prevails with regard to all joint contractors, not being partners, who have undertaken a joint liability, and one of whom has paid the whole or more than his own proportion of the common burthen, and has thus relieved his co-contractors from their liability, either wholly or in part (*d*). If a party of friends, for example, meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pays for all, he may maintain an action against the others upon an implied promise to pay their several proportions of the joint liability (*e*); and the same implied promise arises, where four persons jointly retain a solicitor to defend them against a civil or a criminal charge, or to conduct an action or a prosecution on their behalf, and the plaintiff, one of the four, has paid the solicitor's bill (*f*); or where two parties agree to employ an arbitrator, and one of them pays money to take up the award (*g*). But there is no contribution between persons who have engaged to do an unlawful act, and are therefore joint tort-feasors (*h*); nor where money has been paid by one of several joint contractors negligently, and not in discharge of a joint liability (*i*); and it has been held that no such promise is implied, as between under-lessees of separate portions of premises holden under one original lease at an entire rent, where one only has been distrained upon or compelled under a threat of distress to pay the whole of such rent (*k*).

Money paid by mistake.—Where money has been paid by A. to B.'s bankers at the request of B. under forgetfulness or a mistake of facts, A. is entitled to recover back the money (*l*).

Implied request to pay.—The action for money paid is founded

(*c*) *Harbert's case*, 3 Co. 13 a, 15 b.

(*d*) *Burnell* v. *Minot*, 4 Moore, 340; *Prior* v. *Hembrow*, 8 M. & W. 873; 10 L.J. Ex. 371; *Reynolds* v. *Wheeler*, 10 C.B. N.S. 961; 30 L.J. C.P. 350; *Macdonald* v. *Whitfield*, 8 App.Cas. 733; 52 L.J. P.C. 70.

(*e*) *Hussey* v. *Crickitt*, 3 Campb. 168, 173.

(*f*) *Edger* v. *Knapp*, 6 Sc. N.R. 707, 713; *Holmes* v. *Williamson*, 6 M. & S. 158.

(*g*) *Marsack* v. *Webber*, 6 H. & N. 1, 6.

(*h*) *Farebrother* v. *Ansley*, 1 Campb. 343; *Wilson* v. *Milner*, 2 Campb. 452.

(*i*) *Hunter* v. *Hunt*, 1 C.B. 300; 14 L.J. C.P. 113; *Johnson* v. *Wild*, 44 Ch.D. 146; 59 L.J. Ch. 322, *per* Chitty, J.

(*k*) *McIlreath* v. *Margetson*, 4 Doug. 278; see *Johnson* v. *Wild*, 44 Ch.D. 147; 59 L.J. Ch. 322.

(*l*) *Mills* v. *Alderbury Union*, 3 Exch. 590; 18 L.J. Ex. 252; and see *post*, pp. 460–462.

on the notion that the money was paid by the plaintiff for the use of the defendant, at his *request*, and that the defendant in consideration thereof, promised the plaintiff to pay him the amount so expended; for the law raises no implied promise in respect of a voluntary payment, which the party was not required to make on behalf of another (*m*). But the law will, under certain circumstances, imply the request as well as the promise, and so support a meritorious claim (*n*).

It has been held, for example, that a compulsion indirectly emanating from the defendant amounted to a constructive request in the following cases:—where the carriage of the plaintiff was intrusted to the defendant, a coachmaker, to be repaired, and whilst standing on the defendant's premises, was distrained by the landlord for rent due from the defendant, and the plaintiff, in order to redeem his carriage, was obliged to pay the rent (*o*);—where a sub-tenant paid, under a threat of distress, a ground-rent to the original lessor, which ought to have been paid by his own immediate landlord (*p*); also, where a tenant was compelled to pay income-tax and other outgoings, which ought by law to have been paid by the lessor (*q*);—where an executor paid a legacy in full, inadvertently omitting to deduct the legacy duty, which he is required by Act of Parliament to deduct and pay to the crown, and was afterwards compelled to pay such duty, the statute declaring that, in case the executor omits to deduct the duty, such duty shall become a debt due to the crown from both the executor and the legatee (*r*);—where the defendant omitted to furnish money for the payment of shares which he had directed the plaintiff to buy for him, and the plaintiff was obliged to re-sell the shares at a loss, and the action was brought for the money lost (*s*);—where the plaintiff had been obliged by the custom of the Stock Exchange to pay calls on shares bought by him for the defendant, which calls the defendant was bound to pay (*t*);—where the plaintiff, a carrier, by mistake, delivered to the defendant goods consigned to a third party, and the defendant appropriated the goods to his own use, and the carrier was obliged to pay the

(*m*) Lord Kenyon, *Exall* v. *Partridge*, 8 T.R. 308, 310, 613; *Stokes* v. *Lewis*, 1 T.R. 21.

(*n*) *Edmunds* v. *Wallingford*, 14 Q.B.D. 811; 54 L.J. Q.B. 305; *The Orchis*, 15 P.D. 38; 59 L.J. P. 31.

(*o*) *Exall* v. *Partridge*, 8 T.R. 308; *Rodgers* v. *Maw*, 15 M. & W. 444, 448; 10 L.J. Ex. 137.

(*p*) *Sapsford* v. *Fletcher*, 4 T.R. 511.

(*q*) *Baker* v. *Greenhill*, 3 Q.B. 148; 11 L.J. Q.B. 161; *Graham* v. *Tate*, 1 M. & S. 611; *Earle* v. *Maugham*, 14 C.B. N.S. 626.

(*r*) *Hales* v. *Freeman*, 4 Moore, 21; *Foster* v. *Ley*, 2 Sc. 438; 5 L.J. C.P. 17; *Bate* v. *Payne*, 13 Q.B. 900; 18 L.J. Q.B. 273.

(*s*) *Pollock* v. *Stables*, 12 Q.B. 765; 17 L.J. Q.B. 352; *Smith* v. *Lindo*, 5 C.B. N.S. 587; 27 L.J. C.P. 335.

(*t*) *Bayley* v. *Wilkins*, 7 C.B. 886; 18 L.J. C.P. 273.

value of them to the consignor (*u*);—where the defendant obtained possession of goods intrusted to the plaintiff to be sold at a fixed price, upon the terms that he should either re-deliver them to the plaintiff, or pay the price within a limited period, and the defendant refused to do either, and the plaintiff, being threatened with an action, paid the price to the owner, and the action was brought to recover the amount so paid (*x*);—where the plaintiff had entered into a deed of composition with his creditors upon the terms that they should receive ten shillings in the pound, and the defendant refused to sign the deed without receiving security for the payment of the residue of the debt, and the plaintiff privately gave the defendant his promissory note for the remainder of the debt, upon the terms that he should keep such note in his own hands, and the defendant, in breach of his agreement to that effect, negotiated the note, and the plaintiff was compelled to pay the amount thereof to the indorsee (*y*);—where the plaintiff agreed to grant the defendant a lease, and the lease was prepared by the plaintiff's solicitor, and the plaintiff was obliged to pay for the lease by reason of the defendant's refusal so to do, it being shown that, according to the usual course of business in such cases, the lessor's solicitor prepared the lease, and the lessee paid the expense of it (*z*). But the law raises no such implied promise from a mortgagor in favour of the mortgagee's attorney, where the negotiation for a mortgage goes off through the default of the mortgagor (*a*). Where the owner of goods had left them for his own convenience in a place in which they were lawfully seized for the debt of another, it was at one time thought that he would not obtain indemnity (*b*); but it is very doubtful whether this exception to the general rule would now be held to exist (*c*).

The law also raises an implied promise in respect of money paid by the plaintiff for the use of the defendant in the following cases:—where a broker has paid money for his principal in the usual and known course of business, although without a

(*u*) *Brown* v. *Hodgson*, 4 Taunt. 189; see also *Spencer* v. *Parry*, 3 A. & E. 331, 338.

(*x*) *Longchamp* v. *Kenny*, 1 Doug. 137.

(*y*) *Horton* v. *Riley*, 11 M. & W. 492; 13 L.J. Ex. 81; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; 11 L.J. Ex. 5; *Smith* v. *Cuff*, 6 M. & S. 160; *Atkinson* v. *Denby*, 31 L.J. Ex. 362; 7 H. & N. 934.

(*z*) *Grissell* v. *Robinson*, 3 Sc. 329; 5 L.J. C.P. 313; see, as to the cost of preparing a marriage settlement, *Helps* v. *Clayton*, 17 C.B. N.S. 553; 34 L.J. C.P. 1; or of renewal of a lease where there is a covenant for renewal at the costs of the lessee, *Fitzsimmons* v. *Mostyn* (*Lord*), (1904) A.C. 46; 73 L.J. K.B. 72.

(*a*) *Wilkinson* v. *Grant*, 25 L.J. C.P. 233; 18 C.B. 319.

(*b*) *England* v. *Marsden*, L.R. 1 C.P. 529; 35 L.J. C.P. 259, distinguishing *Exall* v. *Partridge*, 8 T.R. 308.

(*c*) *Bishop*, *Ex parte*, 15 Ch.D. 400, 417; 50 L.J. Ch. 18; *Edmunds* v. *Wallingford*, 14 Q.B.D. 811; 54 L.J. Q.B. 305.

direct request from the principal (*d*); where the plaintiff, at the request of the defendant, has become security for him for the payment of money, and the plaintiff, by reason of the neglect of the defendant to pay at the time appointed, is compelled to pay the debt out of his own pocket (*e*); where the plaintiff accepts a bill of exchange drawn on him by the defendant, and the consideration for the acceptance fails, and the plaintiff is obliged to pay the amount of the bill when due (*f*); also where the plaintiff has accepted a bill for money lent by the defendant, and has become insolvent, and the defendant has agreed to a composition, and it has become his duty to indemnify the plaintiff from liability on the bill, and he has neglected so to do, and the plaintiff has been compelled to pay the amount (*g*); also, where the plaintiff accepts a bill of exchange, or makes or endorses a promissory note for the accommodation of the defendant, and without value or consideration, and the plaintiff is obliged to pay the bill or note when it comes to maturity, by reason of the defendant's neglect to provide the necessary funds for the purpose (*h*); also, where the acceptor neglects to pay a bill when due, and the plaintiff, as indorser, is compelled by the holder to pay him (*i*). It is sufficient, if the party paying the money shows that the legal obligation was cast upon him by the default of the defendant, and that the law compelled him to do what he has done; he need not wait for the actual issue of legal process, or abide the result of an action, in order to establish the fact of the compulsion (*k*). But the law raises no implied promise out of a transaction which has been a breach of duty, and will give no assistance towards the recovery of money paid in furtherance of an illegal or immoral purpose (*l*); or which a party has been compelled to pay in consequence of his own neglect (*m*). If a tenant, after he has paid the income-tax, omits to deduct it from the rent, he cannot recover it from the landlord in an action for money paid (*n*). It must be shown

(*d*) *Sentance* v. *Hawley*, 13 C.B. N.S. 458.

(*e*) *Fisher* v. *Fellows*, 5 Esp. 171; Lord Kenyon, *Exall* v. *Partridge*, 8 T.R. 310; *Lewis* v. *Campbell*, 8 C.B. 541; 19 L.J. C.P. 130.

(*f*) *Hooper* v. *Treffry*, 1 Exch. 17; 16 L.J. Ex. 233.

(*g*) *Hawley* v. *Beverley*, 6 Sc. N.R. 837; 6 M. & G. 221.

(*h*) *Bleadon* v. *Charles*, 5 Moo. & P. 14; 9 L.J. (O.S.) C.P. 82; *Reynolds* v. *Doyle*, 2 Sc. N.R. 45; *Driver* v. *Burton*, 17 Q.B. 989; 21 L.J. Q.B. 157. See 45 & 46 Vict. c. 61, s. 28, *post*, p. 1260.

(*i*) *Pownal* v. *Ferrand*, 6 B. & C. 439; 5 L.J. (O.S.) K.B. 176; *Bishop, Ex parte*, 15 Ch.D. 400; see *Andrew* v. *St. Olave's Board of Works*, (1898) 1 Q.B. 775; 67 L.J. Q.B. 592.

(*k*) *Maydew* v. *Forrester*, 5 Taunt. 615; *Austen* v. *Ward*, Ry. & M. 116.

(*l*) *Pitcher* v. *Bailey*, 8 East, 171; *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1.

(*m*) *Capp* v. *Topham*, 6 East, 392; *Pitcher* v. *Bailey*, 8 East, 171.

(*n*) *Cumming* v. *Bedborough*, 15 M. & W. 438.

that money or its equivalent has been actually paid (*o*), and that the defendant was bound to pay what the plaintiff has been compelled to pay on his behalf (*p*).

Sub-section III.

Implied promises in respect of money received for the use of another.

Implied promises in respect of money received for the use of another.—The rules of Equity upon this matter do not appear to be so strict as those of the Common Law (*a*); and even mistakes in law, as upon the doubtful construction of a grant (*b*), will in general though not always (*c*) be rectified (*d*); and the reader must bear this in mind in considering the cases cited in this section. If a man, through some mistake or misapprehension, or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, *in foro conscientiæ*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner (*e*).

But it has been held that, if a party makes a voluntary payment in satisfaction and discharge of some disputed claim, with full knowledge of the facts (*f*), but under ignorance of the law and from a misapprehension of his legal liability, and no fraud, or concealment, or misrepresentation, has been resorted to by the other side to induce the payment, the law will not help the party so paying the money to recover it back (*g*). If an action, for example, has been commenced to enforce a claim put forward by the plaintiff, and the defendant settles the action and pays money in satisfaction and discharge of such claim, and then discovers that the claim was unfounded, and that there was no cause of action, he cannot recover back the money on the

(*o*) *Taylor* v. *Higgins*, 3 East, 169; *Maxwell* v. *Jameson*, 2 B. & Ald. 51; *Moore* v. *Pyrke*, 11 East, 52.

(*p*) *Griffenhoofe* v. *Daubuz*, 25 L.J. Q.B. 237; 5 E. & B. 746.

(*a*) *Daniell* v. *Sinclair*, 6 App.Cas. 181; 50 L.J. P.C. 50.

(*b*) *Beauchamp* (*Earl*) v. *Winn*, L.R. 6 H.L. 223.

(*c*) *Rogers* v. *Ingham*, 3 Ch.D. 351.

(*d*) See *post*, p. 473, as to mistakes in accounts.

(*e*) *Kelly* v. *Solari*, 9 M. & W. 58; 11 L.J. Ex. 10; *Lucas* v. *Worswick*, 1 Moo. & R. 293; *Milnes* v. *Duncan*, 6 B. & C. 671, 677; 5 L.J. (O.S.) 239; *Bell* v. *Gardiner*, 4 M. & Gr. 11; 4 Sc. N.R. 621; *Barber* v. *Brown*, 1 C.B. N.S. 121; 26 L.J. C.P. 41; *Durrant* v. *Ecclesiastical Commissioners*, 6 Q.B.D. 234; 50 L.J. Q.B. 30.

(*f*) See *per* Lord Alverstone, C.J., *Finck* v. *Tranter*, (1905) 1 K.B. 427; 74 L.J. K.B. 345.

(*g*) *Bilbie* v. *Lumley*, 2 East, 469; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Higgs* v. *Scott*, 7 C.B. 63; *Platt* v. *Bromage*, 24 L.J. Ex. 63; *Rogers* v. *Ingham*, *supra*.

ground that it was paid by mistake; for there would be no end to litigation, if that were to be permitted, and disputed transactions so settled were to be opened afresh (*h*). It is otherwise, however, if the party making the claim knows it to be unfounded, and wrongfully makes use of the process of the law for purposes of extortion (*i*). But, where the money has actually been paid under compulsory process of law, in consequence of the non-attendance of a particular witness, or the non-production of a particular document, it cannot be recovered back; for otherwise the rights of parties would never be settled, and verdicts and judgments might be rendered nugatory (*k*). The rule in the absence of fraud applies to a case where the money was paid under a material mistake of fact, and under the compulsion of a police court summons which was afterwards withdrawn (*l*); but it does not apply where there has been an absence of *bona fides* on the part of the defendant; it is, however, applicable to a case where the plaintiff, although he has paid no money to the defendant, has by mistake given him credit for a payment on account which has not in fact been made (*m*). The rule, also, has always been that, if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he cannot recover back the money, as where a man has paid a debt which was barred by the Statute of Limitations, or a debt contracted during infancy (*n*).

It has been held that the law would imply a promise from the defendant to pay to the plaintiff money received under the following circumstances: where silver was sold in bars at a price to be calculated according to the number of ounces of pure silver contained in each bar, to be determined by an assay of the metal, and a mistake was made by the assay master, and the plaintiff, in consequence thereof, paid the defendant for a greater quantity of silver than each bar was found subsequently to contain, and the action was brought to recover the amount of such overpayment (*o*); where the plaintiff had paid rent to the defendant, and it afterwards appeared that the defendant had no right to receive such rent, and the action was

(*h*) *Marriott* v. *Hampton*, 7 T.R. 269; *Goodman* v. *Sayers*, 2 J. & W. 263; *Hamlet* v. *Richardson*, 2 Moo. & Sc. 811; 9 Bing. 644.

(*i*) *Cadaval* (*Duke de*) v. *Collins*, 4 Ad. & E. 858; 5 L.J. K.B. 171.

(*k*) *Marriott* v. *Hampton*, 7 T.R. 269; *Wilson* v. *Ray*, 10 Ad. & E. 82; 8 L.J. Q.B. 224; *Caird* v. *Moss*, 33 Ch.D. 22; 55 L.J. Ch. 854.

(*l*) *Moore* v. *Fulham Vestry*, (1895) 1 Q.B. 399; 64 L.J. Q.B. 226.

(*m*) *Ward* v. *Wallis*, (1900) 1 Q.B. 675; 69 L.J. Q.B. 423.

(*n*) *Bize* v. *Dickason*, 1 T.R. 286.

(*o*) *Cox* v. *Prentice*, 3 M. & S. 349, 350; *Newall* v. *Tomlinson*, L.R. 6 C.P. 405.

brought to recover it back, the title to the land not coming into question, and not being sought to be tried in such action (*p*); where money was paid by the plaintiff to the defendant for the purchase of a leasehold estate, and it afterwards appeared that the defendant had no title to the lease (*q*). It is not necessary, however, that money should have been actually received by the defendant to render him liable in this form of action; but the circumstances must be equivalent to a receipt of money (*r*). If two men reckon together, and money is passed in account, and one overpays the other by mistake or false reckoning, the overpayment may be recovered in an action for money had and received (*s*). But the law raises no implied promise upon which an action can be maintained in respect of money had and received, from the mere fact of one man's money having come into the possession of another (*t*). "If I apply to a man for payment of a debt, and some third person pays me, can he recover back the money because he has paid it under some misapprehension?" (*u*). It is necessary in order to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands of another (*x*), and that there should be some privity between them (*y*).

When money paid by mistake cannot be recovered back.—If trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and allow them to draw out the same and spend it as their own, the trustees or agents cannot recover back the money. Neither can they retain other monies in their hands belonging to these same parties by way of indemnity (*z*). The law raises no implied promise in respect of money had and received, where the rights of the

(*p*) *Newsome* v. *Graham*, 10 B. & C. 234; 8 L.J. (O.S.) K.B. 100; *Robinson* v. *Anderton*, 1 Peake, 129; *Moneypenny* v. *Bristowe*, 2 Russ. & Mylne, 117; 1 L.J. Ch. 88; the courts will not suffer a title to land to be tried in an action for money had and received: *Marshall* v. *Hopkins*, 15 East, 313, 314; *Clarance* v. *Marshall*, 2 Cr. & M. 495; 3 L.J. Ex. 142.

(*q*) *Cripps* v. *Reade*, 6 T.R. 606.

(*r*) *Gingell* v. *Purkins*, 4 Exch. 720, 726; 19 L.J. Ex. 129; *Spratt* v. *Hobhouse*, 4 Bing. 173, 179; 5 L.J. (O.S.) C.P. 147.

(*s*) Holt, C.J., *Lamine* v. *Dorrell*, 2 Ld. Raym. 1217; *Townsend* v. *Crowdy*, 8 C.B. N.S. 477; 29 L.J. C.P. 305.

(*t*) *Jones* v. *Carter*, 8 Q.B. 134; 15 L.J. Q.B. 96; *Bluck* v. *Siddaway*, 15 L.J. Q.B. 359; *Robbins* v. *Fennell*, 11 Q.B. 248; 17 L.J. Q.B. 77; *Foster* v. *Green*, 7 H. & N. 881; 31 L.J. Ex. 158.

(*u*) Martin, B., *Aiken* v. *Short*, 1 H. & N. 213; 25 L.J. Ex. 321.

(*x*) *Follett* v. *Hoppe*, 17 L.J. C.P. 76; 5 C.B. 226.

(*y*) *Watson* v. *Russell*, 5 B. & S. 968; 34 L.J. Q.B. 93; *Colonial Bank* v. *Exchange Bank of Nova Scotia*, 11 App. Cas. 84; 55 L.J. P.C. 14; *Holt* v. *Ely*, 1 E. & B. 795.

(*z*) *Skyring* v. *Greenwood*, 4 B. & C. 281, 290; *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29; *Shaw* v. *Dartnall*, 6 B. & C. 56, 65; 5 L.J. (O.S.) K.B. 35; *Shaw* v. *Woodcock*, 7 B. & C. 73, 85; 5 L.J. (O.S.) K.B. 296; *Reg.* v. *Treasury* (*Lords*), 16 Q.B. 357, 362; 20 L.J. Q.B. 305; Gibbs, J., *Brisbane* v. *Dacres*, 5 Taunt. 152; and see *Cave* v. *Mills*, 7 H. & N. 913; 31 L.J. Ex. 265.

receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount (*a*). Nor can money be recovered back which was allowed by mistake on a settlement of accounts, where there were cross demands, and the settlement was made on the basis of adjusting differences between the parties (*b*). Where money has been paid under a mistake of fact, the Statute of Limitations begins to run from the time of such payment, except in cases where, previous to the Judicature Act, 1873, equitable relief only could have been obtained. Where both parties are under the mistake when the payment was made, the cause of action is complete on such payment, and no demand for repayment is necessary (*c*).

Money improperly received and wrongfully detained.—If one man has obtained money from another through the medium of extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party (*d*). It has been held, that the defendant is indebted to the plaintiff in respect of "money had and received by the defendant for the use of the plaintiff," in the following cases: where a man, having a claim or lien to a certain amount on goods in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods, is obliged to satisfy and discharge the extortionate demand (*e*); where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignee, in order to get possession of the goods, pays the extortionate demand (*f*); where a married man, pretending to be single, marries a lady, and, under colour of such pretended marriage, gets possession of her estates, and receives the rents (*g*); where one man takes and wrongfully pledges (*h*), or sells, the goods of another, and receives the price (*i*); or claims or receives rents or money under a false or pretended

(*a*) *Watson* v. *Moore*, 33 L.T. O.S. 121; *Shand* v. *Grant*, 15 C.B. N.S. 324; *Holland* v. *Russell*, 32 L.J. Q.B. 297; *Edwards, Ex parte*, 13 Q.B.D. 747.

(*b*) *Lee* v. *Merrett*, 8 Q.B. 820; 15 L.J. Q.B. 289.

(*c*) *Baker* v. *Courage & Co.*, (1910) 1 K.B. 56; 79 L.J. K.B. 313.

(*d*) *Neate* v. *Harding*, 6 Exch. 349; 20 L.J. Ex. 250; *Chowne* v. *Baylis*, 31 L.J. Ch. 757; 31 Beav. 351.

(*e*) *Astley* v. *Reynolds*, 2 Str. 915; *Shaw* v. *Woodcock*, 7 B. & C. 73; 5 L.J. (O.S.) K.B. 296.

(*f*) *Ashmole* v. *Wainwright*, 2 Q.B. 837; 11 L.J. Q.B. 79; *Kent* v. *G. W. Ry.*, 3 C.B. 714; 16 L.J. C.P. 72; *Parker* v. *Bristol & Exeter Ry.*, 6 Exch. 702; *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S. 137; 33 L.J. C.P. 197; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*g*) *Hasser* v. *Wallis*, Salk. 28.

(*h*) *Allanson* v. *Atkinson*, 1 M. & S. 583.

(*i*) *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Edwards* v. *Scarsbrook*, 3 B. & S. 280; 32 L.J. Q.B. 45.

authority (*k*), or under the coercion of threatened penal proceedings (*l*); or wrongfully usurps the office of another, and receives the fees annexed thereto (*m*); or receives a masquerade ticket to be sold or re-delivered, and refuses to re-deliver it, the presumption being in such a case that he has sold it and received the money (*n*).

The action upon such implied promise lies also against an agent who wrongfully demands and receives money in the name and on behalf of his principal, although he may have paid the money over to the latter (*o*); or a principal who has obtained money through the medium of a fraud committed by his agent (*p*); or a solicitor who wrongfully exacts money, either on his own account or on behalf of his client, as the price of the liberation of deeds illegally detained by him on behalf of such client (*q*); or who extorts more than the principal and interest due on a mortgage deed, and the costs, under a threat of the exercise of a power of sale (*r*); or a parish clerk who demands and receives on behalf of the rector a greater sum for searches in the parish register than he is entitled to charge (*s*); or a vestry clerk who wrongfully receives and detains, by the direction of the vestry, burial fees which belong to the rector (*t*); or a steward of a manor who exacts exorbitant fees from tenants on their admittance (*u*); or who demands and receives an extravagant charge, as the condition of his producing deeds in his custody, which the party paying the money could not do without, and which the steward ought to have produced on tender of a reasonable compensation (*x*); or a broker in possession of goods under a distress who demands and receives unauthorised and excessive charges (*y*); or a sheriff who exacts a larger fee than the law allows for executing the King's writ (*z*); or who obtains money under the pressure of an illegal arrest (*a*); or under a threat to sell goods seized under a *fi. fa.* which he has

(*k*) *Robson* v. *Eaton*, 1 T.R. 62; *Dupen* v. *Keeling*, 4 C. & P. 102.

(*l*) *Unwin* v. *Leaper*, 1 M. & Gr. 752; 10 L.J. C.P. 41.

(*m*) *Howard* v. *Wood*, 2 Lev. 245; 2 Jon. 127; *Arris* v. *Stukeley*, 2 Mod. 263; *Hall* v. *Swansea* (*Mayor*), 5 Q.B. 526, 548; 13 L.J. Q.B. 107; *Boyter* v. *Dodsworth*, 6 T.R. 681.

(*n*) *Longchamp* v. *Kenny*, 1 Doug. 137.

(*o*) *Snowdon* v. *Davis*, 1 Taunt. 359; but see *Holland* v. *Russell*, 30 L.J. Q.B. 297, 308; 4 B. & S. 14.

(*p*) *Crockford* v. *Winter*, 1 Campb. 127.

(*q*) *Smith* v. *Sleap*, 12 M. & W. 585, 588; *Wakefield* v. *Newbon*, 6 Q.B. 280; 13 L.J. Q.B. 258; *Oates* v. *Hudson*, 6 Exch. 346; 20 L.J. Ex. 284.

(*r*) *Close* v. *Phipps*, 8 Sc. N.R. 381; 7 M. & G. 586; see *Fraser* v. *Pendlebury*, 31 L.J. C.P. 1.

(*s*) *Steele* v. *Williams*, 8 Exch. 625; 22 L.J. Ex. 225.

(*t*) *Spry* v. *Emperor*, 6 M. & W. 639; 10 L.J. Ex. 50.

(*u*) *Traherne* v. *Gardner*, 5 E. & B. 942; 25 L.J. Q.B. 201.

(*x*) *Spry* v. *Piggott*, cited 2 Esp. 723.

(*y*) *Hills* v. *Street*, 2 Moo. & P. 96, 103; 6 L.J. (O.S.) C.P. 215.

(*z*) *Dew* v. *Parsons*, 2 B. & Ald. 562.

(*a*) *Payne* v. *Chapman*, 4 Ad. & E. 364; *Mesnil* (*Baron de*) v. *Dakin*, L.R. 3 Q.B. 18; 37 L.J. Q.B. 42.

no right to sell (*b*); or a justice of the peace who exacts a fee from a publican as the condition of granting him a licence (*c*); or a toll collector who exacts an illegal or unauthorised toll (*d*); or an overseer of the poor who levies money by seizing and selling goods upon a magistrate's conviction which is afterwards quashed (*e*); or a revenue officer who unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take as the condition of their release (*f*); or a nurse who, upon the death of a person she attends, carries away his money (*g*); or a creditor who has received money as the condition of his signing a bankrupt's certificate (*h*); or who has received money from a bankrupt as the price of his discharge from an arrest, having at the time notice of the bankruptcy (*i*); or who has openly joined other creditors in executing a deed of composition with a debtor consenting to take a composition, but has privately stipulated for and accepted payment of the residue of his debt, and the action is brought to recover back the amount so paid (*k*).

The action upon such implied promise lies, moreover, against all persons who extort money for doing what they are by law bound to do without payment or reward (*l*); and who take and wrongfully detain the money of another (*m*). Upon a statement of claim properly framed for that purpose, the plaintiff may recover interest on the money detained by way of damages for being kept out of the use of the money (*n*).

Money received without consideration.—The law raises also an implied promise to pay back money that has been received without consideration, or upon a consideration that has failed; and an action may be maintained upon such implied promise by the grantee of an annuity to recover back money paid for an annuity which has been set aside, or has become void for want of registry or enrolment (*o*); also to recover money paid to an

(*b*) *Valpy* v. *Manley*, 1 C.B. 594; 14 L.J. C.P. 204.

(*c*) *Morgan* v. *Palmer*, 3 B. & C. 729; 2 L.J. (O.S.) K.B. 145.

(*d*) *Lewis* v. *Hammond*, 2 B. & Ald. 206; *Waterhouse* v. *Keen*, 4 B. & C. 200; 6 D. & R. 257.

(*e*) *Feltham* v. *Terry*, Bull. N.P. 131, a; cited 1 T.R. 387; *Lindon* v. *Hooper*, Cowp. 414, 419.

(*f*) *Irving* v. *Wilson*, 4 T.R. 485; *Atlee* v. *Backhouse*, 3 M. & W. 645; 7 L.J. Ex. 234.

(*g*) *Thomas* v. *Whip*, Bull. N.P. 130, a.

(*h*) *Smith* v. *Bromley*, 2 Doug. 697, in notis; *Sievers* v. *Boswell*, 4 Sc. N.R. 165, 173; 11 L.J. C.P. 14.

(*i*) *Follett* v. *Hoppe*, 17 L.J. C.P. 76; 5 C.B. 226.

(*k*) *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; 11 L.J. Ex. 5; *Smith* v. *Cuff*, 6 M. & S. 160; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Clay* v. *Ray*, 17 C.B. N.S. 188; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50; *Lenzberg's Policy, In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*l*) *Parker* v. *G. W. Ry.*, 7 Sc. N.R. 835, 874; 13 L.J. C.P. 105.

(*m*) *Jones* v. *Barkley*, 2 Doug. 690.

(*n*) *Per* Pollock, C.B., *Sutton* v. *S. E. Ry.*, L.R. 1 Ex. 32, 37; 35 L.J. Ex. 183.

(*o*) *Shove* v. *Webb*, 1 T.R. 732; *Scurfield* v. *Gowland*, 6 East, 241; *Davis* v.

auctioneer as a deposit on the sale of an estate, when the title is defective, and the purchase consequently cannot be completed (*p*); or if the estate does not correspond with the description given of it in a printed particular (*q*); or money paid to a broker by his principal in the belief that an order has been duly executed, where the contract made by the broker is not in compliance with the order (*r*); also to recover money received as a consideration or bonus for a lease by a person who is subsequently found to have no right to grant the lease (*s*); or paid on a conditional sale which has been rescinded, and the goods returned (*t*); or on a purchase of a goodwill, or fixtures, shares or chattels, when the things contracted for, or some of them, have not been transferred or delivered (*u*); or on the purchase of goods sold by the vendor as his own, which the true owner has claimed from the purchaser (*x*); or money paid as a premium upon a policy of insurance, when the risk insured against was not run (*y*); or money paid on a bill of exchange, when there is no consideration for the bill (*z*), or the consideration has failed (*a*); or to the promoters of a scheme, who promise to carry out their plan for the benefit of the subscribers, but afterwards abandon it without their consent (*b*); or money paid to parish officers for the support of a bastard child, when the child dies before the money has been expended (*c*); or conduct money paid to a party upon a subpœna as a witness, where the cause is settled, and the subpœna is not acted upon (*d*); or to the holder of a bill, or bank-note, or other security, who has presented it to the plaintiff to be discounted, and got the money, and the bill turns out to be a forgery (*e*), if the plaintiff has given prompt notice of the forgery to the holder, and has not been guilty of

Bryan, 6 B. & C. 651; 5 L.J. (O.S.) K.B. 237; *Waters* v. *Mansell*, 3 Taunt. 56; *Huggins* v. *Coates*, 5 Q.B. 432; 13 L.J. Q.B. 46; *Turner* v. *Browne*, 3 C.B. 157; 15 L.J. C.P. 223; *Weddell* v. *Lynam*, 2 Esp. 310.

(*p*) *Burrough* v. *Skinner*, 5 Burr. 2639.

(*q*) *Post*, p. 494.

(*r*) *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

(*s*) *Cripps* v. *Reade*, 6 T.R. 606; *Wright* v. *Colls*, 19 L.J. C.P. 60; 8 C.B. 164.

(*t*) *Hurst* v. *Orbell*, 8 Ad. & E. 107; 7 L.J. Q.B. 138; *Street* v. *Blay*, 2 B. & Ad. 456, 462.

(*u*) *Anon.*, 1 Str. 407; *Wright* v. *Newton*, 2 Cr. M. & R. 127; *Wilkinson* v. *Lloyd* 7 Q.B. 44; *Devaux* v. *Conolly*, 8 C.B. 640; 19 L.J. C.P. 71.

(*x*) *Eicholz* v. *Bannister*, 34 L.J. C.P. 105; 17 C.B. N.S. 708.

(*y*) *Stevenson* v. *Snow*, 3 Burr. 1240.

(*z*) *Cobden* v. *Kendrick*, 4 T.R. 432.

(*a*) *Hooper* v. *Treffry*, 1 Exch. 17; 16 L.J. Ex. 233. See 45 & 46 Vict. c. 61, ss. 29, 30, *post*, p. 1255, 1257.

(*b*) *Nockells* v. *Crosby*, 5 D. & R. 751; 3 B. & C. 814, 824; *Kempson* v. *Saunders*, 4 Bing. 5; 5 L.J. (O.S.) C.P. 6.

(*c*) *Chappell* v. *Poles*, 2 M. & W. 867.

(*d*) *Martin* v. *Andrews*, 7 E. & B. 1; 26 L.J. Q.B. 39.

(*e*) *Jones* v. *Ryde*, 5 Taunt. 488; 1 Marsh. 163; *Wilkinson* v. *Johnson*, 3 B. & C. 428; 3 L.J. (O.S.) K.B. 58; *Fuller* v. *Smith*, R. & M. 49; *Gurney* v. *Womersley*, 4 E. & B. 133; 24 L.J. Q.B. 46. See 45 & 46 Vict. c. 61, s. 58 (3), *post*, p. 1280.

laches (*f*). The action also may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received the money (*g*).

Money received under illegal contract.—The law also, so long as an illegal contract continues executory, implies from the person who has received money in furtherance of the execution of the contract, a promise to refund it in favour of the party who paid the money, and who repudiates the illegal transaction (*h*); and an action upon this implied promise may be maintained against a person who has received money upon an illegal insurance or wager, at any time before the happening of the event which is to decide the adventure (*i*); also against a stakeholder with whom money has been deposited to abide the event of an illegal wager, who has not paid over the money to the winner, or who pays it over after he has received notice not to do so from the party who has deposited the money in his hands (*k*); and against parish officers who wrongfully receive money under an illegal contract, although they have quitted office, and handed over the money received to their successors (*l*). If money has been paid or goods delivered for an illegal purpose, the person so paying the money or delivering the goods may recover them back before the illegal purpose has been carried out (*m*); but where the illegal purpose has been carried into effect in a material part, but part still remains unperformed, the money or goods cannot be recovered (*n*). An illegal contract cannot be directly enforced by specific performance, nor can it be indirectly enforced by claiming damages for a breach; but it does not follow that in some cases money cannot be recovered which has been paid over to third persons in pursuance of such contract, or that in some cases moneys may not

(*f*) *Price* v. *Neal*, 3 Burr. 1357; 1 W. Bl. 390; *Smith* v. *Mercer*, 6 Taunt. 76; *Cocks* v. *Masterman*, 9 B. & C. 902; 8 L.J. (O.S.) K.B. 77.

(*g*) *Towers* v. *Barrett*, 1 T.R. 133; *Giles* v. *Edwards*, 7 T.R. 181; *Smith* v. *Mundy*, 29 L.J. Q.B. 172; *Ehrensperger* v. *Anderson*, 3 Exch. 148, 159; 18 L.J. Ex. 132.

(*h*) *Palyart* v. *Leckie*, 6 M. & S. 290; *Busk* v. *Walsh*, 4 Taunt. 290.

(*i*) *Varney* v. *Hickman*, 17 L.J. C.P. 102; 5 C.B. 271; *Clarke* v. *Shee*, Cowp. 197; *Tenant* v. *Eliot*, 1 Bos. & P. 3; *Farmer* v. *Russell*, *ib.* 296; *Tappenden* v. *Randall*, 2 Bos. & P. 467; *Sykes* v. *Beadon*, 11 Ch.D. 170; 48 L.J. Ch. 322.

(*k*) *Hodson* v. *Terrill*, 1 Cr. & M. 797; 2 L.J. Ex. 282; *Robinson* v. *Mearns*, 6 D. & R. 26; *Hastelow* v. *Jackson*, 8 B. & C. 221; 6 L.J. (O.S.) K.B. 318; *Mearing* v. *Hellings*, 14 M. & W. 711; 15 L.J. Ex. 168; *Pickard* v. *Bankes*, 13 East, 20; *Bone* v. *Ekless*, 5 H. & N. 925; 29 L.J. Ex. 438; *Hampden* v. *Walsh*, 1 Q.B.D. 189; 45 L.J. Q.B. 238; *Shoolbred* v. *Roberts*, (1900) 2 Q.B. 497; 69 L.J. Q.B. 800; *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398; *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538

(*l*) *Chappell* v. *Poles*, 2 M. & W. 867.

(*m*) *Taylor* v. *Bowers*, 1 Q.B.D. 291.

(*n*) *Kearley* v. *Thomson*, 24 Q.B.D. 742; 59 L.J. Q.B. 288.

be recovered from the parties to the contract which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them (*o*). The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand *in pari delicto* with the defendant. Where contracts, for example, are prohibited by statute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand *in pari delicto* with the person who has received it, and may, after the forbidden transaction is completed, bring an action upon a promise implied by law from the person who has got the money to refund it (*p*). An action upon such implied promise may be maintained to recover back money privately paid to a creditor to induce him to sign a bankrupt's certificate (*q*), or to recover from a creditor money paid to the indorsee of a bill of exchange, or the assignee of a policy of insurance, originally given to the creditor to induce him to sign a composition deed (*r*), or money paid to a lottery-office keeper for insuring tickets contrary to the statute (*s*).

Money received by agents.—If a broker or commission agent, employed to sell, effects a sale and receives the purchase-money, and refuses to pay over the amount to his employer after deducting his commission, an action for money had and received may be maintained against him (*t*); also against a sharebroker who has received money from his principal to buy shares, and the authority to buy is countermanded, before the purchase has been made (*u*); but not where the commission has been executed before countermand, and the shares have been bought, although they may subsequently turn out to be forgeries (*x*). If an agent refuses to account for goods delivered to him for sale, it shall be presumed after a reasonable time that he has sold them and received the proceeds in money (*y*). A solicitor employed to sell real estate, who, as the agent of the vendor, receives a deposit from the purchaser, is not entitled to retain

(*o*) *Sykes* v. *Beadon*, 11 Ch.D. 170; 48 L.J. Ch. 322.

(*p*) *Williams* v. *Hedley*, 8 East, 378.

(*q*) *Lowry* v. *Bourdieu*, 2 Doug. 472; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Lenzberg's Policy, In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*r*) *Smith* v. *Cuff*, 6 M. & S. 165, 166; *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Smith* v. *Bromley*, 2 Doug. 695.

(*s*) *Jaques* v. *Withy*, 1 H. Bl. 65; 2 Bl. R. 1073; *Clarke* v. *Shee*, Cowp. 197; *Browning* v. *Morris*, *ib.* 790.

(*t*) *Bousfield* v. *Wilson*, 16 M. & W. 185; 16 L.J. Ex. 44.

(*u*) *Fletcher* v. *Marshall*, 15 M. & W. 755, 763.

(*x*) *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*y*) *Hunter* v. *Welsh*, 1 Stark. 224.

it as a stakeholder until the completion of the purchase, but must pay it over to the vendor on demand (*z*).

The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received (*a*). Whenever one man agrees to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money if it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of the other (*b*). If an agent authorised to receive money for his principal employs a third party to receive it, there is, it seems, no implied promise from the latter to pay over the money to the principal, but only to his own immediate employer, the agent. Therefore, if a client in the country employs a country solicitor to recover a debt, and the money is received by the town agent of the country solicitor, such money is not money had and received by him for the use of the client, but for the use of his own employer; and the client consequently cannot recover it from the town agent (*c*). But the town agent may, under certain circumstances, make himself liable to the client in respect of money received by him; and the court in the exercise of its summary jurisdiction over its own officers will often compel a London agent to pay such money to the client, "to enforce justice according to the equity of the individual case" (*d*).

It is a general rule of law that, if money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent, if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal in an action against the agent. But, if the payment of the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over at the time he receives notice of the mistake, or if

(*z*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7.

(*a*) *Ante*, p. 355.

(*b*) *Griffith* v. *Young*, 12 East, 51; see *Sanderson* v. *Graves*, L.R. 10 Ex. 234; 44 L.J. Ex. 210.

(*c*) *Cobb* v. *Becke*, 6 Q.B. 930; 14 L.J. Q.B. 108; *Robbins* v. *Fennell*, 11 Q.B. 248; 17 L.J. Q.B. 77; *Hurley* v. *Baker*, 16 M. & W. 26; 16 L.J. Ex. 273. See *post*, p. 964.

(*d*) *Robbins* v. *Heath*, 12 Jur. 158; *Hanby* v. *Cassan*, 11 Jur. 1088; *Robbins* v. *Fennell*, 17 L.J. Q.B. 79; 11 Q.B. 428. See *post*, p. 964.

he has not given credit in account to his principal for it, and the account has not been stated and settled between them on that footing (*e*). If, however, he has got money into his own hands by a wrongful detainer of goods, or by his own illegal act, he cannot discharge himself from liability by paying it over (*f*). When the person who has received the money is in ignorance of the facts which entitle the other party to recover it back, the obligation to repay it does not arise until after demand has been made (*g*).

Receipt of foreign money.—It is immaterial whether the money received by the defendant was English money or foreign currency (*h*).

Sub-section IV.

Implied promises in respect of accounts stated.

Implied promise in respect of account stated.—If an account has been stated and settled between persons who have cross claims against each other, the law implies a promise from those against whom the balance appears to pay over the amount of such balance to the others; and any admission made by the defendant of some definite balance being against him, or of a sum certain being due from him to the plaintiff, will be evidence of an "account stated," and raise an implied promise to pay over the amount (*i*). And the promise will be implied where the account is stated in respect of one item only as well as in the case of a plurality of items (*k*); but a general admission of liability to a pecuniary demand, without specifying the amount of it, will not support an "account stated," and will not entitle the plaintiff to recover nominal damages (*l*). Nor is an offer to pay a sum less than the sum claimed, if unaccepted, any evidence of an account stated in an action for the larger sum (*m*). An I O U, being a distinct admission of a sum due, is *primâ facie* evidence of an account stated, and of a

(*e*) *Holland* v. *Russell*, 4 B. & S. 14; 32 L.J. Q.B. 297; *Shand* v. *Grant*, 15 C.B. N.S. 324; *Lloyd* v. *Sandilands*, Gow, 13.

(*f*) Addison on Torts, p. 38 (ed. 8).

(*g*) *Freeman* v. *Jeffries*, L.R. 4 Ex. 189; 38 L.J. Ex. 116.

(*h*) *Ehrensperger* v. *Anderson*, 3 Exch. 148, 157; 18 L.J. Ex. 132.

(*i*) *Knowles* v. *Michel*, 13 East, 249; *Laycock* v. *Pickles*, 4 B. & S. 497; 33 L.J. Q.B. 43; *Prouting* v. *Hammond*, 8 Taunt. 688; Gow, 41; *Ashby* v. *Ashby*, 3 Moo. & P. 186; 7 L.J. (O.S.) C.P. 221; *Porter* v. *Cooper*, 1 Cr. M. & R. 394, 395; 3 L.J. Ex. 330; *Davies* v. *Wilkinson*, 10 Ad. & E. 98; 8 L.J. Q.B. 228; *Chisman* v. *Count*, 2 Sc. N.R. 569; 10 L.J. C.P. 124; *Purdon* v. *Purdon*, 10 M. & W. 562; 12 L.J. Ex. 3; *Penny* v. *Slade*, 15 L.J. Q.B. 10; 8 Q.B. 115.

(*k*) *Highmore* v. *Primrose*, 5 M. & S. 67.

(*l*) *Lane* v. *Hill*, 21 L.J. Q.B. 318; 18 Q.B. 252; *Bernasconi* v. *Anderson*, 1 M. & M. 183.

(*m*) *Atkinson* v. *Woodall*, 31 L.J. M.C. 174; 1 H. & C. 170.

promise to pay the amount to the person who is in possession of the document (*n*): but the effect of it may be got rid of, where it is the only item of evidence of account, by showing that there was no debt and no demand which could be enforced by virtue of it (*o*). Where the plaintiff lent money to A. upon B.'s promise to become surety for its repayment, and, on the money being advanced, A. and B. signed and delivered to the plaintiff the following memorandum—"We jointly and severally owe you 60*l.*," it was held to be evidence of an account stated by A. and B. jointly (*p*). The law also will imply a promise to pay over the money, where the drawer of a bill overdue and unpaid has promised to pay the indorsee and holder (*q*); also where partners have settled accounts on the close of their partnership, and an ascertained balance is admitted to be due from the one to the other. Wherever the defendant has got the benefit of the fulfilment of a contract, performance of which could not have been enforced by reason of the Statute of Frauds, and has subsequently admitted that a certain sum is due to the plaintiff in respect thereof, the debt so admitted may be recovered on an account stated (*r*). But the law implies no promise from an infant, or lunatic, or person incapable of contracting, in respect of an account stated (*s*). Nor can a claim which is absolutely void by reason of an illegality or immorality in the consideration, or for want of consideration, as a promise to pay money to counsel for services connected with litigation, be relied upon in support of a count upon an account stated (*t*). And an admission by the defendant of a debt due to a solicitor for his services as such will not enable the solicitor to recover on an account stated so as to defeat the provisions of the statute requiring a signed bill to be delivered by the solicitor before action (*u*).

Account stated with trustees.—If a trustee states an account with his *cestui que trust*, and admits that he has money in his hands applicable to a claim made on him by the latter, he is no longer a trustee merely of that money, but becomes liable as

(*n*) *Payne* v. *Jenkins*, 4 C. & P. 324; *Curtis* v. *Rickards*, 1 Sc. N.R. 155; 9 L.J. C.P. 240; *Gould* v. *Coombs*, 1 C.B. 543; 14 L.J. C.P. 175; *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

(*o*) *Lemere* v. *Elliott*, 6 H. & N. 656; 30 L.J. Ex. 350; *Wilson* v. *Wilson*, 14 C.B. 616; 23 L.J. C.P. 137.

(*p*) *Buck* v. *Hurst*, L.R. 1 C.P. 297.

(*q*) *Oliver* v. *Dovatt*, 2 M. & Rob. 230.

(*r*) *Salmon* v. *Watson*, 4 Moore, 73; *Cocking* v. *Ward*, 1 C.B. 858; 15 L.J. C.P. 245; *Griffith* v. *Young*, 12 East, 514, *ante*, p. 26; *Seago* v. *Deane*, 4 Bing. 459; 1 Moo. & P. 227.

(*s*) *Tarbuck* v. *Bispham*, 2 M. & W. 2, 7; 6 L.J. Ex. 49; *Bates* v. *Townley*, 2 Exch. 152; 19 L.J. Ex. 339.

(*t*) *Kennedy* v. *Broun*, 13 C.B. N.S. 677; 32 L.J. C.P. 137; *Lubbock* v. *Tribe*, 3 M. & W. 607, 613; 7 L.J. Ex. 158.

(*u*) *Brooks* v. *Bockett*, 9 Q.B. 847; 16 L.J. Q.B. 178; *Scadding* v. *Eyles*, 9 Q.B. 858; 15 L.J. Q.B. 364; *Turner* v. *Willis*, (1905) 1 K.B. 468; 74 L.J. K.B. 365.

a debtor to the *cestui que trust* (*x*). If he acknowledges that he owes the latter a specific sum, the law implies a promise from him to pay the amount. But, so long as the trust remains open, and the accounts are unadjusted, and an ascertained balance has not been admitted to be due, or if admitted has been the result of a clear mistake, no such implied promise arises (*y*). Where a creditor received goods from his debtor upon trust to sell and apply the proceeds in liquidation of the debt due to him, and hand over any balance that might remain to the debtor after the sale, and the goods were sold, and the creditor admitted that he had a balance in hand of 5*l.* 19*s.*, it was held that he was liable for the amount on an "account stated" (*z*). But, where trustees for the separate use of the wife admitted that they had received and held a certain sum to her separate use, and refused to pay it over without her separate receipt, it was held that an action on an account stated would not lie by the husband and wife for the sum so admitted to be due to her (*a*).

A defendant who has admitted that he owes a certain sum of money to the plaintiff, and has recognised the title of the latter to the money, cannot of his own accord set up a *jus tertii* for the purpose of defeating the plaintiff's claim (*b*): but, if the plaintiff was only an agent in the transaction dealing on behalf of an undisclosed principal, and the latter intervenes and gives the defendant notice not to pay the debt to the plaintiff, the defendant's liability to the latter is discharged (*c*).

Settlement of mutual accounts.—Where there are mutual accounts and mutual debts and credits, and the parties meet and settle their respective claims and liabilities and strike a balance, the account cannot be re-opened on the ground of the existence of overcharges or insufficient charges, or on the ground of some mistake as to legal rights (*d*), or on the ground that some of the claims and demands so taken into account were demands for which no action could have been maintained, or were only equitable or moral claims. It is not necessary, in order to make out an account stated of this sort, that the debts should be debts *in præsenti*, or that they should be legal debts (*e*), or be legally recoverable: for, where parties having cross demands against each other settled and balanced their accounts, and an action was brought for the balance, it was

(*x*) *Topham* v. *Morecraft*, 8 E. & B. 972, 983; *Harding* v. *Harding*, 17 Q.B.D. 442; 55 L.J. Q.B. 462.

(*y*) *Rogers* v. *Holland*, 3 Ad. & E. 99; 4 L.J. K.B. 156.

(*z*) *Howard* v. *Brownhill*, 23 L.J. Q.B. 23.

(*a*) *Bond* v. *Nurse*, 10 Q.B. 244; 16 L.J. Q.B. 196.

(*b*) *Peacock* v. *Harris*, 10 East, 107.

(*c*) *Post*, p. 954.

(*d*) *Dawson* v. *Remnant*, 6 Esp. 24

(*e*) *Laycock* v. *Pickles*, 4 B. & S. 506; 33 L.J. Q.B. 47.

held that the settlement bound the defendant, and that he could not set up as a defence that some of the items of the account with which he had been debited were not recoverable by reason of the statute regulating the sale of spirituous liquors (*f*), or by reason of the Statute of Frauds (*g*). In these cases of a real account stated, the claims and demands on either side are merged in the account stated, so that the parties cannot afterwards resort to them. Thus, if A. sells his horse to B. for 10*l.*, and, there being divers other dealings between them, they come to an account upon the whole, and B. is found in arrear 5*l.*, A. must sue for the balance upon the account stated, for his claim for the price of the horse is discharged (*h*).

Mistakes in accounts.—A party who has admitted the correctness of an account is not conclusively bound by it (*i*). He may show that the admission was made under a mistake of fact (*k*), or that certain items were miscalculated or founded in error (*l*), provided the correction is promptly made before the other party has innocently acted upon the faith of the correctness of the account, and altered his previous position so as to render it inequitable to call upon him to refund the money (*m*). But when money has been paid to an agent under a mistake of fact, and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money (*n*). Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law, yet in equity they may be sometimes recovered (*o*).

(*f*) *Dawson* v. *Remnant*, 6 Esp. 24.
(*g*) *Laycock* v. *Pickles*, *supra*.
(*h*) *Milward* v. *Ingram*, 2 Mod. 44; *Laycock* v. *Pickles*, *supra*.
(*i*) *Shand* v. *Grant*, 15 C.B. N.S. 324.
(*k*) *Thomas* v. *Hawkes*, 8 M. & W. 140; 10 L.J. Ex. 240.
(*l*) *Rose* v. *Savory*, 2 Sc. 199; 4 L.J. C.P. 275; *Cox* v. *Prentice*, 3 M. & S. 344; *Lucas* v. *Worswick*, 1 Moo. & R. 295.
(*m*) *Spurraway* v. *Rogers*, 12 Mod. 517; *Dawson* v. *Remnant*, 6 Esp. 24; *Knox* v. *Whalley*, 1 Esp. 1; *Skyring* v. *Greenwood*, 4 B. & C. 281; *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29; *Lee* v. *Merrett*, 8 Q.B. 820; 15 L.J. Q.B. 289; *Shand* v. *Grant*, *supra*.
(*n*) *Holland* v. *Russell*, 4 B. & S. 4; 32 L.J. Q.B. 297.
(*o*) *Daniell* v. *Sinclair*, 6 App.Cas. 181; 50 L.J. P.C. 50.

BOOK II.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF SALE.

SECTION I.

CONTRACTS FOR THE SALE OF LANDS.

Contracts of sale in general.—The contract of purchase and sale ranks amongst that class of contracts called bilateral contracts. It is founded upon a mutuality of engagement, or upon mutual promises, the promise of the one party to sell being the consideration for the promise of the other to buy; and is rendered binding, consequently, if properly authenticated, by the bare consent of the parties. It is essential to the creation of a contract of sale that there be a price consisting of a sum of money to be paid by the buyer to the seller (*a*).

Sale of lands and corporeal hereditaments.—No action can be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised to sign it (*ante*, p. 22); it is not necessary, however, to show that the writing or memorandum has been signed by both parties, in order to render the party sought to be charged liable under the agreement (*ante*, p. 36). The memorandum or note need not be drawn up in technical language, but the subject-matter of the sale and the price to be paid for it must both be

(*a*) As to the sale of goods, see p. 526, *et seq.*

specified; and it must also mention who is the purchaser(*b*). If, therefore, upon a treaty for the purchase and sale of an estate, the owner writes a letter containing a distinct offer to sell the property upon certain terms, and the party to whom the letter is addressed answers it accepting the offer within a reasonable period, the contract is complete; and an action for damages may be maintained upon it, or the owner may be compelled to specifically perform it (*c*). But, if there has not been a clear offer and acceptance of one and the same set of terms—if the property has not been clearly defined, or any material particulars have been left unsettled between the parties—there is not a concluded contract capable of supporting an action for damages or specific performance (*d*). So, where an offer to purchase land was accepted "subject to the conditions of sale and an agreement" and no further contract was made by the parties, it was held that there was no concluded contract of which specific performance could be claimed (*e*). Where a draft agreement had on the back of it, "We approve of this draft," followed by the signatures of the intended parties to the agreement, it was held that there was merely evidence of something they intended to agree to, and not an actual agreement (*f*). "Still," observes Lord St. Leonards, "where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case, whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement" (*g*).

"It is not necessary that the note in writing, to be binding under the statute, should be contemporary with the agreement. It is sufficient if it has been made at any time, and adopted by the party afterwards; and then any thing under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute which was only intended to protect persons from having parol agreements imposed on them" (*h*).

Signature of the writing.—As to the various modes of signing contracts by the party to be charged, so as to satisfy the requirements of the Statute of Frauds, see *ante*, p. 39.

(*b*) *Saunders* v. *Wakefield*, 4 B. & Ald. 595, 601; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 50 L.J. Ch. 613; *Plant* v. *Bourne*, (1897) 2 Ch. 281; 66 L.J. Ch. 643.

(*c*) *Coleman* v. *Upcot*, 5 Vin. Abr. 527, pl. 17; *Dunlop* v. *Higgins*, 1 H.L.C. 381; *Filby* v. *Hounsell*, (1896) 2 Ch. 737; 65 L.J. Ch. 852.

(*d*) *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638; *Thomas* v. *Blackman*, 1 Coll. Ch. 301, 312.

(*e*) *Clark* v. *Robinson*, 51 W. R. 443; *Watson* v. *McAllum*, 87 L. T. 547; cp. *Winn* v. *Bull*, 7 Ch.D. 29; 47 L.J. Ch. 139; *Rossiter* v. *Miller*, 3 App.Cas. 1124; 48 L.J. Ch. 10.

(*f*) *Doe* v. *Pedgriph*, 4 C. & P. 312.

(*g*) Sugd. V. & P. 144 (ed. 14).

(*h*) *Shippey* v. *Derrison*, 5 Esp. 192.

Sales by auction.—In the case of sales by auction, the assent of the parties to the contract of sale is manifested by the fall of the auctioneer's hammer; the bidding is a mere offer to buy at the price named by the bidder, and may be retracted at any time before the hammer is down and the offer has been accepted (*i*). A stipulation in the conditions of sale, that no bidder shall retract his bidding, will not, at common law, prevent the bidder from retracting, if he thinks fit so to do, before his offer has been accepted. The vendor may, if he thinks fit, be his own auctioneer; but he cannot, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an undervalue. The employment of a single person to bid on behalf of the vendor will avoid the sale, unless the fact is notified to the assembled bidders (*k*). And, if the vendor reserves to himself the right of bidding once for the property, and then employs another person to make additional biddings, this is a fraud upon the parties who attend the sale, and entitles the person who is declared the purchaser to abandon the contract (*l*). Formerly there was a conflict between the courts of law and equity in respect of the validity of sales by auction, where a puffer had bid, although no right of bidding was reserved, the former holding that all such sales were absolutely illegal, and the latter giving effect to them under some circumstances (*m*); but, by the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, s. 4, "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sect. 5 of the same Act requires that the particulars or conditions of sale shall state whether the land is to be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that land will be sold without reserve, or to that effect, it is unlawful for the seller to employ any person to bid at the sale, or for the auctioneer knowingly to take any bidding from such person. And, by sect. 6, if a right to bid is reserved, the seller, or any person on his behalf, may bid as he may think proper (*n*). But there is a distinction between a reserved

(*i*) *Payne* v. *Cave*, 3 T.R. 148; *Warlow* v. *Harrison*, 1 E. & E. 295, 314; 29 L.J. Q.B. 14.

(*k*) Parke, B., *Thornett* v. *Haines*, 15 M. & W. 372; 15 L.J. Ex. 230; *Parnell* v. *Tyler*, 2 L.J. Ch. 195; *Green* v. *Baverstock*, 32 L.J. C.P. 181; 14 C.B. N.S. 204.

(*l*) *Parfitt* v. *Jepson*, 46 L.J. C.P. 529; *Rex* v. *Marsh*, 3 Y. & J. 331.

(*m*) *Mortimer* v. *Bell*, L.R. 1 Ch. 10; 35 L.J. Ch. 25.

(*n*) These sections are not to affect sales of land by the Court in the

bidding and a reserved right to bid, and in order to reserve to the vendor the right to bid up to the reserve price such right must be expressly stipulated for, and it is not sufficient to state in the conditions that the sale is subject to a reserve bidding(*o*). The effect of employing any one to bid at a sale "without reserve" is, that the sale is void, and the purchaser is entitled to recover back his deposit from the auctioneer (*p*). The term "without reserve" is understood "to exclude all interference by the vendor, or those coming under him, with the right of the public to have the property at the highest bidding." Any arrangement, therefore, between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale null and void (*q*). When the vendor inserts in the conditions of sale that the property is to be sold "without reserve," he contracts with the highest *bonâ fide* bidder that the sale shall be without reserve. If, therefore, a bid is made by or on behalf of the vendor, the latter may render himself responsible in damages to the highest *bonâ fide* bidder for a breach of the conditions of sale (*r*). But the auctioneer is not responsible for a breach of the condition, unless he has by a representation false to his knowledge induced the plaintiff to incur expense and loss, for there is no contract between the auctioneer and the highest bidder (*s*). It is no defence to an action for specific performance brought by the vendor against the purchaser that unknown to the vendor a fictitious bidding was made whereby the purchaser was induced to give more than he otherwise would have done (*t*).

Again, if a purchaser by his conduct induces other persons not to bid, the sale will not be binding on the vendor (*u*). Where the known agent of the vendor was employed by the purchaser to attend a sale by auction and bid for him, and was thought by the assembled company to be a puffer, which deterred other persons from bidding, and the estate was knocked down to the agent, the court refused to assist the purchaser to enforce the contract, as the employment of the vendor's agent

Chancery Division. As to such sales, see sect. 7, and *Bartlett, In re*, 16 Ch.D. 561; 50 L.J. Ch. 205; *Re Oriental Bank Corporation*, 56 L.T. 868.

(*o*) *Gilliat* v. *Gilliat*, L.R. 9 Eq. 60; 39 L.J. Ch. 142.

(*p*) *Meadows* v. *Tanner*, 5 Mad. 34; *Thornett* v. *Haines*, 15 M. & W. 367; 15 L.J. Ex. 230; *Warlow* v. *Harrison*, 1 E. & E. 295, 316; 29 L.J. Q.B. 14.

(*q*) *Robinson* v. *Wall*, 16 L.J. Ch. 401; 2 Ph. 372.

(*r*) *Warlow* v. *Harrison, supra*; *Johnston* v. *Boyes*, (1899) 2 Ch. 73; 68 L.J. Ch. 425.

(*s*) *Mainprice* v. *Westley*, 6 B. & S. 420; 34 L.J. Q.B. 229.

(*t*) *Union Bank* v. *Munster*, 37 Ch.D. 51; 57 L.J. Ch. 124.

(*u*) *Fuller* v. *Abrahams*, 6 Moo. C.P. 316; 3 B. & B. 116.

by the purchaser had hurt the sale and had been detrimental to the vendor (*x*).

When an estate is sold by auction in separate lots, a separate contract is created as to each lot (*y*). But it may be otherwise, if a contract is made for the purchase of several lots at one aggregate price; or, if the several lots are so connected together that the possession of all is essential to the use and enjoyment of any one or more of them, and they have consequently been purchased by the vendee as one property (*z*).

As soon as the hammer of the auctioneer is down, and the bidding has been accepted, an agreement for the sale and purchase should be signed by the parties themselves, or by the auctioneer as their agent, inasmuch as sales by auction are, as we have seen, within the Statute of Frauds, and must, whenever the subject-matter is an estate or interest in land, be authenticated by a signed writing (*ante*, pp. 22, 474). The printed conditions of sale, containing the terms on which the purchaser bids and the vendor accepts his bidding, form, when signed, a written contract between vendor and purchaser sufficient to satisfy the Statute of Frauds; and the auctioneer's receipt for the deposit, signed by him, will amount to an agreement binding upon the seller, if it contains the names of the seller and purchaser, a description of the estate sold, and the price to be paid; or if it refers to the conditions or particulars of sale, so as to enable the court to read them together as one contract (*ante*, pp. 36—41).

Upon a sale by auction the auctioneer is the agent of the purchaser as well as of the vendor, and has as such agent implied authority to sign the contract or a note or memorandum thereof to satisfy the Statute of Frauds; but, until the hammer goes down, the auctioneer is exclusively the agent of the vendor (*a*); and, when the sale is over, the auctioneer is no longer the agent of either party (*b*). But he is not necessarily the agent of both parties; for it may be shown that the purchaser bought under an express contract between him and the vendor, and not under the conditions of sale (*c*). As an agent may not as a rule delegate his authority, the auctioneer's clerk

(*x*) *Twining* v. *Morrice*, 2 Bro. Ch.C. 326.

(*y*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *James* v. *Shore*, 1 Stark. 426; *Roots* v. *Dormer* (*Lord*), 4 B. & Ad. 77; *Casamajor* v. *Strode*, 2 Myl. & K. 706, *per* Brougham, L.C.

(*z*) *Chambers* v. *Griffiths*, 1 Esp. 150; *Gibson* v. *Spurrier*, 2 Peake, N.P.C. 49; *Boyer* v. *Blackwell*, 3 Anstr. 656; *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282.

(*a*) *Warlow* v. *Harrison*, 1 E. & E. 295, 316; 29 L.J. Q.B. 14.

(*b*) *Mews* v. *Carr*, 1 H. & N. 484; 26 L.J. Ex. 39.

(*c*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792.

cannot sign the required note or memorandum of the contract unless in special circumstances, as, where the bidder to be charged has by word or sign authorized signature by the clerk (*d*). The auctioneer generally puts down the purchaser's name in his catalogue or in the conditions or particulars of sale, with the amount of the bidding opposite the lot purchased; or he makes an entry of the particulars in his books, inserting the name of the purchaser. In either case the latter will be bound. If the conditions of sale are posted up in a conspicuous position in the auction-room, the purchaser will be bound by their terms, although it cannot be proved that he read them (*e*). They cannot be contradicted, added to, or altered by verbal declarations made by the auctioneer at the time of the sale; thus, the reading of a lease at an auction by an auctioneer is no excuse for a misdescription of the terms of the lease in the particulars or conditions of sale (*f*). And where an auctioneer corrects a material misdescription in the particulars of sale before the biddings commence, but such correction is not heard by the purchaser, the court will rescind the contract notwithstanding a condition for compensation in that behalf (*g*). If the estate is sold by order of the court and a bidder who is declared the purchaser sells again in the auction-room at an additional price, the court will order a re-sale (*h*). If the auctioneer at a sale does not disclose the name of the vendor, but makes the contract in his own name, he will be personally responsible for the fulfilment of the contract (*i*). Where he does disclose the name of the principal, yet if it appears from the terms of the contract that he is dealing with the purchaser he will likewise be personally bound (*k*).

Oral contracts for sale and purchase of estates.—If livery of seisin is made to a purchaser under an oral contract for the sale of a freehold estate, or of a leasehold estate exceeding three years in duration, and he is actually put into possession of the property agreed to be sold, yet he will have only an estate or lease at will; for, by sect. 4 of the Statute of Frauds, all estates of freehold, or terms of years, or any uncertain interest in lands, tenements, or hereditaments, made or created by

(*d*) *Peirce* v. *Corf*, L.R. 9 Q.B. 210, 214; 43 L.J. Q.B. 52; *Bell* v. *Balls*, (1897) 1 Ch. 663; 66 L.J. Ch. 397; cp. *Bird* v. *Boulter*, 4 B. & Ad. 443.

(*e*) *Mesnard* v. *Aldridge*, 3 Esp. 271; *Bywater* v. *Richardson*, 1 Ad. & E. 508; 3 L.J. K.B. 164.

(*f*) *Higginson* v. *Clowes*, 15 Ves. 521; *Jones* v. *Edney*, 3 Campb. 285; *Flight* v. *Booth*, 1 Bing. N.C. 370, 379; 4 L.J. C.P. 66.

(*g*) *Hare and O'More's Contract, In re*, (1901) 1 Ch. 93; 70 L.J. Ch. 45.

(*h*) *Holroyd* v. *Wyatt*, 2 Coll. C.C. 327.

(*i*) *Franklyn* v. *Lamond*, 16 L.J. C.P. 221; 4 C.B. 637.

(*k*) *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534; and see *ante*, p. 345.

livery and seisin only, or by parol, and not put into writing and signed by the parties creating them or their agents, shall have the force and effect of leases or estates at will only, excepting leases not exceeding the term of three years from the making thereof. But the purchaser so let into possession will be entitled to a conveyance of the estate; and the court will compel the vendor to execute such a conveyance, notwithstanding the provisions of the Statute of Frauds, on the ground that there has been part performance of the contract, and that, possession having been given and accepted in fulfilment of the bargain, it would be fraudulent in either party to withdraw therefrom without the consent of the other (*l*). The mere naked transfer of the possession of land alone is not, it has been said, sufficient to justify the courts in enforcing the performance of an oral contract for the purchase of the freehold on the ground of part performance. Acts done in performance, it has been observed, must be such as could have been done with no other view or design than to fulfil the particular contract sought to be enforced (*m*). So, if the change of possession is accompanied by the payment of money on the part of the occupier to the owner, under circumstances giving rise to the presumption that it was an instalment of purchase-money, and not rent paid in advance, there will undoubtedly be part performance of a contract, which could be no other than a contract of sale (*n*). And, if the change of possession has been accompanied by the exercise of acts of ownership, such as the expenditure of money in building, repairs, drainage, and lasting improvements, quite inconsistent with the notion of a contract for a yearly tenancy, it will be evident, from the acts done, that there has been part performance, either of a contract for the purchase of the fee (*o*), or for the grant of a lease (*p*). And if the purchaser of lands under an oral contract enters an action against the vendor to carry such contract into execution, and the vendor puts in a

(*l*) *Butcher* v. *Stapely*, 1 Vern. 363; *Pyke* v. *Williams*, 2 *ib.* 455; Fonblanque, 175, n.; *Reynolds* v. *Waring*, 1 Younge, 352; *Caton* v. *Caton*, L.R. 1 Ch. 137, 148; 35 L.J. Ch. 292, 295. A condition giving the vendor a right to rescind in the event of his being unable or unwilling to give a conveyance is not in general good: *Hardman* v. *Child*, 28 Ch.D. 712; 54 L.J. Ch. 695.

(*m*) *Gunter* v. *Halsey*, Ambl. 586; *Cole* v. *White*, cited 1 Bro. Ch.C. 409; *Alderson* v. *Maddison*, 8 App.Cas. 467; 52 L.J. Q.B. 737; *Reynolds* v. *Waring*, 1 Younge, 350; *O'Reilly* v. *Thompson*, 2 Cox, 273; *Watt* v. *Evans*, 4 Y. & Coll. 579; but see *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241; *Humphreys* v. *Green*, 10 Q.B.D. 148; 52 L.J. Q.B. 140.

(*n*) *Main* v. *Melbourne*, 4 Ves. junr. 720.

(*o*) *Borrett* v. *Gomeserra*, Bunb. 94; *Dickinson* v. *Barrow*, (1904) 2 Ch. 339; 73 L.J. Ch. 701.

(*p*) *Sutherland* v. *Briggs*, 1 Hare, 26; 11 L.J. Ch. 36; *Ramsden* v. *Dyson and Thornton*, L.R. 1 H.L. 129; reversing 4 Giff. 519; *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140; *Williams* v. *Evans*, L.R. 19 Eq. 547; 44 L.J. Ch. 319.

defence admitting the contract as stated, that will take it entirely out of the Statute of Frauds, and, there being then no danger of perjury, the court will decree it to be performed (*q*). Such acts as are ordinarily introductory to contracts for the purchase and sale of an estate or interest in land, such as the giving of directions for a conveyance to be prepared, making valuations, or fixing upon parties to value fixtures or stock, or the making of measurements, or the preparing of maps or plans, are not acts of performance, sufficient to take the contract out of the statute (*r*).

The equity arising from part performance operates against a company in like manner as against an individual, the enactments of the Companies Clauses Act, 1845, as to the mode in which contracts may be entered into on behalf of a company, not precluding the enforcement against a company of the ordinary equity based on part performance (*s*).

Transfer of estate before execution of conveyance.—The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by delivery of possession of the land to the purchaser, does not, since the passing of 8 & 9 Vict. c. 106, transfer to the latter the legal estate or interest agreed to be sold. The written contract, if it amounts to a grant of the fee, would be a feoffment, and would be avoided by sect. 3 of the Act, which enacts that "a feoffment (other than a feoffment made under a custom by an infant) shall be void unless evidenced by DEED." A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. It is not necessary, however, for the alienation of property that there should be a formal deed of conveyance; a contract for a valuable consideration, by which it is agreed to make a transfer of particular specified property, passes the beneficial interest, provided the contract is one which would be specifically enforced (*t*). "The estate, from the signing of the contract, becomes the real property of the vendee. It is vendible as his, chargeable as his, capable of being incumbered as his, devised as his; it may be assets, and will descend to his heir" (*u*). The pur-

(*q*) *Att.-Gen.* v. *Day*, 1 Ves. senr. 218; *Gunter* v. *Halsey*, Ambl. 586; *Rondeau* v. *Wyatt*, 2 H. Bl. 63.

(*r*) *Clerk* v. *Wright*, 1 Atk. 12; *Cooke* v. *Tombs*, 2 Anstr. 420; *Whitchurch* v. *Bevis*, 2 Bro. Ch.C. 559; *Redding* v. *Wilkes*, 3 Bro. Ch.C. 400; *Phillips* v. *Edwards*, 33 Beav. 440.

(*s*) *Wilson* v. *West Hartlepool Harbour Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241.

(*t*) *Holroyd* v. *Marshall*, 10 H.L.Cas. 191; 33 L.J. Ch. 193; *Bolton Partners* v. *Lambert*, 41 Ch.D. 295; 58 L.J. Ch. 425.

(*u*) Lord Eldon, *Seton* v. *Slade*, 7 Ves. 274.

chaser, therefore, in such a case, is said to have the equitable interest in land, whilst the vendor has the legal estate, and is deemed to be a trustee for the purchaser holding the land upon trust to convey it to the latter upon the terms and conditions of the contract of sale (*x*), whilst the purchaser is a trustee of the purchase-money for the vendor (*y*). Where the vendor of a farm could not complete and the farm was left without a tenant, it was held the duty of the vendor as trustee for the purchaser to re-let it (*z*).

This transfer of the equitable ownership is naturally accompanied with a corresponding transfer of the risk of loss, so that, if lands and houses are agreed to be sold, and the houses are burned down by fire, or otherwise destroyed, between the time of the making of the contract of sale and the execution of a conveyance of the legal estate, the loss will fall upon the purchaser, who will be compelled to accept a conveyance of the land without the houses, and to pay the full amount of the purchase-money to the vendor (*a*); nor will he be entitled to the benefit of any insurance effected by the vendor in the absence of an express stipulation to that effect in the agreement for the purchase (*b*). So, if a simple contract be entered into for the sale of an estate holden for two lives, and one of the lives drops before the conveyance is executed, the loss will be the loss of the purchaser (*c*). Where, on the other hand, any profit or gain accrues, it will belong to the purchaser. If, for example, a reversionary interest is agreed to be purchased, and lives drop between the making of the agreement and the execution of a conveyance, the purchaser will have the benefit (*d*). And, if an estate is sold for an annuity to be paid by the purchaser during the life of the vendor, and the vendor dies after the signing of the agreement and before the execution of the conveyance, the purchaser will nevertheless remain the equitable owner of the property, and will be entitled to call upon the heir-at-law of the vendor for a conveyance of the legal estate; and that without payment of a single shilling of money (*e*). But he must not sleep over

(*x*) *Davie* v. *Beardsham*, 1 Ch.C. 39; *Phillips* v. *Silvester*, L.R. 8 Ch. 173; 42 L.J. Ch. 225; *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch.D. 390; 56 L.J. Ch. 840; *Clarke* v. *Ramuz*, (1891) 2 Q.B. 456; 60 L.J. Q.B. 679.

(*y*) *Green* v. *Smith*, 1 Atk. 572; *Pollexfen* v. *Moore*, 3 Atk. 272.

(*z*) *Egmont* (*Earl*) v. *Smith*, 6 Ch.D. 469; 46 L.J. Ch. 356.

(*a*) *Harford* v. *Purrier*, 1 Mad. 532, 538; *Rawlins* v. *Burgis*, 2 Ves. & B. 832; *Paine* v. *Meller*, 6 Ves. 349; *Cass* v. *Rudele*, 2 Vern. 280; *Poole* v. *Adams*, 33 L.J. Ch. 639.

(*b*) *Poole* v. *Adams*, *supra*; *Collingridge* v. *Royal Exch. Assur. Co.*, 3 Q.B.D. 173; *Edwards* v. *West*, 7 Ch.D. 858; 47 L.J. Ch. 463; *Rayner* v. *Preston*, 18 Ch.D. 1; 50 L.J. Ch. 472; *Castellain* v. *Preston*, 11 Q.B.D. 380; 52 L.J. Q.B. 366.

(*c*) *White* v. *Nutts*, 1 P.Wms. 62.

(*d*) *Manning*, *Ex parte*, 2 P.Wms. 410.

(*e*) *Mortimer* v. *Capper*, 1 Bro. C.C. 156; *Jackson* v. *Lever*, 3 *ib.* 604.

his rights (*f*); if the annuity becomes due before the death of the vendor, and the purchaser has neglected to pay it or tender payment, the court will render him no assistance (*g*). But the contract of purchase and sale must be complete and concluded, in order to transfer the right of property and the risk of loss to the purchaser. In the case of sales by the Court in the Master's office, the contract is not considered to be concluded until the Master's report is confirmed as to who is the best purchaser, and the title is accepted, and in some cases not until the purchase-money is brought into court or paid into the bank (*h*). In order to transfer the right of property and the risk of loss, it must also appear that the vendor had a good title at the time of the making of the contract, or before the disaster happened, and that he was clothed with the estate or interest he agreed to sell; for, if he had not himself got the estate, it could not, of course, have passed to the purchaser. Where a vendor had purchased property from a railway company which the company had no right to sell, and the purchaser did not object to the title until after seven days, as required by the conditions of the resale, it was held that the objection was made too late; for the vendor had more than a revocable licence, he had a possessory title to the thing he proposed to sell (*i*). A purchaser who exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money, although the delay in completion may be caused by the vendor (*k*).

Registration of title.—By the Land Transfer Act, 1875 (*l*), and the Land Transfer Act, 1897 (*m*), provisions are made with respect to the registration of titles to freehold land or leasehold held under a lease derived out of freehold (*n*), and for the transfer of such lands (*o*), and their transmission on death, or bankruptcy, or marriage (*p*). As to rules under these Acts adapting them to the registration of small holdings and as to registration of a county council as proprietors of small holdings, see sect. 13 of the Small Holdings and Allotments Act, 1908 (*q*). Enrolment of assignments, &c., of Crown leases in

(*f*) *Wyvill* v. *Exeter* (*Bishop*), 1 Pr. 292.

(*g*) *Pope* v. *Roots*, 1 Bro. P.C. 370.

(*h*) *Twigg* v. *Fifield*, 13 Ves. 517; *Mackrell* v. *Hunt*, 2 Mad. 34, n.; see Dart, V. & P. (7th ed.) 1167.

(*i*) *Rosenberg* v. *Cook*, 8 Q.B.D. 162; 51 L.J. Q.B. 170.

(*k*) *Ballard* v. *Shutt*, 15 Ch.D. 122; 49 L.J. Ch. 618.

(*l*) 38 & 39 Vict. c. 87, ss. 5—21.

(*m*) 60 & 61 Vict. c. 65, Sched. I.

(*n*) Customary freehold in certain cases is not deemed freehold (38 & 39 Vict. c. 87, s. 2).

(*o*) 38 & 39 Vict. c. 87, ss. 29—39.

(*p*) *Ib.*, ss. 41—48, 87.

(*q*) 8 Edw. 7, c. 36.

the office of Land Revenue Records and Enrolments has been abolished by the Crown Lands Act, 1906 (*r*).

Production and proof of vendor's title.—It is the first duty of a vendor, when an executory contract of sale has been concluded, to prepare and show to the purchaser satisfactory evidence of title. "An agreement to make out a good title is implied from every contract for the sale of realty" (*s*); and a purchaser has, as a general rule, a right to investigate the title to the property he has purchased and to refuse to accept a doubtful title (*t*). A vendor may, if he thinks fit, stipulate for the sale of an estate with such a title only as he happens to have; and in such a case the purchaser will be bound to take whatever interest the vendor has in the premises, whether freehold, leasehold, or copyhold (*u*). And, if a vendor, believing on reasonable grounds that a statement in the particulars that the property was freehold was true, the conditions may entitle him to impose upon the purchaser the burden of assuming the fact so stated, so as to preclude the purchaser from rescinding his bargain(*x*). So again, limitations may, by agreement, be imposed by the conveyance on the purchaser's rights; for example, as to the class of premises to be built, frontage, user, &c., and such restrictive conditions will run with the land and pass by assignment thereof (*y*). And so, where land, part of an estate laid out under a building scheme, was sold, and the conveyance was made subject to a reservation of the power to vary the plans and conditions, it was held that in the absence of any representation that adjoining land shown on the building plan annexed to the conveyance as a vacant space should remain vacant, the purchaser could not restrain building operations in contravention of such building plan (*z*). In some cases there may be constructive notice of defect in the title so as to preclude a purchaser from relief, as where the contract of sale was stated to be subject to conditions in a specified deed which contained a reference to a second deed imposing restrictions, and the purchaser before executing the contract inspected neither of the two deeds (*a*). If no precise

(*r*) 6 Edw. 7, c. 28.

(*s*) *Hall* v. *Betty*, 4 M. & Gr. 410; 11 L.J. C.P. 256; *Dick* v. *Donald*, 1 Bligh, N.S. 655; *Want* v. *Stallibrass*, L.R. 8 Ex. 175, 185; 42 L.J. Ex. 108.

(*t*) *Pelly and Jacob's Contract, In re*, 80 L. T. 45.

(*u*) *Freme* v. *Wright*, 4 Mad. 364; *Duke* v. *Barnett*, 2 Coll. C.C. 337.

(*x*) *Blaiberg* v. *Keeves*, (1906) 2 Ch. 175; 75 L.J. Ch. 464; *Sandbach and Edmondson, In re*, (1891) 1 Ch. 99; 60 L.J. Ch. 60.

(*y*) *Nalder and Collyer's Brewery Co.* v. *Harman*, 83 L.T. 257; *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L.J. Ch. 652; *Webb* v. *Fagotti Brothers*, 79 L.T. 683.

(*z*) *Whitehouse* v. *Hugh*, (1906) 2 Ch. 283; 75 L.J. Ch. 677.

(*a*) *Childe and Hodgson's Contract, In re*, 54 W.R. 234.

time is fixed within which the title is to be deduced, the vendor will have a reasonable time for its establishment (*b*). But the Conveyancing Act, 1881, s. 3 (6), on a sale of any property, the expenses of production of documents not in the vendor's possession, or of taking copies of documents retained by the vendor, are to be borne by the purchaser. By sect. 2 (2), recitals, &c., contained in deeds, &c., twenty years old shall, unless proved to be inaccurate, be taken to be true; (3) inability of the vendor to give a legal covenant to produce title shall not be an objection if on completion the purchaser will have an equitable right to the production; (4) covenants required by the purchaser are to be at his expense; (5) where the vendor retains part of estate he may retain the documents referring to it.

As to what constitutes an abstract of title, to use the words of Kindersley, V.-C., "an abstract is delivered whenever a number of sheets of paper, call it what you will, whenever a document is delivered to the purchaser, which contains, with sufficient clearness and sufficient fulness, the effect of every instrument which constitutes part of the title of the vendor"; that is, the instrument must be stated and its effect must be stated, and merely a statement of what some other instrument contains or recites as the effect of any particular document, is insufficient (*c*).

A delivery of the vendor's title-deeds is not equivalent to the delivery of an abstract of title (*d*). But the right of the purchaser to have an abstract may be waived; and, if the agreement for purchase provides for the delivery of an abstract to the purchaser at the vendor's expense, this stipulation may be waived by an acceptance on the part of the purchaser of the title-deeds themselves, and a perusal of them and approval of the title on the part of the purchaser's counsel; but the fact of the approval and of the waiver of the delivery of the abstract must be established by written evidence of the same legal character as that by which the contract itself is authenticated, and cannot be established by oral testimony.

A proviso that, in case the vendor cannot deduce a good title or the purchaser does not pay the money on the appointed day, the agreement shall be void, will not enable either party to vitiate the agreement by refusing to perform his part of it. The meaning is that, if the vendor cannot make out a title, the

(*b*) *Samson* v. *Rhodes*, 6 Bing. N.C. 261; 9 L.J. C.P. 145.

(*c*) *Oakden* v. *Pike*, 34 L.J. Ch. 620, 622; *Stamford, &c. Banking Co. and Knight's Contract, In re*, (1900) 1 Ch. 287, 289; 69 L.J. Ch. 127.

(*d*) *Horne* v. *Wingfield*, 3 Sc. N.R. 340; 10 L.J. C.P. 295.

purchaser shall be at liberty to be off the bargain; and *e contra*, if the purchaser is not ready with the money, the vendor may refuse to carry out the contract; but "the purchaser cannot say, 'I am not ready with my money; therefore I will avoid the contract;' nor can the vendor say, 'My title is not good; therefore I will be off'" (*e*). Where there is a proviso that, if the purchaser shall make any objection or requisition as to title which the vendor shall not be able or willing to remove or comply with, the vendor shall be at liberty to rescind the contract, and the vendor tenders reasons for rescinding the contract, in an action for specific performance by the purchaser the court will consider whether the grounds stated for rescission are reasonable or merely arbitrary (*f*). When, in such a case, objections are sent in, the vendor must determine which of two courses he will adopt. If he expresses his willingness to remove the objections, he is for ever thereafter precluded from exercising the option given him to rescind the contract (*g*). And a vendor who has knowingly misdescribed the property sold will not be allowed to rescind if the purchaser desires to complete with compensation as provided for in the contract (*h*).

Where the time for sending in requisitions and objections to title is limited, the purchaser will, as a rule, be bound if his requisitions are not sent in in time (*i*). The limitation of time may, however, be waived by the vendor's receiving and considering the objections after the time appointed, provided the fact can be established by evidence in writing (*j*). Where, after notice of rescinding the contract, a correspondence on the title is continued under protest, this gives to the transaction the character of a treaty for the renewal of the rescinded contract (*k*). If it is provided that no further evidence of the identity of the parcels shall be required beyond what is afforded by the title-deeds and documents abstracted, and the descriptions in the documents differ, the purchaser is entitled to further proof of identity (*l*). If it is provided that no other title shall be required than that deduced by a particular abstract, the purchaser is not precluded from objecting to the title as it appears

(*e*) *Roberts* v. *Wyatt*, 2 Taunt. 277.

(*f*) *Quinion* v. *Horne*, (1906) 1 Ch. 596; 75 L.J. Ch. 293.

(*g*) *Tanner* v. *Smith*, 10 Sim. 410; 4 Jur. 310.

(*h*) *Jackson and Haden's Contract, In re*, (1906) 1 Ch. 412; 75 L.J. Ch. 226; *Nelthorpe* v. *Holgate*, 1 Coll. C.C. 203.

(*i*) *Pryce-Jones* v. *Williams*, (1902) 2 Ch. 517; 71 L.J. Ch. 762; but, as to the applicability of such a limitation where the requisitions go to the root of the title, see *Want* v. *Stallibrass*, L.R. 8 Ex. 175; 42 L.J. Ex. 108; *Tanqueray-Willaume and Landau, In re*, 20 Ch.D. 465; 51 L.J. Ch. 434.

(*j*) *Cutts* v. *Thodey*, 13 Sim. 206.

(*k*) *Southcomb* v. *Exeter* (*Bishop*), 6 Hare, 213; 16 L.J. Ch. 378.

(*l*) *Flower* v. *Hartopp*, 6 Beav. 476; 12 L.J. Ch. 39; *Nicholl* v. *Chambers*, 21 L.J. C.P. 54; 11 C.B. 996.

upon the face of the abstract (*m*). If a party sells an estate without having a title, but before he is called upon to make a conveyance gets such an estate as will enable him to make a title, that is sufficient (*n*).

Title to realty.—Changes of an important character have been effected with regard to questions of title by the Conveyancing Act, 1881; but wherever sect. 3 of the Act is referred to, the reader must remember that the section applies only—(1) to sales properly so called; (2) if and as far as the contract of sale does not provide otherwise; (3) to sales made after 31st December, 1881; and (4) the purchaser need not complete if, on a contract containing stipulations similar to the section, specific performance would not be enforced.

An agreement to sell a house or land generally, not specifying the estate or interest of the vendor, is in contemplation of law an agreement to sell an estate in fee; and the purchaser may refuse to complete his contract, if the vendor is unable to make out a title to, and convey, such an estate (*o*). But, if the abstract of title shows that the vendor is possessed only of a life estate or a term of years, and the purchaser, after the delivery of such abstract, proceeds with the purchase and accepts the title, the contract will be deemed to be for the sale and purchase of the estate and interest disclosed by the abstract. So if a vendor contracts for the sale of leasehold property held under a lease, he must show that it is held under an original lease; but where the particulars and conditions of sale show that the property is held under a derivative lease, the purchaser cannot refuse to complete or claim compensation (*p*). If the agreement specifies the precise nature of the estate or interest agreed to be sold, and the abstract discloses a title to a different estate in the same land, and the purchaser accepts the title in writing, the contract for the purchase of the first-named estate will be deemed to be abandoned, and a new contract set up for the purchase of the interest disclosed by the abstract. But an oral acceptance of the title, or an oral agreement to accept such subsequently disclosed interest in lieu of the estate originally bargained for, cannot be set up in opposition to the original contract (*q*).

A contract to make a good title to an estate means, of course, a title good both at law and in equity (*r*); and if the vendor

(*m*) *Sellick* v. *Trevor*, 11 M. & W. 729; 12 L.J. Ex. 401.
(*n*) *Thompson* v. *Miles*, 1 Esp. 185.
(*o*) *Hughes* v. *Parker*, 8 M. & W. 244; 10 L.J. Ex. 297.
(*p*) *Camberwell Building Society* v. *Holloway*, 13 Ch.D. 754; 49 L.J. Ch. 361.
(*q*) *Deverell* v. *Bolton* (*Lord*), 18 Ves. 510.
(*r*) *Maberley* v *Robins* 1 Marsh.

has only a naked legal title as a trustee, or a mere equitable interest without the legal estate, the contract as to title is not fulfilled (*s*). A title may be good, and the purchaser may be compelled to complete the purchase, although there may be no title-deeds; "there are good titles in which the origin cannot be shown by any deed or will: but then you must show something that is satisfactory to the mind of the court, that there has been such a long uninterrupted possession, enjoyment and dealing with the property as affords a reasonable presumption that there is an absolute title in fee-simple" (*t*). Although a conveyance, voluntary upon the face of it, is *primâ facie* void against a subsequent purchaser for value, yet it may become valid by force of subsequent events (*u*); and, therefore, a purchaser is not bound to take a title where there appears to have been such a conveyance, but may decline to complete, and may recover his deposit (*x*). If a conveyance to a purchaser has been accidentally burned, the vendor, if living, will be compelled to execute a fresh conveyance (*y*).

By the Conveyancing Act, 1881 (which took effect from the 31st day of December, 1881), s. 3 (2), where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*z*). Where land sold is held by lease (not including underlease) the purchaser is to assume the lease was duly granted, and, on production of receipt for rent, that all covenants have been performed (*a*). In case of underlease he is to assume that it and every superior lease were duly granted, and, on production of receipt for rent under underlease, that all covenants have been performed, and that rent due under superior leases has been paid (*b*).

Period for which title ought to be shown.—By the Vendor and Purchaser Act, 1874 (*c*), forty years is substituted for sixty years for the commencement of title which a purchaser may require subject to any stipulation in the contract to the contrary (*d*). As an estate for life may last sixty years, and thirty

258; 5 Taunt. 625; *Jeakes* v. *White*, 21 L.J. Ex. 265; 6 Exch. 873; *Boyman* v. *Gutch*, 7 Bing. 379; 9 L.J. (O.S.) C.P. 63.

(*s*) *Elliot* v. *Edwards*, 3 Bos. & P. 181, 183; *Cane* v. *Baldwin*, 1 Stark. 65.

(*t*) *Cottrell* v. *Watkins*, 1 Beav. 365; *Scott* v. *Nixon*, 3 Dru. & W. 338, 405. And see *post*, p. 493.

(*u*) *Prodgers* v. *Langham*, 1 Sid. 133.

(*x*) *Clarke* v. *Willott*, L.R. 7 Ex. 313; 41 L.J. Ex. 197; *Marsh. In re*, 24 Ch.D. 11; 53 L.J. Ch. 81.

(*y*) *Bennett* v. *Ingoldsby*, Finch, 262.

(*z*) 44 & 45 Vict. c. 41, s. 3 (2): nor can he require the production of deeds, &c. recited in the enfranchisement: sect. 3 (3).

(*a*) Sect. 3 (4).

(*b*) Sect. 3 (5).

(*c*) 37 & 38 Vict. c. 78, s. 1.

(*d*) Any question arising between

years more may be required, in case of disabilities, to bar the claim of the remainderman, it is obvious that the period of sixty years for which the title is, by the general practice of the profession, required to be carried back is not too long, and that a purchaser would not be safe in limiting his researches to a shorter space of time. It follows that the Real Property Limitation Act, 1833 (*e*)—although it has made a sixty years' title a better title than it was before—has in no wise abridged the time for which the title must be shown; and every purchaser is still entitled, if he makes a contract to that effect, to the production of a sixty years' title on the part of the vendor (*f*). It has been held that under an open contract it is not sufficient for the vendor to offer an abstract commencing with a deed more than twenty years old reciting a previous conveyance, but that a full forty years' title must be deduced (*g*). And where less than a forty years' title is accepted with the result that equities affecting the land remain unextinguished without the knowledge of the purchaser, the latter must be taken as having constructive notice of them (*h*). An oral stipulation that the title is not to be made out beyond a limited period cannot be engrafted upon a written contract which makes no mention of such a stipulation; but, if a notice in writing to that effect can be proved to have been given to the purchaser prior to the making of the contract, the latter must accept the title as limited unless he can show that he has refused to be bound by the notice, and had declined to treat on the terms sought to be imposed upon him (*i*).

Title to leaseholds.—By the Vendor and Purchaser Act, 1874, in the completion of any contract made after the 31st of December, 1874, and subject to any stipulation to the contrary in the contract, under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold (*k*). And by the Conveyancing Act, 1881, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*l*); and under a contract to grant a lease for a term of

vendor and purchaser as to any requisitions or objections may be dealt with summarily in chambers: see sect. 9; see *Ford, In re*, 10 Ch.D. 365; 48 L.J. Ch. 327.

(*e*) 3 & 4 Will. 4, c. 27.

(*f*) *Cooper* v. *Emery*, 1 Phil. 388.

(*g*) *Wallis and Grout's Contract, In re*, (1906) 2 Ch. 206; 75 L.J. Ch. 519; *Jacobs* v. *Revell*, (1900) 2 Ch. 858; 69 L.J. Ch. 879.

(*h*) *Nisbet and Potts' Contract, In re*, (1906) 1 Ch. 386; 75 L.J. Ch. 238.

(*i*) *Ogilvie* v. *Foljambe*, 3 Mer. 65; *Best* v. *Hamand*, 12 Ch.D. 1; 48 L.J. Ch. 503.

(*k*) 37 & 38 Vict. c. 78, s. 2.

(*l*) 44 & 45 Vict. c. 41, s. 3 (1).

years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion (*m*). But if an agreement is made for the sale of leasehold property (not being a church lease), the vendor is bound to establish the lessor's title to grant the lease, unless there is an express stipulation to the contrary in the contract (*n*); and no agreement to dispense with the production of the lessor's title will be implied from the antiquity of the lease (*o*), the shortness of the term for which the lease is granted, the small value of the property, or the absence of a premium (*p*). And on the grant of a sub-lease by a lessee, the intending sub-lessee has a right to inspect the lessee's lease (*q*). It is different, however, in the case of a bargain for the purchase of an agreement for a lease (*r*). Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shown (*s*). The obligation to produce the lessor's title does not, it seems, extend to church leases and bishops' leases (*t*).

If a vendor stipulates that he shall not be obliged to produce the lessor's title, this stipulation does not preclude the purchaser from taking an objection derived from another source to that title (*u*). But, if the purchaser agrees to take the title that the vendor has, and to purchase the lease as holden by him, he will be precluded from objecting to the title (*x*).

When a man professes to grant or sell a lease, it is, of course, understood to be a lease which the lessee or purchaser may insist upon as good against all the world. If, therefore, a covenant or condition has been broken, and a right to re-enter has accrued to the superior landlord, and the vendor is unable to put the purchaser into possession of a good lease, he is liable in damages for a breach of contract (*y*). If the consent of the

(*m*) 44 & 45 Vict. c. 41, s. 13.

(*n*) *Hume* v. *Bentley*, 5 De G. & S. 520; 21 L.J. Ch. 760; *Scott* v. *Alvarez*, (1895) 2 Ch. 603; 64 L.J. Ch. 821.

(*o*) *Frend* v. *Buckley*, L.R. 5 Q.B. 213; 39 L.J. Q.B. 90.

(*p*) *Souter* v. *Drake*, 5 B. & Ad. 992; 3 L.J. K.B. 31; *Hall* v. *Betty*, 4 M. & Gr. 410; 11 L.J. C.P. 256; *Purris* v. *Rayer*, 9 Pr. 488; *Deverell* v. *Bolton* (*Lord*), 18 Ves. 505.

(*q*) *Gosling* v. *Woolf*, (1893) 1 Q.B. 39.

(*r*) *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L.J. Ex. 287.

(*s*) *Hodgkinson* v. *Cooper*, 9 Beav. 304; 15 L.J. Ch. 160.

(*t*) *Fane* v. *Spencer*, 2 Mad. 438.

(*u*) *Shepherd* v. *Keatley*, 1 C. M. & R. 117; 3 L.J. Ex. 288; *Waddell* v. *Wolfe*, L.R. 9 Q.B. 515; 43 L.J. Q.B. 138; *Smith* v. *Robinson*, 13 Ch.D. 148; 49 L.J. Ch. 20.

(*x*) *Spratt* v. *Jeffery*, 10 B. & C. 249; 8 L.J. (O.S.) K.B. 114; *Best* v. *Hamand*, 12 Ch.D. 1; 48 L.J. Ch. 503; *Nat. Prov. Bank of England and Marsh's Contract, In re*, (1895) 1 Ch. 190; 64 L.J. Ch. 255.

(*y*) *Penniall* v. *Harborne*, 11 Q.B. 368; 17 L.J. Q.B. 94; *Nouaille* v. *Flight*, 7 Beav. 521; 13 L.J. Ch. 414; *Brewer* v. *Broadwood*, 22 Ch.D. 105; 52 L.J. Ch. 136.

original lessor is essential to the validity of the transfer or assignment of the lease to the purchaser, it is the duty of the vendor to procure that consent (*z*). When leaseholds, consisting of several houses held under the same lease, are sold in several lots to distinct purchasers, and the lease contains covenants affecting the whole, with a proviso enabling the landlord to re-enter in case of the breach of any one covenant, the purchaser of one lot may be evicted without any default on his part, solely through the default of another purchaser (*a*). Great risk may be run of the loss of the entire purchase from such a state of circumstances. The covenants of the original lease, therefore, should be strictly examined; and when such covenants as just mentioned exist, the purchaser is not bound to accept the title with an indemnity (*b*). The production of the last rent receipt is only *primâ facie*, and not conclusive, evidence that there has been no breach of covenant (*c*). And, in every case, when an agreement has been entered into for the purchase of an existing lease or underlease, the purchaser is not affected with notice of the covenants, and is not bound to complete if the covenants are onerous and unusual, unless before entering into the agreement he had a fair opportunity of ascertaining the terms of the covenants (*d*).

Waiver of proof of title and of objections to title.—Where there is a contract for the purchase of a lease and the defendant's conduct has been inconsistent with the right to call for an inspection of the lessor's title, that will be strong evidence that he has waived all right to call for such title (*e*). The taking of possession is not of itself a waiver, but is some evidence of acceptance of title which may be rebutted by other circumstances (*f*). If possession is given under the contract, and the abstract of title is delivered, and the purchaser continues in possession for a lengthened period, making no objections at all to the title, or only frivolous objections with a view of delaying payment of the purchase-money, the court will, unless the title is clearly shown to be bad, decree payment without

(*z*) *Lloyd* v. *Crispe*, 5 Taunt. 249; *Mason* v. *Corder*, 7 *ib.* 9; 2 Marsh. 332.

(*a*) *Paterson* v. *Long*, 6 Beav. 590, 597; 13 L.J. Ch. 1.

(*b*) *Blake* v. *Phinn*, 3 C.B. 976; 16 L.J. C.P. 159.

(*c*) *Hignett and Bird's Contract, In re*, (1903) 1 Ch. 287; 72 L.J. Ch. 220.

(*d*) *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121; *Reeve* v. *Berridge*, 20 Q.B.D. 523; 57 L.J. Q.B. 265; *Davis and Cavey, In re*, 40 Ch.D. 601; 58 L.J. Ch. 143; *White's Contract, In re*, (1896) 1 Ch. 637; 65 L.J. Ch. 481; *Haedicke's Contract, In re*, (1901) 2 Ch. 666; 70 L.J. Ch. 811; *Molyneux* v. *Hawtrey*, (1903) 2 K.B. 487; 72 L.J. K.B. 873.

(*e*) *Haydon* v. *Bell*, 1 Beav. 337; *Simpson* v. *Sadd*, 4 De G. M. & G. 665; 24 L.J. Ch. 562.

(*f*) *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121; *Burroughs* v. *Oakley*, 3 Swanst. 171.

going into any investigation of title (*g*). So, a purchaser may, by taking possession of the estate agreed to be sold to him after the delivery of an abstract apprising him of the existence of certain incumbrances, waive his right of objecting to the title, on the ground of the existence of such incumbrances. Where, for example, a purchaser took possession of an estate after the delivery of an abstract of title, on the face of which it appeared that part of the estate was subject to a right of sporting, it was held that he had waived his right to object to the title on the ground of the existence of such a right (*h*). But where the defect is removable by the vendor, as in the case of a mortgage, there would be no waiver (*i*). Proof of title to transfer the estate agreed to be sold is a condition precedent to the vendor's right to the purchase-money; and the court cannot make a purchaser accept a title which does not exist, and will not compel him to pay the purchase-money, when it cannot give him the estate for which he agreed to pay it (*k*). And where the contract provides that a good title shall be shown, the purchaser is entitled to insist upon it, though he knows of defects (*l*); but, if the contract is silent as to title, notice of defects to the purchaser will affect his right to insist upon a good title (*m*). A purchaser cannot be held to have waived objections to title because his counsel has approved of the title (*n*). Even if he expressly accepts the title as satisfactory, such acceptance does not preclude him from subsequently showing that the vendor has no title at all, and that the acceptance has been made under a misapprehension and a mistake (*o*). If it is stipulated by the contract that objections to title are to be considered as waived unless made within a certain time, such time is of the essence of the contract; so that if the objection is not sent in within the time, the vendor has the right to take the benefit of the condition, and say that the title has been accepted, unless, indeed, no title is shown upon the face of the abstract (*p*). If the purchaser takes possession under the contract, and afterwards rejects the title, he may be turned out of possession by the vendor, and cannot, in general, claim compensation for im-

(*g*) *Anspach* (*Margravine*) v. *Noel*, 1 Mad. 310; *Hall* v. *Laver*, 3 You. & C. 196.

(*h*) *Burnell* v. *Brown*, 1 Jac. & Walk. 168.

(*i*) *Gloag's Contract*, *In re*, 23 Ch.D. 320; 52 L.J. Ch. 654.

(*k*) *Blachford* v. *Kirkpatrick*, 6 Beav. 232, 236; 12 L.J. Ch. 108.

(*l*) *Cato* v. *Thompson*, 9 Q.B.D. 616.

(*m*) *Gloag's Contract*, *In re*, *supra*. See also *Ellis* v. *Rogers*, 29 Ch.D. 661 *Childe and Hodgson's Contract*, *In re* 54 W.R. 234.

(*n*) *Deverell* v. *Bolton* (*Lord*), 18 Ves. 505.

(*o*) *Warren* v. *Richardson*, 1 You. 1; *Ward* v. *Trathen*, 14 Sim. 82; *Bousfield* v. *Hodges*, 33 Beav. 90; *Harnett* v. *Baker*, L.R. 20 Eq. 50; 45 L.J. Ch. 64.

(*p*) *Blacklow* v. *Laws*, 2 Hare, 40; *Oakden* v. *Pike*, 34 L.J. Ch. 620.

provements (*q*). But whenever a third person, having a title to lands about to be sold, knows of the sale and of his title, and neglects to give the purchaser notice thereof, "he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser; and, in such case, infancy and coverture shall be no excuse" (*r*).

Production of title-deeds.—After the title, as disclosed upon the abstract, has been approved of and accepted by the purchaser or his legal advisers, the title-deeds themselves must be produced for inspection and verification with the abstract. If these are not produced, the purchaser will not be bound to complete his purchase. In the case of a sale of a copyhold estate, the copies of court-roll are the documents of title, and must be furnished to the purchaser for comparison with the abstract (*s*). The vendor is in all cases bound to produce and show to the purchaser all deeds and writings in his possession or under his control that in anywise concern the property agreed to be sold, whatever be their date of age; but he is not in general bound to furnish an abstract of any deed of an earlier date than sixty years. If the deeds abstracted refer to prior deeds, settlements, or wills not in the possession or under the control of the vendor, and the absence of the deed so referred to throws a serious doubt upon the title, the purchaser will not be bound to complete his purchase. But "when the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, the loss of the deed recited throws no reasonable doubt upon the title" (*t*). Where, for example, a deed or will in the abstract professed to have been made in execution of a power of appointment contained in a previous deed or will more than sixty years old, and not abstracted, the purchaser was entitled to call for the production of the deed, if in the possession of the vendor, to see that the power had been properly executed. But, where there had been sixty years' undisputed possession by the parties entitled under the appointment, and the deed creating the power was not in the possession or under the control of the vendor, the presumption was in favour of a valid execution of the power, and the purchaser was compelled to complete his contract, where he could not bring forward evidence impeaching the appointment, and throwing a reasonable doubt upon the title. By the Conveyancing Act, 1881, a purchaser is not to

(*q*) *Nicloson* v. *Wordsworth*, 2 Swanst. 365.

(*r*) *Savage* v. *Foster*, 9 Mod. 35, 38; *Sharpe* v. *Foy*, L.R. 4 Ch. 35.

(*s*) *Whitbread* v. *Jordan*, 1 You. & C. 318; 4 L.J. Ex. 38, and see *ante*, p. 488.

(*t*) *Prosser* v. *Watts*, 6 Mad. 59; *Moulton* v. *Edmonds*, 29 L.J. Ch. 181.

require the production, or any abstract or copy, of any deed, will, or document, nor make inquiry as to such, dated before the time fixed by law or contract for commencement of the title, notwithstanding reference to such in deeds, &c., produced, and he is to assume recitals and executions to be correct (*u*). The expenses of production, inspection, &c., of documents not in the vendor's possession are to be borne by the purchaser (*x*).

Loss of title-deeds after delivery of abstract.—If the title-deeds are destroyed by accident after approval of the title, the vendor must furnish the purchaser with the means of proving the actual existence of the deeds, their contents, and their due execution by all necessary parties. If the abstract of title has been delivered and compared with the deeds themselves prior to their destruction, this may afford the means of proving the contents of the deeds; but it must still be shown who the attesting witnesses were, and that the deeds were duly executed and delivered, and the purchaser must be furnished with the means of proof thereof, for the purpose of asserting his title, and defending his possession. If no such proof is afforded, the purchaser is discharged (*y*). And if, after the making of the contract, the purchaser is let into possession, and the contract is abandoned or rescinded, the purchaser cannot be treated as a lessee, and be compelled to pay rent, or to pay for the use and enjoyment of the property (*z*).

Effect of misdescription.—The vendor must be prepared to convey to the purchaser an estate or interest substantially corresponding with that bargained for, both as regards the tenure and the situation and natural advantages of the property. Any misdescription of the estate or interest, or of the nature, or situation, or extent, or value of the property in a material point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the contract would never have been made, at once releases the purchaser from the bargain (*a*). And a vendor is under an obligation to disclose any material defect in the subject of the sale or in the title thereof which is exclusively within his own knowledge and which a purchaser could not be expected to dis-

(*u*) 44 & 45 Vict. c. 41, s. 3 (3).

(*x*) Sect. 3 (6). Note that the section in no way relieves a vendor from the duty of making out a title: see *Moody and Yates' Contract, In re*, 30 Ch.D. 344; 54 L.J. Ch. 886; *Johnson and Tustin, In re*, 30 Ch.D. 42; 54 L.J. Ch. 889; *Stuart and Olivant and Seadon's Contract, In re*, (1896) 2 Ch. 328, 332; 65 L.J. Ch. 576; *Duthy and Jesson's Contract, In re*, (1898) 1 Ch. 419; 67 L.J. Ch. 218.

(*y*) *Bryant* v. *Busk*, 4 Russ. 1.

(*z*) *Kirtland* v. *Pounsett*, 2 Taunt. 145.

(*a*) *Dimmock* v. *Hallett*, L.R. 2 Ch. 21; 36 L.J. Ch. 146; *Aberaman Iron Works* v. *Wickens*, L.R. 4 Ch. 101, *Jacobs* v. *Revell*, (1900) 2 Ch. 858; 69 L.J. Ch. 879.

cover for himself by the exercise of ordinary care (*b*). If the conditions of sale provide that errors and misstatements shall not vitiate the sale, but that an abatement shall be made in the purchase-money by way of compensation, the provision will extend only to unintentional errors and misstatements in matters of detail, not amounting to fraud (*c*), and not materially altering the nature of the subject-matter of the contract; for no man is bound to take an estate or interest essentially different from that which he agreed to purchase (*d*). So, where there are such conditions, and an error is discovered after the conveyance has been executed, the purchaser is entitled to compensation (*e*); but this is not so if he might have discovered the defect, and if there was no agreement as to compensation (*f*). If an infinitesimal portion of the estate sold cannot be given to the purchaser, he may be compelled to complete with compensation, but not when the estate given is substantially different (*g*).

A general agreement to sell a house or land means that the owner of the property will sell an estate in fee. The purchaser, therefore, may refuse to complete the purchase, if the vendor is unable to transfer a freehold property or if he has not got what he has contracted to sell; though, if the purchaser chooses to take such an estate as the vendor has in the land, the latter will be bound to transfer his whole interest to him (*h*). So, when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of from any other person, the purchaser may, as soon as he discovers the fact which will usually be when the abstract is delivered, say, "I shall not complete;" and he is not bound to wait to see whether the vendor can induce some third person to join in making a good title to the property sold (*i*). So, where there was a contract to sell the residue of a lease, of which twelve and

(*b*) *Carlish* v. *Salt*, (1906) 1 Ch. 335; 75 L.J. Ch. 175.

(*c*) *Dimmock* v. *Hallett, supra; Whittemore* v. *Whittemore*, L.R. 8 Eq. 603; 38 L.J. Ch. 17. The difference between the grounds for specific performance and rescission must, however, be noted: see *Terry's Contract*, *In re*, 32 Ch.D. 14; 55 L.J. Ch. 345.

(*d*) *Flight* v. *Booth*, 1 Bing. N.C. 370; 4 L.J. C.P. 66; *Hart* v. *Swaine*, 7 Ch.D. 42; 47 L.J. Ch. 5; *Fawcett and Holmes*, *In re*, 42 Ch.D. 150; 58 L.J. Ch. 763; *Jacobs* v. *Revell*, (1900) 2 Ch. 858; 69 L.J. Ch. 879; *Puckett's Contract*, *In re*, 1902) 2 Ch. 258; 71 L.J. Ch. 666.

(*e*) *Turner and Skelton*, *In re*, 13 Ch.D. 130; 49 L.J. Ch. 114; *Bos* v. *Helsham*, L.R. 2 Ex. 72; 36 L.J. Ex. 20; *Palmer* v. *Johnson*, 13 Q.B.D. 351; 53 L.J. Q.B. 348; cp. *Debenham* v. *Sawbridge*, (1901) 2 Ch. 98; 70 L.J. Ch. 525.

(*f*) *Clayton* v. *Leech*, 41 Ch.D. 103. As to misleading conditions of sale, see *Sandbach's Contract*, *In re*, (1891) 1 Ch. 99; 60 L.J. Ch. 60; *Scott and Alvarez's Contract*, *In re*, (1895) 1 Ch. 596; 64 L.J. Ch. 376.

(*g*) *Arnold*, *In re*, 14 Ch.D. 270.

(*h*) *Bower* v. *Cooper*, 2 Hare, 408; *Bellamy* v. *Debenham*, (1891) 1 Ch. 412; 60 L.J. Ch. 166.

(*i*) *Forrer* v. *Nash*, 35 Beav. 167; *Bryant and Barningham's Contract*, *In re*, 44 Ch.D. 218; 59 L.J. Ch. 636; *Bellamy* v. *Debenham*, *supra*.

a half years were unexpired, but it turned out that the lessors had an option to determine at the end of five years, it was held that the purchaser might rescind the contract and recover the deposit (*k*); and it was held, where a ground rent was omitted to be mentioned (*l*), and also where a restrictive covenant was omitted (*m*), that the purchaser of the lease was discharged. Every document that forms a link in the vendor's title should be abstracted in chief (*n*).

If, pending negotiations for the sale of real property, the vendor affirms the rents to be more than they really are, and the person to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed containing no notice of such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement (*o*). Even where, for example, the rent stated is literally true, but the property had been only let for one year at the rent stated, which was far above its value, the vendee is entitled to be relieved from his purchase (*p*). On the other hand, a statement not literally true, yet not substantially misleading, is no ground for annulling a contract: as where a vendor of a leasehold house stated himself to be a lessee for twenty-four years, whereas he was an under-lessee for that period, less three days (*q*). Where the vendor of a public-house, pending the treaty for the sale of the house, made sundry false representations to the plaintiff concerning the amount of business done, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit (*r*). Where, however, there is no proof of fraud, and the purchaser has not relied on the vendor's statements but tested their accuracy, and after having knowledge

(*k*) *Weston* v. *Savage*, 10 Ch.D. 736; 48 L.J. Ch. 239.

(*l*) *Jones* v. *Rimmer*, 14 Ch.D. 588; 49 L.J. Ch. 775.

(*m*) *Higgins and Hitchman's Contract, In re*, 21 Ch.D. 95; 51 L.J. Ch. 772; *Ebsworth and Tidy's Contract, In re*, 42 Ch.D. 23; 58 L.J. Ch. 665; *Cox's Contract, In re*, (1891) 2 Ch. 109.

(*n*) *Stamford Banking Co. and Knight's Contract, In re*, (1900) 1 Ch. 287; 69 L.J. Ch. 127.

(*o*) *Lysney* v. *Selby*, 2 Ld. Raym. 1118; see *Bos* v. *Helsham*, L.R. 2 Exch. 72; 36 L.J. Ex. 20; *Palmer* v. *Johnson*, 13 Q.B.D. 351; 53 L.J. Q.B. 348.

(*p*) *Dimmock* v. *Hallett*, L.R. 2 Ch. 21; 36 L.J. Ch. 146.

(*q*) *Duddell* v. *Simpson*, L.R. 2 Ch. 102; 36 L.J. Ch. 70; see *Aberaman Iron Works* v. *Wickens*, L.R. 4 Ch. 101.

(*r*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L.J. (O.S.) K.B. 89; *Canham* v. *Barry*, 15 C.B. 597; 24 L.J. C.P. 100.

or the means of knowledge declared that he was satisfied, then the purchaser will not be allowed to rescind (*s*).

Again, if a man contracts for the purchase of a house *and* wharf, or a wharf *and* jetty, he may refuse to take the house without the wharf, or the wharf without the house, or without the jetty, if they are contiguous to each other, and were clearly intended to go together (*t*). And, whenever mansion-houses, farms, woods, or meadows are sold together as one estate, and the hope of possessing the one was the inducement to the purchaser to buy the others, he may insist upon having the whole or none (*u*). "The court will determine as a jury would the question: 'Did or did not the party purchase the one with reference to the other? Would he or would he not have taken the one, had he not reckoned also upon having the other?'" (*x*). If a purchaser has contracted for the purchase of a freehold interest, he is not bound to accept a copyhold estate (*y*), nor a leasehold interest, however long the duration of the term (*z*). If he has bargained for a fee simple in possession, he is not bound to take a remainder in fee expectant upon the determination of a life estate, however advanced in life the tenant for life may be, or however liberal may be the compensation offered in the shape of an abatement of the purchase-money (*a*). If he has bargained for the purchase of a lease having eight years to run, he cannot be compelled to take a lease of only six, although the vendor may offer him a proportionate reduction in the amount of the purchase-money (*b*). So if an estate is subject to a right of sporting, or of common, or to dig for mines, or a right on the part of third persons to have extensive underground watercourses, and to enter upon the land to repair such watercourses, and the purchaser contracts for the estate in ignorance of these rights, he may refuse to complete his purchase as soon as he is aware of their existence; and he cannot be compelled to take the estate with an abatement on the amount of the purchase-money (*c*). Nor, on the other hand, can a purchaser be compelled to take more than he has bargained for (*d*). But, if there is only a slight difference in the duration of the term of

(*s*) *Attwood* v. *Small*, 6 Cl. & F. 232, 445.

(*t*) *Peers* v. *Lambert*, 7 Beav. 546.

(*u*) *Poole* v. *Shergold*, 2 Bro. C.C. 118; *Gibson* v. *Spurrier*, 2 Peake, 49; *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282.

(*x*) *Casamajor* v. *Strode*, 2 Myl. & K. 706, 730; *Lewin* v. *Guest*, 1 Russ. 325, 330.

(*y*) *Hick* v. *Phillips*, Pr.Ch. 575.

(*z*) *Drewe* v. *Corp*, 9 Ves. 368; *Wright* v. *Howard*, 1 Sim. & Stu. 190; 1 L.J. (O.S.) Ch. 94; *Price* v. *Ley*, 4 Giff. 235; 32 L.J. Ch. 530.

(*a*) *Collier* v. *Jenkins*, 1 You. 295.

(*b*) *Farrer* v. *Nightingal*, 2 Esp. 630; *Long* v. *Fletcher*, 2 Eq.Ca.Abr. 5, pl. 4.

(*c*) *Shackleton* v. *Sutcliffe*, 12 Jur. 199; 1 De G. & S. 609.

(*d*) *North* v. *Percival*, (1898) 2 Ch. 128; 67 L.J. Ch. 321.

a lease offered to be assigned and that bargained for—if the former substantially corresponds with the description given of it in the contract for the sale—the purchaser will be bound to take it, and the deficiency must be compensated for in an abatement of the price (*e*). If, therefore, the purchaser bargains for a term of ninety-nine years in land, and the vendor has only ninety-eight or ninety-seven years, the purchaser will be bound to take the smaller term, receiving a proportionate abatement in the amount of the purchase-money (*f*).

If a man has not the entirety of the estate he professes to sell, the purchaser is not bound to accept at a proportionate price the share which he actually has in the estate. And, if tenants in common of an estate contract for the sale of it, and one of them dies, the purchaser cannot be compelled to take the share of the survivors without the share of the deceased (*g*). If the purchaser elects to take such an interest as the vendor has in the land agreed to be sold, subject to a fair and proportionate abatement in the amount of purchase-money, the vendor is not entitled to object to his so doing. So, if he has bargained for a lease of the whole property, and finds that the vendor can only give a title to a moiety, he may have a decree for that moiety, and an abatement of the rent (*h*). The purchaser is entitled to take what he can get, with compensation for what he ought to have had but cannot obtain (*i*), provided the contract is capable of being carried out by a decree for specific performance (*k*). His right in such a case where the contract is silent as to compensation rests on the principle of equitable estoppel, namely, that, where a vendor has represented and contracted to sell an estate as his own and the purchaser has relied on the representation, the vendor cannot afterwards be heard to say he has not the entirety (*l*). Where, however, the purchaser knows that the land is in the occupation of a tenant, he is not entitled to specific performance with compensation if the tenant has a lease (*m*). And the relief is also inapplicable where compensation cannot be properly assessed, as in the case of restrictive covenants (*n*). Neither, on the other hand, can

(*e*) *Belworth* v. *Hassell*, 4 Campb. 140.

(*f*) *Halsey* v. *Grant*, 13 Ves. 77; *Mortlock* v. *Buller*, 10 Ves. 305.

(*g*) *Att.-Gen.* v. *Day*, 1 Ves. senr. 218.

(*h*) *Burrow* v. *Scammell*, 19 Ch.D. 175; 51 L.J. Ch. 296.

(*i*) *Wood* v. *Griffith*, 1 Wils. Ch.C. 45; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Graham* v. *Oliver*, 3 Beav. 124; *Barnes* v. *Wood*, L.R. 8 Eq. 424; 38 L.J. Ch. 683; *Jackson and Haden's Contract*, *In re*, (1906) 1 Ch. 412; 75 L.J. Ch. 226.

(*k*) *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L.J. Ch. 78.

(*l*) *Rudd* v. *Lascelles*, (1900) 1 Ch. 815; 69 L.J. Ch. 396.

(*m*) *James* v. *Lichfield*, L.R. 9 Eq. 51; 39 L.J. Ch. 248.

(*n*) *Thomas* v. *Dering*, 6 L.J. Ch. 267, 272; *Cato* v. *Thompson*, 9 Q.B.D. 616, 618; *Rudd* v. *Lascelles*, *supra*.

the vendor enforce the contract, if the terms of tenancy are materially misdescribed in the particulars of sale (*o*). Quit rents, being incidents of tenure, are proper subjects of compensation by abatement of the purchase-money; an omission, therefore, of the fact of an estate being charged with a quit-rent will not invalidate the contract for the sale of it (*p*). But it is otherwise if the charge is a rent-charge (*q*). Conditions of sale must not be misleading, and a condition is misleading if it requires the purchaser to assume what the vendor knows to be false, or if it states that the title is not accurately known when in fact it is accurately known to the vendor (*r*).

The following misstatements and misdescriptions have been held so far material and important as to entitle the purchaser to refuse to complete his contract, and to enable him to recover back his deposit, on the ground that the vendor had not tendered him that for which he had bargained, although the contract contained the usual provision that errors and misstatements should not vitiate the sale:—a reversionary estate described as "absolute on the death of a person aged sixty-six," whereas the party was only sixty-four, and the reversion was not absolute (*s*)—a redeemable estate, or a redeemable annuity issuing out of land, described generally as "an estate," or "an annuity," no notice being taken of its being subject to redemption (*t*)—a plot of ground described generally on a plan, without notice of any right of way over it, or right of sporting, whereas it was held subject to a right of sporting (*u*), or to a right of way on the part of the occupiers of an adjoining house, their servants and families (*x*)—leases described as containing particular covenants on the part of the lessees, whereas no such covenants existed (*y*)—or described as leasehold renewable by custom, when no custom to renew existed (*z*)—dwelling-houses described as being holden on a ground-rent lease at a net annual ground-rent of 42*l.*, whereas the rent was a rack-rent (*a*)—a dwelling-house described as a brick-built dwelling-house, whereas parts of the external walls were composed of only lath

(*o*) *Caballero* v. *Henty*, L.R. 9 Eq. 447; 43 L.J. Ch. 635.

(*p*) *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122.

(*q*) *Bowles* v. *Waller*, 1 Hayes, 441.

(*r*) *Banister*, *In re*, 12 Ch.D. 131; 48 L.J. Ch, 837.

(*s*) *Sherwood* v. *Robins*, 3 C. & P. 339; Mood. & M. 194.

(*t*) *Coverley* v. *Burrell*, 5 B. & Ald. 257; *Ballard* v. *Way*, 1 M. & W. 520; 5 L.J. Ex. 207.

(*u*) *Burnell* v. *Brown*, 1 Jac. & W. 168.

(*x*) *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282; if the right of way is patent and obvious, the principle of *caveat emptor* applies: *Bowles* v. *Round*, 5 Ves. 509.

(*y*) *Waring* v. *Hoggart*, Ry. & M. 39.

(*z*) *Newby* v. *Painter*, 22 L.J. Ch. 871; 17 Jur. 483.

(*a*) *Stewart* v. *Alliston*, 1 Mer. 26.

and plaster (*b*)—a public-house and yard described as being holden for a term, of which twenty-three years were unexpired, at a rent of 55*l.* per annum, whereas the yard was held distinct from the public-house, under a demise from year to year only, at an additional rent of 8*l.* per annum (*c*)—a public-house described in the printed conditions as a "free public-house," whereas it was held upon the terms that all the beer should be taken from a particular brewer (*d*)—a lease described as containing a restriction against offensive trades, whereas it contained a restriction, not only against offensive trades, but also against some trades that were perfectly inoffensive (*e*)—houses described as Nos. 3 and 4, whereas they were Nos. 2 and 3 (*f*)—a steam factory described as being well supplied with "water," whereas there was no natural supply, but all the water was furnished at very great cost by a water company (*g*)—a house described as being held at a low ground-rent of 15*l.* per annum, whereas the ground-rent was 35*l.* per annum (*h*)—a lease described as an original lease, whereas it was an under-lease (*i*)—and described as in the occupation of a tenant, whereas the occupier was a hostile claimant (*k*)—meadows described generally, without notice of any right of common over them, whereas one of the meadows was held subject to the exercise of such a right every third year (*l*)—a timber estate described as comprising a wood of sixty-five acres of fine oak timber trees of the average size of fifty feet, whereas the average size of the trees appeared to be only twenty-two feet (*m*)—a freehold garden described as "inclosed by a rustic wall with tradesman's side entrance," whereas the wall was not part of the property and the entrance was only used on sufferance (*n*)—a sum in gross payable under a covenant described as a freehold ground-rent (*o*). Where a purchaser surveyed the property with a plan in his hand, which had been furnished to him by the vendors, and was naturally misled into thinking that the boundary included certain trees which it did not include, the court held that he had been misled by the fault of the vendors, and refused to decree specific performance against him (*p*).

(*b*) *Robinson* v. *Musgrove*, 2 Moo. & R. 92.
(*c*) *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; 4 L.J. K.B. 201.
(*d*) *Jones* v. *Edney*, 3 Campb. 285.
(*e*) *Flight* v. *Booth*, 1 Bing. N.C. 370; 4 L.J. C.P. 66.
(*f*) *Leach* v. *Mullett*, 3 C. & P. 115.
(*g*) *Leyland* v. *Illingworth*, 3 De G. F. & J. 248; 29 L.J. Ch. 611.
(*h*) *Mills* v. *Oddy*, 6 C. & P. 728.
(*i*) *Mason* v. *Corder*, 2 Marsh. 336.
(*k*) *Lachlan* v. *Reynolds*, 23 L.J. Ch. 8; Kay, 52.
(*l*) *Gibson* v. *Spurrier*, Peake's Ad. Cas. 49.
(*m*) *Brooke* (*Lord*) v. *Rounthwaite*, 5 Hare, 298; 15 L.J. Ch. 332.
(*n*) *Brewer* v. *Brown*, 28 Ch.D. 309; 54 L.J. Ch. 605.
(*o*) *Robins* v. *Evans*, 2 H. & C. 410; 33 L.J. Ch. 68.
(*p*) *Denny* v. *Hancock*, L.R. 6 Ch. 1; 40 L.J. Ch. 193.

On the other hand, if what is tendered to the purchaser substantially corresponds with the description in the contract of sale, and there only exists some trifling defect, easily measurable on a pecuniary basis, the purchaser will be bound to complete his contract, on receiving a proportionate abatement of the purchase-money. Thus, where a piece of meadow-land, imperfectly watered, was described by a vendor as "uncommonly rich water-meadow," and where a leasehold estate was represented to be nearly equal to freehold, being renewable upon a small fine, whereas the fine was a large one, it was held that the misrepresentation did not avoid the contract, but afforded ground for compensation to the purchaser (*q*). But where an auctioneer innocently represented that there was a right of way to a property when there was none, it was held by Denman, J., that no compensation could be recovered from the vendor after completion of the purchase (*r*). And where the purchaser must have known the true state and condition of the property, and could not have been misled or deceived by the misdescription, he will not be permitted to avail himself of it for the purpose of avoiding the contract. So, if he proceeds with the treaty after he is aware of the misstatement or misdescription, and makes no objection, he will be deemed to have waived his right to object, and to have assented to take the estate as it is, subject, it may be, to an abatement in the amount of the purchase-money. If the misrepresentation, too, does not in anywise affect the value or enjoyment of the property, it will not invalidate the contract. Where fines payable to the lord of a manor were described as arbitrary, whereas they were both arbitrary and certain, but the annual value of the property was correctly stated, it was held that the purchaser had no ground for refusing to complete the purchase (*s*). And if the price of an estate is not regulated by the acreage of the property, but by its peculiar situation or adventitious value, and the quantity is stated as mere matter of description or opinion, and not as the result of actual admeasurement, the purchaser may be compelled to take the estate, and will not be entitled to any abatement of his purchase-money, if the actual quantity falls short of the estimated quantity. If the price has been regulated by the acreage, and the quantity has been innocently misrepresented by the vendor, "the purchaser has a right to have what the vendor can give, with an abatement out of the purchase-money for so much as the quan-

(*q*) *Scott* v. *Hanson*, 1 Sim. 13; *Fenton* v. *Browne*, 14 Ves. 144; *Trower* v. *Newcombe*, 3 Mer. 704.

(*r*) *Brett* v. *Clowser*, 5 C.P.D. 376.

(*s*) *White* v. *Cuddon*, 8 Cl. & Fin. 785.

tity falls short of the representation. This is the rule, though the land is neither bought nor sold professedly by the acre, the presumption being that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of" (*t*). Conversely, where a mistake of quantity is of such a nature that it cannot equitably be made the subject of compensation, it is not a case for compensation, but a ground for avoiding the contract (*u*). And if the purchaser has never seen the estate, but relies solely on the representations of the vendor, and there is any material difference between the actual and represented quantity, the purchaser will not be bound to complete his purchase. The words, "more or less," or "thereabouts," will only cover a moderate excess or deficiency, and will never be suffered to be the instrument of fraud (*x*). If a vendor makes a mistake against his own interest, as where he sells an estate with the timber, which timber is by mistake sold at too low a price, the purchaser is entitled to his bargain (*y*).

Alterations in condition of property.—The vendor must transfer the estate in the same condition that it was in at the time of the agreement for the sale. Thus, where the vendor removed a summer-house, it was held that the purchaser might refuse to complete the purchase and recover back the deposit (*z*). So, where the vendor cut down some ornamental timber, it was held that the purchaser might refuse to complete his contract (*a*). If a man contracts for the sale of the land and trees, the purchaser is not bound to take the estate without the timber (*b*). If it is stipulated that the purchaser shall pay for timber growing on the land, he must pay for all trees which are considered to be timber by the custom of the country (*c*).

Time and mode of performance.—By the Judicature Act, 1873, s. 25 (7), stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contract in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity. The time appointed for the conveyance of the legal estate, or

(*t*) *Hill* v. *Buckley*, 17 Ves. 401; *King* v. *Wilson*, 6 Beav. 124; *Terry and White's Contract, In re*, 32 Ch.D. 14; 55 L.J. Ch. 345.

(*u*) *Durham* (*Earl*) v. *Legard*, 34 L.J. Ch. 589; 34 Beav. 611.

(*x*) *Day* v. *Fynn*, Owen, 133; *Winch* v. *Winchester*, 1 Ves. & B. 377; *Portman* v. *Mill*, 2 Russ. 570. See *Joliffe* v. *Baker*, 11 Q.B.D. 255; 52 L.J. Q.B. 609.

(*y*) *Griffiths* v. *Jones*, L.R. 15 Eq. 279; 42 L.J. Ch. 468.

(*z*) *Granger* v. *Worms*, 4 Camp. 83.

(*a*) *Magennis* v. *Fallon*, 2 Moll. 561, 588.

(*b*) *St. Albans* (*Duke*) v. *Shore*, 1 H.Bl. 270.

(*c*) *Chandos* (*Duke*) v. *Talbot*, 2 P. Wms. 601; *Aubrey* v. *Fisher*, 10 East, 446.

the delivery of the abstract of title, or the performance of the other preliminaries, is not of the essence of the contract; and the parties, although precise days are fixed, will be allowed a reasonable time for performance, regard being had to all the circumstances of the case, and the nature of the title to be made (*d*). If the vendor will not complete his part of the contract within a reasonable time, the purchaser may withdraw from the contract, and decline to have anything further to do with it (*e*).

Time may, however, be made of the essence of the contract, before the sale, by a proper condition (*f*), and, after the sale, by giving a proper notice of completion or rescission by a limited time (*g*), if there has been no unreasonable delay (*h*); and, if it plainly appears to have been the intention of the parties that time should be of the essence of the contract (*i*), or that the sale should be conditional, and be made to depend on the performance of the contract by an appointed period, the court will not decree performance after the time has elapsed (*k*). Thus, in a condition that objections to the vendor's title are to be sent in within a given period, time is of the essence of the contract (*l*). But, if a vendor does not deliver the abstract of title within the time specified, the purchaser is not bound to send in his objections within the specified time (*m*). If, again, a person, seeking to enforce a contract for the sale of land, has himself been guilty of delay—if he has slept over his rights, and allowed an unreasonable time to elapse before seeking for performance—the court will not assist him (*n*). Time is also considered to be material, and, to a very considerable extent, of the essence of the contract, from the nature of the property or the circumstances (*o*), as where the subject-matter of the sale is exposed to daily variations in value, such as stock, shares,

(*d*) *Hipwell* v. *Knight*, 1 You. & Coll. 416; 4 L.J. Ex. 52; *Hearne* v. *Tenant*, 13 Ves. 287.

(*e*) *Macbryde* v. *Weekes*, 22 Beav. 533, 539; *Nott* v. *Riccard*, *ib.* 307; 25 L.J. Ch. 618.

(*f*) *Hudson* v. *Temple*, 29 Beav. 536; 30 L.J. Ch. 251.

(*g*) *Taylor* v. *Brown*, 2 Beav. 180; 9 L.J. Ch. 14; *Wells* v. *Maxwell*, 32 Beav. 408; 33 L.J. Ch. 45. Such notice must be reasonable: *Crawford* v. *Toogood*, 13 Ch.D. 153; 49 L.J. Ch. 108; *Green* v. *Sevin*, 13 Ch.D. 589; 49 L.J. Ch. 166; *Compton* v. *Bagley*, (1892) 1 Ch. 313; 61 L.J. Ch. 113.

(*h*) *Green* v. *Sevin*, *supra*; *Halkett* v. *Dudley* (*Earl of*), (1907) 1 Ch. 590; 76 L.J. Ch. 330.

(*i*) *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 33 L.J. Ch. 9; 1 De G. J. & S. 204.

(*k*) *Reynolds* v. *Nelson*, Mad. & Geld. 26; *Hudson* v. *Bertram*, 3 Mad. 440; *Hipwell* v. *Knight*, 1 Y. & C. 401; 4 L.J. Ex. 52; *Ranelagh* (*Lord*) v. *Melton*, 34 L.J. Ch. 227; 2 Dr. & Sm. 278.

(*l*) *Oakden* v. *Pike*, 34 L.J. Ch 620.

(*m*) *Upperton* v. *Nicholson*, L.R. 6 Ch. 436; 40 L.J. Ch. 401.

(*n*) *Lloyd* v. *Collett*, 4 Ves. 689, n.; *Guest* v. *Homfray*, 5 Ves. 818; *Watson* v. *Reid*, 1 Russ. & Myl. 236; *Colby* v. *Gadsden*, 34 Beav. 416.

(*o*) *Roberts* v. *Berry*, 3 De G. M. & G. 284; 22 L.J. Ch. 398; *Tilley* v. *Thomas*, L.R. 3 Ch. 61.

scrip (*p*), reversionary estates (*q*), mines (*r*), factories and buildings used for trading purposes, and public-houses (*s*), and in the case of contracts made with ecclesiastical corporations, where the value of the subject-matter of the contract, and the persons who are to participate in the benefit of it, are liable to constant change (*t*). Where a purchaser agrees that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest, he must pay such interest, unless the delay has been occasioned by misconduct on the part of the vendor (*u*); and he cannot relieve himself from this liability by setting apart the unpaid purchase-money and giving notice thereof to the vendor (*x*).

Where time is of the essence of the contract, mutual promises or covenants between a vendor and purchaser, for the conveyance of an estate on the one hand, and the payment of the purchase-money on the other, at an appointed period, constitute mutual conditions to be performed at the same time; so that, "if one party was ready and willing, and offered to perform his part of the contract and the other neglected or refused to perform his, he who was ready and willing has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act" (*y*). It is a sufficient performance, however, of the vendor's part of the contract, if he is "ready and willing" to execute a conveyance, inasmuch as it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution (*z*), unless the latter has previously declared that he will never execute it, or has refused to deliver the abstract, and intimated his intention not to complete the purchase, or has sold the estate

(*p*) *Doloret* v. *Rothschild*, 1 Sim. & Stu. 590; 2 L.J. (O.S.) Ch. 125.

(*q*) *Newman* v. *Rodgers*, 4 Bro. C.C. 391; unless where a contrary intention can be gathered: *Patrick* v. *Milner*, 2 C.P.D. 342; 46 L.J. C.P. 537.

(*r*) *Walker* v. *Jeffreys*, 1 Hare, 348; 11 L.J. Ch. 209; *Watson* v. *Charlesworth*, (1905) 1 K.B. 74; 74 L.J. K.B. 155.

(*s*) *Coslake* v. *Till*, 1 Russ. 376; *Cowles* v. *Gale*, L.R. 7 Ch. 12; 41 L.J. Ch. 14.

(*t*) *Carter* v. *Ely* (*Dean, &c.*), 7 Sim. 211; 4 L.J. Ch. 132.

(*u*) *Williams* v. *Glenton*, L.R. 1 Ch. 200; 35 L.J. Ch. 284; *Palmerston* (*Lord*) v. *Turner*, 33 Beav. 524; 33 L.J. Ch. 457; *Young and Harston's Contract*, *In re*, 31 Ch.D. 168; *Bennett* v. *Stone*, (1903) 1 Ch. 509, 525; 72 L.J. Ch. 240. As to meaning of "wilful default," see *Hetling's Contract*, *In re*, (1893) 3 Ch. 269; 62 L.J. Ch. 783; *London Corporation's Contract*, *In re*, (1894) 2 Ch. 524; 67 L.J. Ch. 430; *Wilson's Contract*, *In re*, (1894) 3 Ch. 546; 63 L.J. Ch. 863; *Strafford's* (*Lord*) *Contract*, *In re*, (1896) 1 Ch. 235; 65 L.J. Ch. 124; *North* v. *Percival*, (1898) 2 Ch. 128; 67 L.J. Ch. 321; *Woods and Lewis' Contract*, *In re*, (1898) 2 Ch. 211; 67 L.J. Ch. 475; *Pelly and Jacob's Contract*, *In re*, 80 L. T. 45; *Bennett* v. *Stone*, *supra*; *Postmaster-General and Colgan's Contract*, *In re*, (1906) 1 Ir. R. 287, 477.

(*x*) *Riley*, *In re*, 34 Ch.D. 386; 56 L.J. Ch. 442.

(*y*) *Jones* v. *Barkley*, 2 Doug. 684; *Kingston* v. *Preston*, cited *ib.* 691.

(*z*) *Poole* v. *Hill*, 6 M. & W. 835; 10 L.J. Ex. 81.

to another person, or done any act incapacitating him from fulfilling his engagement (*a*). The conveyance tendered must be of the estate and interest bargained for and agreed to be sold (*b*). A purchaser is not entitled to have the conveyance executed in his or his solicitor's presence, but at his own cost may have the signature attested (*c*).

If one time has been appointed for the execution of the conveyance and another for the payment of the purchase-money, the mutual promises do not constitute mutual conditions, but the several acts must be strictly performed in the order agreed upon. And, if a time is appointed for the payment of the purchase-money, but no time has been specified for the execution of the conveyance, the purchaser is bound to pay the money at the time appointed, whether he has or has not obtained a conveyance of the property. In such a case the execution of the conveyance is not a condition precedent to, or concurrent with, the payment of the purchase-money; and the vendor may consequently sue for the money, if not paid at the time appointed, without offering to execute a conveyance (*d*).

Enlargement of time of performance.—The time limited for the performance of a contract required to be in writing by the Statute of Frauds cannot be extended by a mere oral agreement; "for to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent oral agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing but by parol only, and amounts to a contravention of the Statute of Frauds" (*e*). Where a contract for the sale and purchase of land provided that a good title to the land should be produced, and an incurable defect was discovered in the title, and the purchaser then agreed by word of mouth to waive the defect, and take the land with such a title as the vendor possessed, but afterwards, repenting this promise, refused to complete the purchase, it was held that the oral waiver ought to have been authenticated by writing and could not be given in evidence as it had the effect of creating a new contract (*f*). But, even where time

(*a*) *Franklyn* v. *Lamond*, 4 C.B. 637; 16 L.J. C.P. 221.
(*b*) *Vonhollen* v. *Knowles*, 12 M. & W. 602; 13 L.J. Ex. 140.
(*c*) 44 & 45 Vict. c. 41, s. 8.
(*d*) *Mattock* v. *Kinglake*, 10 Ad. & E. 50; 8 L.J. Q.B. 215.
(*e*) *Stowell* v. *Robinson*, 3 Bing. N.C. 928, 937; 6 L.J. C.P. 326.
(*f*) *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 65; 2 L.J. K.B. 127; *Harvey* v. *Grabham*, 5 Ad. & E. 61, 74; 5 L.J. K.B. 235.

is of the essence of the contract, it may be waived by the conduct of the parties, and by the contract being treated and acted upon as a continuing contract after the appointed period (*g*).

Non-performance by vendor.—Where the vendor has reserved a right to rescind the contract if the purchaser raises objections to the title which the vendor is unable or unwilling to remove, the vendor cannot refuse to complete the contract, if the purchaser is willing to waive the objections he has made (*h*). To preclude the exercise of the right, there must be actual waiver either by acquiescence or otherwise (*i*). Where, however, in a similar case, a purchaser continues to insist upon removal of the objection, the vendor will be entitled under such a reservation to annul the sale on the ground of matter of conveyance as well as of matter of title (*k*). And, on notice of rescission being then given, nothing done afterwards on the part of the purchaser—no subsequent waiver of the objection—will restore the contract (*l*). The word "unwilling" in a condition of sale of this description does not, however, give an arbitrary power to the vendor to annul the contract; the vendor must show some reasonable ground for the unwillingness, as, for instance, that, if he proceeds to comply with a requisition, he will be involved in litigation or expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract (*m*). A condition that if the purchaser should "make any objection to or requisition on the title," which the vendors should be "unable or unwilling to remove or comply with," the vendors might annul the contract, was held to exonerate the latter from stating their reasons for rescinding the contract, and it was held that though the word "unwilling" ought to be interpreted "reasonably unwilling," yet in the absence of anything to show *mala fides* the court ought not to infer that the vendors were acting unreasonably (*n*). If a purchaser desires to repudiate his contract on the ground that the vendor cannot make a good title he must do so promptly and effectually, and his repudiation will be bad where after notice of the defect he continues to treat the contract as subsisting by making

(*g*) *Webb* v. *Hughes*, L.R. 10 Eq. 281; 39 L.J. Ch. 606.

(*h*) *Turpin* v. *Chambers*, 29 Beav. 104; 30 L.J. Ch. 470.

(*i*) *Isaacs* v. *Towell*, (1898) 2 Ch. 285; 67 L.J. Ch. 508.

(*k*) *Deighton and Harris' Contract, In re*, (1898) 1 Ch. 458; 67 L.J. Ch. 240.

(*l*) *Duddell* v. *Simpson*, L.R. 2 Ch. 102; 36 L.J. Ch. 70.

(*m*) *Duddell* v. *Simpson*, *supra*. See *Dames' Contract, In re*, 39 Ch.D. 626; 54 L.J. Ch. 771; *Spindler's Contract, In re*, (1901) 1 Ch. 908; 70 L.J. Ch. 420; *Weston and Thomas's Contract, In re*, (1907) 1 Ch. 244; 76 L.J. Ch. 179.

(*n*) *Starr-Bowkett Building Society, In re*, 42 Ch.D. 377; 58 L.J. Ch. 651; *Woolcott* v. *Peggie*, 15 App.Cas. 42; 59 L.J. P.C. 44.

requisitions and objections (*o*). If the vendor has no title to the property agreed to be sold, or if he has a naked legal title, or an equitable interest only, the deposit is recoverable (*p*), unless there is an express agreement to the contrary (*q*); and so it is if the estate is shown to be subject to an equitable incumbrance (*r*). The purchaser, in these cases, is entitled to recover the costs and expenses incurred by him in investigating the title (*s*); also the costs of preparing and tendering a conveyance where that has been done; and, where the vendor has acted with bad faith, and wilfully refused to fulfil his contract, damages for the loss of his bargain. It will be no defence to the action that the vendor has a title at the time of the trial, or after the commencement of the action (*t*). If the purchaser intends to sue for the recovery of a deposit paid by him under a contract, and for general damages, by reason of the non-performance of the contract by the vendor at the time agreed upon, he should give the vendor notice of his intention, and allow the latter a reasonable time, from the date of the notice, to complete the contract (*u*). If there has been a general breach of contract by the vendor, independently of the question as to time of performance, an action is maintainable for the recovery of the deposit, with interest, when the deposit has been paid into the hands of the vendor himself.

In order to entitle him to maintain an action against the vendor for the damages resulting from the non-execution of a conveyance, the purchaser must prove a tender of the conveyance to the vendor for execution, and his own readiness and willingness to pay the purchase-money, unless the vendor has incapacitated himself from executing a conveyance by selling the estate to another, and has thus discharged the purchaser from his obligation (*x*). But it is not necessary for the purchaser to prepare and tender a conveyance, in order to enable him to maintain an action for the recovery of his deposit, and

(*o*) *Hoggart* v. *Scott*, 1 Russ. & My. 293; *Eyston* v. *Simonds*, 1 Y. & C. Ch. 608; *Salisbury* v. *Hatcher*, 2 Y. & C. Ch. 54; *Halkett* v. *Dudley* (*Earl of*), (1907) 1 Ch. 590; 76 L.J. Ch. 330.

(*p*) *Maberly* v. *Robins*, 1 Marsh. 258; 5 Taunt. 625; *Cane* v. *Baldwin*, 1 Stark. 65; *Roper* v. *Coombes*, 6 B. & C. 534; 5 L.J. (O.S.) K.B. 223.

(*q*) *Ashworth* v. *Mounsey*, 23 L.J. Ex. 73; 9 Exch. 175

(*r*) *Elliot* v. *Edwards*, 3 Bos. & P. 181; *Blake* v. *Phinn*, 3 C.B. 976; 16 L.J. C.P. 159.

(*s*) *Richardson* v. *Chasen*, 16 L.J. Q.B. 341; 10 Q.B. 756.

(*t*) *Cornish* v. *Rowley*, 1 Selw. N.P. 219 (ed. 13); *Powell* v. *Marshall*, *Parkes & Co.*, (1899) 1 Q.B. 710; 68 L.J. Q.B. 477. In the last-mentioned case, notice of an act of bankruptcy on the part of the vendor before the date fixed for completion of the contract, making the vendor not in a position to complete the purchase, was held to entitle the purchaser to claim a return of his deposit.

(*u*) *Parkin* v. *Thorold*, 16 Beav. 59; 22 L.J. Ch. 175; *King* v. *Wilson*, 6 Beav. 124, 126; cf. *Green* v. *Sevin*, 13 Ch.D. 589.

(*x*) *Knight* v. *Crockford*, 1 Esp. 193.

the expenses of investigating the title (*y*). If the vendor's failure to make out a good title arises from circumstances over which he has no control, and is not the result of fraud or *mala fides* on his part, the purchaser will not be entitled to recover damages in respect of the presumed or fancied value of his bargain; but, if the vendor's conduct has been fraudulent, the case is otherwise. If the title has been made out and accepted by the purchaser, and the latter has then re-sold to a second purchaser, and the original vendor refuses to execute a conveyance on being tendered the purchase-money, the purchaser will be entitled to recover the profit realised on the re-sale, and all the costs and expenses attending it, in addition to his costs of investigating the title. If the purchaser sues the vendor, upon the contract, for the recovery of his deposit as part of the damages resulting from the vendor's neglect to complete the sale, he will be entitled to recover interest upon his deposit (*z*); and he may also, in certain cases, recover interest upon the purchase-money, if it has been lying idle, awaiting the vendor's acceptance (*a*). But, if it should turn out that the contract was not binding upon the vendor by reason of its not being properly authenticated by writing, or if the contract has been abandoned or rescinded by mutual consent, interest on the deposit cannot be recovered, nor any of the costs and expenses incurred in the investigation of the title (*b*). The personal representative of the purchaser, and not his heir, is the proper party to be made plaintiff in an action brought for the recovery of the deposit (*c*). A purchaser who is entitled to a return of his deposit cannot be compelled to take the stock in which it may have been invested, unless the investment was made with his assent or under the authority of the court. And his assent to the investment cannot be inferred from the fact of notice having been given him thereof, and no reply having been made to such notice (*d*).

It is frequently stipulated in contracts for the sale and purchase of estates that, if either party shall neglect to fulfil his part of the contract, he shall pay to the other a fixed, ascertained sum of money, as the liquidated and agreed damages. The amount so agreed to be paid may, as we have seen, under

(*y*) *Lowndes* v. *Bray*, Sugd. V. & P. 364 (ed. 14).

(*z*) *Weston* v. *Savage*, 10 Ch.D. 736; 48 L.J. Ch. 239.

(*a*) *Farquhar* v. *Farley*, 7 Taunt. 592; 1 Moore, 322; *Hodges* v. *Litchfield* (*Earl*), 1 Sc. 443; 1 Bing. N.C. 492; *Gardom* v. *Lee*, 34 L.J. Ex. 113; 3 H. & C. 651.

(*b*) *Walker* v. *Constable*, 1 Bos. & P. 306; *Gosbell* v. *Archer*, 2 Ad. & E. 500; 4 L.J. K.B. 78; *Casson* v. *Roberts*, 32 L.J. Ch. 105; 31 Beav. 613.

(*c*) *Orme* v. *Broughton*, 4 Moo. & Sc. 417; 10 Bing. 533.

(*d*) *Roberts* v. *Massey*, 13 Ves. 561.

certain circumstances and with certain qualifications, be recovered by action (*e*). And, where the vendor is in default, the purchaser will generally be held to be entitled to a lien on the estate for his deposit and interest (*f*).

Non-performance by purchaser—Forfeiture of deposit.—In case of the non-performance of the contract through the fault of the purchaser, the deposit is forfeited (*g*), but, to entitle the vendor to retain the deposit, he must show that he has faithfully fulfilled his own part of the contract, and has not done anything amounting to a waiver of his right to take advantage of the forfeiture. If he has himself prevented the purchaser from fulfilling the contract at the time appointed, or has himself asked for delay, or has induced the purchaser to incur the forfeiture by fraudulent statements, he will not be permitted to take advantage of such forfeiture (*h*). Where it was stipulated by the contract that objections to the title not made within twenty-one days should be considered as waived, and the deposit forfeited, and the vendor at liberty to re-sell in case of the non-completion of the purchase by the purchaser, and the vendor's solicitor received the objections long after the twenty-one days, and entered into a written correspondence respecting them, it was held that the vendor had waived his right to insist on the forfeiture of the deposit and to re-sell the estate (*i*). A stipulation for the forfeiture of the deposit, in case of the non-completion of the contract by the purchaser, does not preclude the vendor from suing the purchaser for the recovery of the general damages resulting from the breach of contract; but, if the deposit has been paid to the vendor and forfeited, it must be treated as so much money paid to the vendor on account of such damages (*k*); unless it was clearly the intention of the parties that the purchaser, if in default, should pay the damages as well as forfeit the deposit (*l*).

Deposits in hands of auctioneers and third parties.—When a deposit has been paid into the hands of an auctioneer, solicitor, or any third party, the latter stands in the position of a stakeholder, and is responsible for the payment of the amount to the vendor in case of the completion of the contract, and also for

(*e*) *Ante*, p. 287.

(*f*) *Rose* v. *Watson*, 33 L.J. Ch. 385; 10 H.L.Cas. 672; *Whitbread* v. *Watt*, (1902) 1 Ch. 835; 71 L.J. Ch. 424.

(*g*) *Barrell, Ex parte*, L.R. 10 Ch. 512; 44 L.J. Bankr. 138; *Howe* v. *Smith*, 27 Ch.D. 89; 53 L.J. Ch. 1055; *Soper* v. *Arnold*, 14 App.Cas. 429; 59 L.J. Ch. 214; *Smith* v. *Butler*, (1900) 1 Q.B. 694; 69 L.J. Q.B. 521.

(*h*) *Carpenter* v. *Blandford*, 8 B. & C. 575; 7 L.J. (O.S.) K.B. 58.

(*i*) *Cutts* v. *Thodey*, 13 Sim. 206.

(*k*) *Ockenden* v. *Henly*, E. B. & E. 485; 27 L.J. Q.B. 361; as to when the forfeit of the deposit can be treated as liquidated damages, see *Lea* v. *Whitaker*, L.R. 8 C.P. 70.

(*l*) *Essex* v. *Daniell*, L.R. 10 C.P. 538.

the return of it to the purchaser in case of the abandonment of the contract, or the neglect of the vendor to complete his part of it. The depositary, therefore, should not part with the deposit until the sale has been abandoned, or until it has been duly completed, so that it appears to whom the deposit properly belongs (*m*). If he pays it over to the vendor, and the title turns out to be defective, he will be bound to make good the amount to the purchaser (*n*), unless it appears to have been the intention of the parties that the amount should be paid over to the vendor, and it had accordingly been done (*o*); as, for instance, where the deposit is to be paid to the vendor's solicitor "as agent for the vendor," in which case the solicitor is not a stakeholder, but must pay the deposit to the vendor on demand (*p*). If the auctioneer makes away with the deposit, and becomes bankrupt, the loss will in general fall upon the vendor, who appoints him, and constitutes him his agent for the keeping of the money (*q*). No notice need be given to the auctioneer of the abandonment of the contract, or of the default made by the vendor, prior to the commencement of the action against him for the recovery of the deposit (*r*). When the action for the return of the deposit is brought against the auctioneer, interest thereon is not recoverable by the purchaser, although the money has been placed in the funds and interest has been made (*s*). But it is otherwise, as we have already seen, when the deposit has been paid to the vendor, and the action for its recovery is brought against him (*t*).

Non-performance by purchaser—Rights of the vendor.—Before the vendor can maintain an action of damages by reason of the neglect of the purchaser to tender and accept a conveyance of the estate and to pay the purchase-money, he must produce a good title to the estate agreed to be sold, and it must appear that he was ready and willing to execute a conveyance thereof to the purchaser, on receiving payment of the purchase-money (*u*). If he can prove this, he is entitled to recover all the damages he has sustained by the breach of contract, and all the costs and expenses he has incurred. Before he brings an action to recover such damages by reason of the non-payment

(*m*) *Post*, p. 849.

(*n*) *Gray* v. *Guttridge*, 1 M. & R. 614.

(*o*) *Hurley* v. *Baker*, 16 M. & W. 26; 16 L.J. Ex. 273.

(*p*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7; *Ellis* v. *Goulton*, (1893) 1 Q.B. 350; 62 L.J. Q.B. 232.

(*q*) [illegible] v. [illegible], 1 Mad. 593; *Smith* v. *Jackson*, 1 Mad. 618.

(*r*) [illegible] v. [illegible], 2 M. & W. 244; 6 L.J. Ex. 81.

(*s*) *Harington* v. *Hoggart*, 1 B. & Ad. 577; 9 L.J. (O.S.) K.B. 14; *Curling* v. *Shuttleworth*, 6 Bing. 121; 8 L.J. (O.S.) C.P. 113; *Gaby* v. *Driver*, 2 Y. & J. 549.

(*t*) See *ante*, p. 507.

(*u*) *Martin* v. *Smith*, 6 East, 555; *Poole* v. *Hill*, 6 M. & W. 835; 10 L.J. Ex. 81; cp. *Phillips* v. *Fielding*, 2 H.Bl. 132.

of the purchase-money at the time appointed, he should give notice to the purchaser, and require the latter to pay the money within a reasonable time. If the purchaser takes possession of the estate, and receives the rents and profits, he will, in general, be compelled to pay interest on the purchase-money from the time that he became possessed of the property. If he neglects to fulfil his part of the contract at the time appointed, or within a reasonable period after request if no time was appointed, the vendor will be entitled, after a reasonable notice, to re-sell the estate and sue for damages. If a second purchaser has taken a conveyance and paid his purchase-money without notice of a prior sale, he has equal equity with the first purchaser; and, having clothed himself with the legal estate, he comes within the rule that, where parties have equal equity, he who has the legal title shall prevail. But, if such second purchaser had notice of the first contract, the court will, if the first purchaser's right to specific performance has not been barred, compel such second purchaser to convey the estate to the first purchaser. To obviate objections to a re-sale, it has been usual to insert in agreements for the sale of realty a stipulation to the effect that, if the purchaser shall fail to complete the purchase and pay the price at the time appointed, the agreement shall be utterly void, and the vendor shall be at liberty to re-sell the estate, when the deficiency, if any, on such re-sale, together with the costs and charges attending the same, shall be made good by the defaulter (*x*). Such a stipulation, and also the vendor's right to a re-sale, may be waived, if objections to title made by the purchaser have been considered by the vendor or his solicitor subsequently to the time fixed for the re-sale, and if it be shown, through the medium of written evidence, that the vendor, after such time of re-sale had elapsed, still continued to deal with the purchaser as a purchaser, and still continued to treat the contract as a subsisting contract (*y*). When the vendor has re-sold and conveyed the property under these circumstances, he will be considered as selling it for the benefit of the original purchaser, for whom, by the first agreement, he became trustee, and he will be compelled to account for the purchase-money (*z*). And, where through no default of the purchaser completion of a purchase is delayed and the vendor remains in possession, the vendor will be trustee for the purchaser of rents received after the date fixed for completion (*a*).

(*x*) *Hunter, Ex parte*, 6 Ves. 94.

(*y*) *Cutts* v. *Thodey*, 13 Sim. 206; 1 Col. 223.

(*z*) *Daniels* v. *Davison*, 16 Ves. 249, 255.

(*a*) *Phillips* v. *Silvester*, L.R. 8 Ch

The relation of a vendor and purchaser is thus stated by Lord Cairns: "The purchaser was the real beneficial owner, in the eye of a court of equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee; he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it" (*b*). And Lord Cranworth says: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him" (*c*). As trustee for the purchaser, a vendor in possession during the interval prior to completion must use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made (*d*). On the other hand, a vendor's interest is sufficiently substantial to give him a lien for unpaid purchase-money and interest from the date of the sale (*e*).

Non-performance by purchaser — Damages for breach of contract.—If an estate agreed to be sold has been actually conveyed by the vendor to the purchaser, and has become the property of the latter, and the vendor sues for the non-payment of the purchase-money, the measure of damages is the price agreed to be paid, with interest; but, if no conveyance has been executed, and the estate still remains the property of the vendor, the measure of damages is the difference between the price agreed to be paid and the marketable value of the property; for the vendor cannot have both the estate and the purchase-money (*f*). Where the right of property has not passed to the purchaser, and the vendor has resold within a reasonable period from the breach of contract, the difference between the price realised on the re-sale and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be

173, 177; 42 L.J. Ch. 225; *Plews* v. *Samuel*, (1904) 1 Ch. 464; 73 L.J. Ch. 279.

(*b*) *Shaw* v. *Foster*, L.R. 5 H.L. 321 338; 42 L.J. Ch. 49.

(*c*) *Rose* v. *Watson*, 10 H.L.Cas. 672, 683; 33 L.J. Ch. 385.

(*d*) *Clarke* v. *Ramuz*, (1891) 2 Q.B. 456, 459; 60 L.J. Q.B. 679.

(*e*) *Rose* v. *Watson*, *supra*; *Davies* v. *Thomas*, (1900) 2 Ch. 462; 69 L.J. Ch. 643; *Stucley*, *In re*, *Stucley* v. *Kekewich*, (1906) 1 Ch. 67; 75 L.J. Ch. 58.

(*f*) *Laird* v. *Pim*, 7 M. & W. 474; 10 L.J. Ex. 259; *East London Union* v. *Metropolitan Ry.*, L.R. 4 Ex. 309; 38 L.J. Ex. 225.

entitled to recover in addition to the costs and expenses of the re-sale. If the vendor does not re-sell the estate, but elects to keep it in his own hands, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property, together with his costs and expenses. Amongst such costs and expenses may be included the expense of making out the title; for, although this is, by custom, defrayed by the vendor, it is so done upon the understanding that the contract will be duly fulfilled by the purchaser. In many cases of sales of realty there will be no difference between the contract price and the marketable value of the property; and in such cases, if the vendor elects to keep the property in his own hands, he will be entitled to recover in addition to his costs only nominal damages in respect of the loss of the purchase.

Damages for non-performance by vendor.—If a person enters into a contract for the sale of real estate, whether under the belief that he has a good title, or knowing that he has no title, and no means of acquiring one, the purchaser cannot, by an action for breach of contract, recover damages beyond the expenses he has incurred: he can only obtain other damages by an action for deceit when there is fraud (*g*). But where the vendor has a part-interest, he may be decreed to perform specifically so much of the contract as he has power to perform (*h*). The rule does not apply to the case of a vendor who can make a good title, but will not; so where the vendor of leaseholds did not do his best to procure the lessor's licence, and such licence was necessary, the purchaser was entitled to damages (*i*); so also where the vendor had not used reasonable diligence to perform his contract (*k*). The expenses recoverable will include not only costs of title but also costs of bidding for and being allowed to be the purchaser of the property (*l*); but expenses incurred in getting a survey made of the estate, or plans prepared before the contract was actually entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved of, and before

(*g*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L.R. 7 H.L. 158; 43 L.J. Ex. 243; overruling *Hopkins* v. *Grazebrook*, 6 B. & C. 31; 5 L.J. (O.S.) K.B. 65, and other cases following that decision; see also *Gray* v. *Fowler*, L.R. 8 Ex. 249; 42 L.J. Ex. 161; *Gas Light and Coke Co.* v. *Towse*, 35 Ch.D. 519; 56 L.J. Ch. 889; *Morgan* v. *Russell*, (1909) 1 K.B. 357; 78 L.J. K.B. 187.

(*h*) *Burrow* v. *Scammell*, 19 Ch.D. 175; 51 L.J. Ch. 296; *Jackson and Haden's Contract, In re*, (1906) 1 Ch. 412; 75 L.J. Ch. 226.

(*i*) *Day* v. *Singleton*, (1899) 2 Ch. 320; 68 L.J. Ch. 593.

(*k*) *Jones* v. *Gardiner*, (1902) 1 Ch. 191; 71 L.J. Ch. 93.

(*l*) *Holliwell* v. *Seacombe*, (1906) 1 Ch. 426; 75 L.J. Ch. 289; *Powell* v. *Powell*, L.R. 19 Eq. 422; 44 L.J. Ch. 311; *Perkins* v. *Ede*, 16 Beav. 268.

it is known whether objections raised to the title can be answered by the vendor (*m*). And, if there has been no written contract of sale binding on the vendor, but the matter rests merely upon an oral agreement invalid by the Statute of Frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty, as money paid upon a consideration that has failed (*n*).

In the case of the non-performance of an agreement for the sale of an estate, damages for non-performance are not given in addition to specific performance, except where special damage has occurred from the delay (*o*). But where a purchaser lost rent, which he would otherwise have obtained, he was allowed the amount as compensation besides damages for the deterioration of the property (*p*). And where a vendor took no care of the property sold and large quantities of surface soil were removed by a trespasser between the dates of the contract of sale and of its completion and payment of the purchase-money, the purchaser was held entitled to maintain an action notwithstanding the conveyance to him (*q*).

Specific performance (*r*).—As the estate agreed to be sold vests in equity in the purchaser from the time of the signing of the agreement, the court will, in ordinary cases, decree specific performance by the vendor of all such acts as are necessary to be done by him to transfer the legal estate to the purchaser, and clothe the latter with the legal as well as the equitable ownership of the property. If the vendor has no title, specific performance cannot be decreed, for he cannot be compelled to convey an estate which he has not got (*s*). If, therefore, he has signed an agreement for the sale of property under the impression that he was seised in fee, and it subsequently appears that he has only a life estate, or only a moiety of the property, specific performance of the contract cannot be decreed; but the purchaser may, if he pleases, have a decree for the conveyance of

(*m*) *Hodges* v. *Litchfield* (*Earl*), 1 Sc. 443; 1 Bing. N.C. 492. As to expenses of producing documents, &c., not in vendor's possession, see 44 & 45 Vict. c. 41, s. 3 (6).

(*n*) *Gosbell* v. *Archer*, 2 Ad. & E. 500; 4 L.J. K.B. 78.

(*o*) *Chinnock* v. *Ely*, 34 L.J. Ch. 399; 2 H. & M. 221; *Rudd* v. *Lascelles*, (1900) 1 Ch. 815; 69 L.J. Ch. 396. Also in the case of a sale of a right of way: *Rowe* v. *London School Board*, 36 Ch.D. 619; 57 L.J. Ch. 179.

(*p*) *Royal Bristol Building Society* v. *Bomash*, 35 Ch.D. 390; 56 L.J. Ch. 840.

(*q*) *Clarke* v. *Ramuz*, (1891) 2 Q.B. 456; 60 L.J. Q.B. 679.

(*r*) The County Courts Act, 1881 (51 & 52 Vict. c. 43), by sect. 67, gives the county court jurisdiction in actions for specific performance of any agreement for the purchase of any property where the purchase-money (not the value of the property: *R.* v. *Birmingham County Court Judge*, (1904) 1 K.B. 827; 73 L.J. K.B. 344), does not exceed £500.

(*s*) *Nicloson* v. *Wordsworth*, 2 Swanst. 369.

the life estate or of the moiety with compensation by way of reduction of the amount of the purchase-money (*t*). Where the remainder, after the determination of the vendor's life interest, is vested in his wife for life, with remainder to his son in fee, the court will not compel him to use his marital and parental authority to induce the wife and son to part with their interests in the property (*u*). The court will not compel a purchaser to take a doubtful title; and a title is regarded as doubtful where there has been a decision adverse to it or the principle upon which it depends, or in favour of it, which the court is of opinion is wrong, or where there is a known difficulty in the title, or when the validity of the title depends upon a fact or facts, of the exact accuracy of which the court has no means of judging (*x*).

A contract established through the medium of letters may be enforced in specie; but it must be a complete and concluded contract (*y*); and it must be sufficiently certain (*z*). The courts grant the decree only in those cases where there is a mutuality of obligation, and where the remedy is mutual. If, therefore, an infant signs a contract for the purchase of an estate, the court will not decree specific performance in his favour, because he is not himself bound by the contract, by reason of his infancy (*a*). So, where a purchaser has repudiated the contract on the ground of want of mutuality, his right so to repudiate will be a defence to an action for specific performance (*b*). But specific performance will not be decreed in favour of a person who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period over his rights, and comes forward at last, when circumstances have changed in his favour, to enforce a stale demand (*c*). If the contract of sale provides that immediate possession shall be given to the purchaser, and possession is accordingly taken by him, and the vendor afterwards evicts him, the vendor is deemed

(*t*) *Barnes* v. *Wood*, L.R. 8 Eq. 424; 38 L.J. Ch. 683; *Hooper* v. *Smart*, L.R. 18 Eq. 683; 43 L.J. Ch. 704; *Horrocks* v. *Rigby*, 9 Ch.D. 180; 47 L.J. Ch. 800.

(*u*) *Howell* v. *George*, 1 Mad. 1, 6; *Castle* v. *Wilkinson*, L.R. 5 Ch. 534; 39 L.J. Ch. 843.

(*x*) *Mullings* v. *Trinder*, L.R. 10 Eq. 449; 39 L.J. Ch. 833.

(*y*) *Huddlestone* v. *Briscoe*, 11 Ves. 591; *Stratford* v. *Bosworth*, 2 Ves. & B. 341; *Cowley* v. *Watts*, 22 L.J. Ch. 591; 17 Jur. 172; *ante*, pp. 15, 16.

(*z*) *Rummens* v. *Robins*, 3 De G. J. & S. 88; *Dear* v. *Verity*, 38 L.J. Ch. 297, 486.

(*a*) *Flight* v. *Bolland*, 4 Russ. 298, 301; *Hills* v. *Croll*, 14 L.J. Ch. 444; 2 Ph. 62, n. (*b*).

(*b*) *Halkett* v. *Dudley* (*Earl of*), (1907) 1 Ch. 590; 76 L.J. Ch. 330. After decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without leave of the Court; *per* Parker, J., at p. 601.

(*c*) *Lloyd* v. *Collett*, 4 Bro. C.C. 469; *Alley* v. *Deschamps*, 13 Ves. 225; *Southcomb* v. *Exeter* (*Bishop*), 6 Hare, 213; 16 L.J. Ch. 378; *Colby* v. *Gadsden*, 34 Beav. 416; *Moore* v. *Marrable*, L.R. 1 Ch. 217; *Halkett* v. *Dudley* (*Earl of*), *supra*.

to have abandoned his right to specific performance (*d*). If there is a mistake between the parties as to what was sold, or as to the quantity sold, or the price, the court will not in general interfere in favour of either of them (*e*). If there has been surprise on third parties at a sale by auction, and they have been deterred from bidding, or if the purchaser has made false statements which have kept persons away from the sale, the decree will not be granted in the purchaser's favour (*f*); nor will it be granted in any case where there has been misrepresentation, fraud, or deceit, or the plaintiff does not appear before the court with "clean hands" (*g*); nor where the conditions of sale have been misleading (*h*); nor where there has been a misapprehension by the defendant to which the plaintiff has by his acts, even unintentionally, contributed (*i*), nor where a person has been induced to sign an agreement whilst he was in a state of complete intoxication (*k*); though, if the defendant was only a little drunk and knew what he was about, and there was no fraud, the decree will be made (*l*). If a person knowingly contracts for the sale of an estate without a title, and the owner offers to make the seller a title, yet the court will not force the buyer to take it: for every seller ought to be a *bonâ fide* contractor (*m*); but, if the vendor has contracted *bonâ fide* in ignorance of the defect of title, and procures a good title within a reasonable time, and then calls upon the purchaser to complete his contract, and the latter refuses, a decree for specific performance will be granted against the purchaser (*n*). Extravagance, or inadequacy of price, forms no ground, in general, for refusing specific performance of a contract, unless "such as shocks the conscience and amounts in itself to conclusive evidence of fraud" (*o*). But an exception is made in favour of heirs dealing with their expectancies, and in the case

(*d*) *Knatchbull* v. *Grueber*, 3 Mer. 124.

(*e*) *Clowes* v. *Higginson*, 1 Ves. & B. 524; *Neap* v. *Abbott*, Coop. Ch.Pr. 333; *Durham* (*Earl*) v. *Legard*, 34 L.J. Ch. 589; 34 Beav. 611; *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L.J. Ch. 652; *Day* v. *Wells*, 30 Beav. 220; *Tamplin* v. *James*, 15 Ch.D. 215; *Van Praagh* v. *Everidge*, (1903) 1 Ch. 434; 72 L.J. Ch. 260; see *ante*, p. 133.

(*f*) *Twining* v. *Morrice*, 2 Bro. C.C. 330; *Mortlock* v. *Buller*, 10 Ves. 305.

(*g*) *Cadman* v. *Horner*, 18 Ves. 10; *Clermont* v. *Tasburgh*, 1 Jac. & Walk. 120; *Phillips* v. *Bucks* (*Duke*), 1 Vern. 227.

(*h*) *Heywood* v. *Mallalieu*, 25 Ch.D. 357; 53 L.J. Ch. 492; *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q.B.D. 778; 55 L.J. Q.B. 280.

(*i*) *Baskcomb* v. *Beckwith*, L.R. 8 Eq. 100; 38 L.J. Ch. 586.

(*k*) *Cooke* v. *Clayworth*, 18 Ves. 12; *Say* v. *Barwick*, 1 Ves. & B. 195.

(*l*) *Lightfoot* v. *Heron*, 3 You. & C. 586, 590.

(*m*) *Tendring* v. *Loudon*, 2 Eq.Cas. Abr. 680.

(*n*) *Boehm* v. *Wood*, 1 Jac. & Walk. 421; *Chamberlain* v. *Lee*, 10 Sim. 444; 8 L.J. Ch. 266; *Eyston* v. *Simonds*, 1 You. & C.C.C. 608.

(*o*) *Coles* v. *Trecothick*, 9 Ves. 246; cp. *Baker* v. *Monk*, 33 Beav. 419.

of sales of reversions by them, these being generally discountenanced (*p*).

Specific performance will also be decreed in favour of a principal who purchased by an agent, although the agency was not known or disclosed until after the contract had been signed, there being no fraud or misrepresentation in the matter (*q*).

If the price to be paid for an estate is to be fixed by a third party, there can be no action for damages, or decree for specific performance, until the price is fixed (*r*). Neither party can be compelled to appoint an arbitrator to name the price (*s*); and if an arbitrator is actually appointed, the death of either party before award made will revoke the submission (*t*), unless there be mutual covenants between the parties for themselves and their heirs, executors, and administrators, for the conveyance of the estate and payment of the money to be awarded to the vendor (*u*). When the person who is to make the valuation is named in the agreement for the sale, the court will compel the vendor to permit the valuation to be made according to the contract (*x*). If a party, having power to revoke the authority given to the arbitrator to name a price, exercises his power contrary to good faith, the court will not give him any aid in furtherance of his misconduct (*y*). A revocation of the submission after it has been made a rule of court is a contempt (*z*). If an action is brought for specific performance, and a valid contract of sale is clearly established, the court will grant an injunction to prevent either of the parties from doing any act which may be injurious to the estate, such as cutting down timber, removing boundaries, pulling down buildings and walls, presenting to a living, &c. (*a*); and the vendor will, in general, be restrained from re-selling the estate and executing a conveyance of the legal estate in the property to a third person (*b*). But, if the validity of the contract is brought into doubt, or

(*p*) Sugd. V. & P. 276—287 (ed. 14); see, however, 31 & 32 Vict. c. 4, s. 1, by which no purchase, &c., made *bonâ fide*, without fraud or unfair dealing, of any reversionary interest, is to be opened or set aside merely on the ground of undervalue.

(*q*) *Hall* v. *Warren*, 9 Ves. 605.

(*r*) *Milnes* v. *Gery*, 14 Ves. 400; *Wilks* v. *Davis*, 3 Mer. 507; *Vickers* v. *Vickers*, L.R. 4 Eq. 529; 36 L.J. Ch. 946; cp. *Richardson* v. *Smith*, L.R. 5 Ch. 648; 39 L.J. Ch. 877. Distinguish, however, the case of a sale at a fair valuation; see *Milnes* v. *Gery*, 14 Ves. 400, 407.

(*s*) *Agar* v. *Macklew*, 2 Sim. & St. 418; 4 L.J. (O.S.) Ch. 16.

(*t*) *Blundell* v. *Brettargh*, 17 Ves. 232.

(*u*) *Belchier* v. *Reynolds*, 2 Ken. Ch. C. part 2, 87.

(*x*) *Morse* v. *Merest*, 6 Mad. 26; *Smith* v. *Peters*, L.R. 20 Eq. 511; 44 L.J. Ch. 613.

(*y*) *Pope* v. *Duncannon* (*Lord*), 9 Sim. 177, 179.

(*z*) *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 511. See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1.

(*a*) *Crockford* v. *Alexander*, 15 Ves. 138; *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L.J. Ch. 219.

(*b*) *Echliff* v. *Baldwin*, 16 Ves. 267.

there is good reason for thinking that a final agreement had not been entered into, the court will decline to interfere by way of injunction.

Sales by trustees will not be enforced by the court, if they are improvident sales. "If the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trust* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence;" for the court will not enforce any contract involving a breach of trust (*c*). Trustees empowered to sell at the request of a tenant for life have a discretion which the court will not control, and cannot, consequently, be compelled to give effect to a contract entered into by the tenant for life, without their concurrence, for the sale of the estate (*d*). If trustees, acting in the exercise of a power of sale, make an agreement for the sale of an estate, the contract binds the estate; and though, by subsequent events, it cannot be executed under the power, yet it will be decreed to be specifically performed by those who have acquired the interest in the estate (*e*). If an agent, authorised to sell by public auction, sells by private contract, specific performance will not be decreed against the principal, although the estate was sold for a greater price than he required for it (*f*). An agreement by one of two joint tenants to sell his share of the joint estate amounts to a severance of the joint tenancy; and a specific performance of the contract will be decreed as against the survivor (*g*).

If, after making a contract of sale, the vendor has re-sold the estate and executed a conveyance to the second purchaser, and the latter has bought and accepted the conveyance, and paid the purchase-money, in ignorance of the first contract of sale, specific performance of such first contract will not be decreed. But, if the second purchaser has bought with notice of the first sale, the first purchaser is entitled to a decree for specific performance against the vendor and the second purchaser, the latter being considered to take subject to the equity of the first purchaser to have the premises conveyed to him at the price originally agreed upon (*h*). If the vendor is seised in fee or *pur autre vie*, and dies before a conveyance is executed, his heir-at-law will be decreed to perform the agreement in specie, and will

(*c*) *Ord* v. *Noel*, 5 Mad. 438; *Thompson* v. *Blackstone*, 6 Beav. 470, 472; *Dunn* v. *Flood*, 28 Ch.D. 586, 595; 54 L.J. Ch. 370.

(*d*) *Thomas* v. *Dering*, 1 Keen, 729; 6 L.J. Ch. 267.

(*e*) *Mortlock* v. *Buller*, 10 Ves. 315.

(*f*) *Daniel* v. *Adams*, Ambl. 495.

(*g*) *Brown* v. *Raindle*, 3 Ves. 256.

(*h*) *Daniels* v. *Davison*, 17 Ves. 433.

be compelled to execute a conveyance (*i*), although the purchase-money is payable not to him but to the personal representatives of the vendor. If the vendor is only tenant in tail, his agreement to sell cannot be enforced against the issue in tail, although he may have entered into the strongest covenants to that effect, and although a decree of specific performance may have been obtained against him in his lifetime, and although he may have received part or even the whole of the purchase-money (*k*); for the issue in tail claim *per formam doni* from the creator of the estate tail, and not from the tenant in tail. But, if the entail is barred by the vendor in his lifetime, and his estate is thus converted into a fee, then, as there are no issue in tail, specific performance will be decreed against the heir-at-law. By 3 & 4 Will. 4, c. 74, s. 47, it is provided that, in dispositions of lands by tenants in tail under that Act, the jurisdiction of courts of equity shall be excluded in regard to specific performance and the supplying of defects in the execution of the powers of disposition given to tenants in tail by the Act, and that no disposition thereof by a tenant in tail shall be of any force, unless at law effectual under the Act. This provision, therefore, prevents the court from treating a contract or covenant to bar an estate tail as an actual bar of the estate, and prohibits a decree for the specific performance of any such contract as against the issue in tail; yet it does not prohibit the exercise of the old power of specifically enforcing a contract against the tenant in tail himself. By 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule (15), the court itself may execute the decree against a tenant in tail in custody for a contempt (*l*).

Payment of purchase-money into court.—In certain cases, where an action has been brought for specific performance, and the purchaser has been let into possession of the property, the purchase-money will be ordered to be paid into court. This has been done where an unexpected delay occurred in making out the title, and the purchaser insisted on his right to retain possession and receive the profits of the land during the delay (*m*)—where the purchaser became insolvent, and attempted to re-sell the estate (*n*)—where the purchaser, after being let into possession, dealt improperly with the land, cut down timber and underwood, and opened and worked mines (*o*)

(*i*) *Gell* v. *Vermedum*, 2 Freem. 199.
(*k*) *Fox* v. *Crane*, 2 Vern. 306; *Frank* v. *Mainwaring*, 2 Beav. 115, 126; 3 & 4 Will. 4, c. 74, s. 47.
(*l*) Sugd. V. & P. 205 (14th ed.).
(*m*) *Gibson* v. *Clarke*, 1 Ves. & B. 500; cp. *Greenwood* v. *Turner*, (1891) 2 Ch. 144; 60 L.J. Ch. 351.
(*n*) *Hall* v. *Jenkinson*, 2 Ves. & B. 125.
(*o*) *Cutler* v. *Simons*, 2 Mer. 103; *Buck* v. *Lodge*, 18 Ves. 450; *Pope* v. *G. E. Ry.*, 36 L.J. Ch. 60; L.R. 3 Eq.

—where the title was accepted, and the purchaser made frivolous objections, still keeping possession of the property. In some cases where a purchaser retains possession, and unexpected delay has occurred in the completion of the title, an occupation rent has been decreed by the court, after deducting interest on the deposit (*p*); in others a receiver has been appointed (*q*); and in others the purchaser has been ordered to give up possession or pay the purchase-money into court (*r*). Where a judgment for specific performance is not complied with, the plaintiff may, after a reasonable time, obtain an order from the court declaring the contract of sale rescinded (*s*). Or where the contract contains a clause forfeiting the deposit, instead of an order for rescission, an order may be had declaring the deposit forfeited, and for payment of any deficiency on a fresh sale and costs (*t*). But rescission of the contract as well as damages for the breach of it cannot be obtained (*u*). Where an order for specific performance has been made, interest on the purchase-money is payable from the date when the master has certified that title was first shown (*x*).

Assignment of contract to purchase land.—A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser without regard to the receipt of a notice that the purchaser has agreed to assign the contract, the vendor not being bound to see that the purchaser carries out his agreement with the sub-vendee; but it would be otherwise if the vendor had notice that the contract had been actually assigned, and that the sub-vendee insisted on its being completed with him instead of with the purchaser (*y*).

Invalid sales—Want of title in vendor—Eviction of purchaser.—We have already seen that, whilst a contract of sale remains executory, and before a transfer or conveyance under seal has been executed, a purchaser is entitled to recover any deposit he may have paid, if it turns out that the vendor is unable from want of title to transfer the estate or interest he has agreed to sell (*ante*, p. 514); and, if the whole purchase-money has been paid in advance, the whole is recoverable. Thus,

171; *Lewis* v. *James*, 32 Ch.D. 326; 56 L.J. Ch. 163; but see *Robertshaw* v. *Bray*, 35 L.J. Ch. 844.

(*p*) *Smith* v. *Jackson*, 1 Mad. 618.

(*q*) *Hall* v. *Jenkinson*, 2 Ves. & B. 125.

(*r*) *Curling* v. *Austin*, 2 Dr. & Sm. 129.

(*s*) *Foligno* v. *Martin*, 16 Beav. 586; *Henty* v. *Schröder*, 12 Ch.D. 666; 48 L.J. Ch. 792; *Baker* v. *Williams*, 62 L.J. Ch. 315. As to the form of order, see Seton on Judgments (6th ed.) Vol. III., p. 2289; *Olde* v. *Olde*, (1904) 1 Ch. 35; 73 L.J. Ch. 81.

(*t*) *Griffiths* v. *Vezey*, (1906) 1 Ch. 796; 75 L.J. Ch. 462.

(*u*) *Henty* v. *Schröder*, *supra*; *Hutchings* v. *Humphrey*, 54 L.J. Ch. 650.

(*x*) *Halkett* v. *Dudley* (*Earl of*), (1907) 1 Ch. 590, 606; 76 L.J. Ch. 330.

(*y*) *Shaw* v. *Foster*, L.R. 5 H.L. 321; 42 L.J. Ch. 49.

where a contract for the purchase of the residue of a term of 1,900 years was entered into, and a deed of assignment of the lease was executed by some of the vendors, and the purchase-money paid and possession given, but, before the deed had been completely executed, it was discovered that the vendors had no title to the lease, and the purchaser was evicted, it was held that he was entitled to recover the purchase-money, as the vendors had never transferred to him that which they had agreed to sell, and he to buy (*z*). But if, after execution of a deed of conveyance and payment of the purchase-money, it appears that the vendor had no title, and the purchaser is evicted, the latter cannot recover back the purchase-money, or obtain compensation for the damages he has sustained, unless the ordinary covenants for title are inserted in the deed and it appears upon the face of the conveyance that a particular estate or interest in the land was covenanted or agreed to be sold. For the purchaser might have protected himself by proper covenants for title; and, if he has neglected to do so, he will be deemed to have been content to take such estate or interest in the land as the vendor actually possessed (*a*). If he might, by a careful investigation of the title, have discovered that he was buying another man's property and not the estate of the vendor, he is concluded by his own laches, unless there has been actual fraud on the part of the vendor (*b*).

Qualified covenants for title.—With respect to conveyances made after 31st December, 1881, provisions are contained in the Conveyancing Act, 1881, whereby in conveyances covenants relating to title:—"right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," "payment of rent and performance of covenants," are implied in certain cases (*c*). By the Land Transfer Act, 1897, no covenant for title is in the absence of special stipulation required of a vendor registered with an absolute title, and a vendor registered with a possessory or qualified title is only required to covenant against estates and interests excluded from the effect of registration (*d*). If the vendor by the conveyance

(*z*) *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Farrer* v. *Nightingal*, 2 Esp. 639; *Cripps* v. *Reade*, 6 T.R. 666.

(*a*) *Bree* v. *Holbech*, 2 Doug. 654; *Johnson* v. *Johnson*, *supra*; *Duke* v. *Barnett*, 2 Coll. C.C. 337; 15 L.J. Ch. 173; *Wakeman* v. *Rutland* (*Duchess*), 3 Ves. 235; *Browning* v. *Wright*, 2 Bos. & P. 13, 23; *Thackeray* v. *Wood*, 34 L.J. Q.B. 226; 6 B. & S. 766; *Goodtitle* v. *Morgan*, 1 T.R. 762; *Roswell* v. *Vaughan*, Cro. Jac. 197; *Chapman* v. *Speller*, 14 Q.B. 624; 19 L.J. Q.B. 239; *Maynard* v. *Moseley*, 3 Swanst. 655; *Clare* v. *Lamb*, L.R. 10 C.P. 334; 44 L.J. C.P. 177.

(*b*) *Anon.*, 2 Ch.C. 19; *Maynard* v. *Moseley*, 3 Swanst. 655.

(*c*) 44 & 45 Vict. c. 41, s. 7; amongst other exceptions, this section does not apply to a demise by way of lease at a rent (5).

(*d*) 60 & 61 Vict. c. 65, s. 16 (3).

transfers the premises so far as he himself possesses them or can grant them, and covenants that, notwithstanding any act done by him, he hath in himself good right to grant and assure, &c., he limits his covenants for title to that which he actually has, or but for his own act would have had, to convey, and does not give a general and absolute warranty of title (*e*).

By the common law the words "give" or "grant" in a deed of feoffment, or any equivalent words passing the estate, raised an implied covenant on the part of the grantor to warrant to the grantee the estate or interest granted, which implied covenant was annexed to the estate and ran with the land passing to the heirs and assigns of the grantee (*ante*, p. 238). Now, however, by 8 & 9 Vict. c. 106, s. 4, it is enacted, "that the word 'give' or the word 'grant' in a deed shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word 'give' or the word 'grant' may, by force of any Act of Parliament, imply a covenant." Consequently, if the purchaser of an estate be evicted, he has no longer any remedy against the grantor upon any implied covenant for title or quiet enjoyment (*f*). But, if the deed of conveyance recites that the vendor is seised of an estate in fee, and that he has agreed to sell such an estate, this amounts to an express covenant that he is so seised, and has the right to convey such an estate to the purchaser (*g*); and, if he is not seised in fee, and no fee in the lands passes by the conveyance, he will be liable in damages for a breach of covenant. If a man, having nothing to sell, bargains as if he had, and prevails on another party to become a purchaser and pay him money or give him a bond, that is a fraud in equity, although the vendor might have thought at the time that he had something to sell (*h*). So, where a man bought his own estate in ignorance of his title, and accepted a conveyance thereof, and paid the purchase-money, the vendor was compelled to repay the amount (*i*). And where both parties have been under a misapprehension, and there has been a common mistake, the court will relieve (*k*).

If a vendor, believing it to be the fact, affirms that he is the owner of certain property, and so induces another party to buy,

(*e*) *Thackeray* v. *Wood*, 34 L.J. Q.B. 226; 6 B. & S. 766; *David* v. *Sabin*, (1893) 1 Ch. 523; 62 L.J. Ch. 347.

(*f*) The word "grant" is no longer necessary, and the word "convey" will probably be used: 44 & 45 Vict. c. 41, s. 49; and see sect. 7 as to implied covenants for title, &c. by beneficial owners, &c.

(*g*) *Severn* v. *Clerk*, 1 Leon. 122; *Barfoot* v. *Freswell*, 3 Keb. 465.

(*h*) *Hitchcock* v. *Giddings*, 4 Pr. 141; *Taylor* v. *Caldwell*, 3 B. & S. 826, 837; 33 L.J. Q.B. 164.

(*i*) *Bingham* v. *Bingham*, 1 Ves. sen. 126.

(*k*) *Jones* v. *Clifford*, 3 Ch.D. 779; 45 L.J. Ch. 809.

an action for deceit will not lie against him, if the purchaser was furnished with the means of ascertaining for himself the truth or falseness of the representation (*l*). The mere assertion by a vendor that he has a good title on the faith of which the purchaser relies without investigation, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract, provided that, at the time, he was ignorant of the defect in his title (*m*). But, if the vendor knew at the time that his title was defective, and concealed the fact from the purchaser, this will avoid the contract *ab initio*, and entitle the purchaser to recover back his purchase-money (*n*); even though in the conditions of sale the vendor has employed general words large enough to include the defect (*o*). And, where copyhold is sold as freehold by a vendor who makes the representation *bonâ fide* and in the belief that it is the fact, the vendor has nevertheless committed a legal fraud, and the purchaser will be entitled to rescind the sale and recover his purchase-money with interest and all expenses incurred in consequence of the purchase (*p*). If an action is brought by a vendor to compel specific performance by a purchaser of a contract of sale, and the purchaser pays the purchase-money without putting in an answer, and afterwards discovers that he was deceived by the vendor, that will not preclude him from bringing an action against the vendor and recovering damages, if he does so speedily after discovering the fraud (*q*).

Damages for breach of covenants for title.—If, after execution of the conveyance and payment of the purchase-money, it is discovered that the vendor had no title to the estate he professed to sell, and the purchaser is evicted, and brings his action for a breach of the ordinary covenants for title and quiet enjoyment, the measure of damages will be the amount of purchase-money paid for the estate, and all incidental damages flowing from the breach of contract, such as the costs and expenses of preparing the conveyance and investigating the title. If the breach has not been followed by any eviction of the purchaser, the latter should wait until the ultimate damage has been sustained by eviction; and he may then as soon as he has been disturbed in his possession and enjoyment of the property

(*l*) *Roswell* v. *Vaughan*, Cro. Jac. 196.

(*m*) *Hume* v. *Pocock*, L.R. 1 Ch. 379; 35 L.J. Ch. 731.

(*n*) *Edwards* v. *M'Leay*, Coop. Ch. 313; 2 Swanst. 287; *Early* v. *Garrett*, 9 B. & C. 932; 8 L.J. (O.S.) K.B. 76; *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C.P.D. 145; 45 L.J. C.P. 401.

(*o*) *Edwards* v. *Wickwar*, L.R. 1 Eq. 68; 35 L.J. Ch. 48.

(*p*) *Hart* v. *Swaine*, 7 Ch.D. 42; 47 L.J. Ch. 5.

(*q*) *Jendwine* v. *Slade*, 2 Esp. 572.

recover the whole amount of purchase-money paid, with interest, and his costs and expenses (*r*).

If, between the execution of the conveyance and the time of eviction, the purchaser has expended money upon the land in drainage, buildings, and improvements, he will not be allowed to recover from the vendor the amount of capital so expended, unless the latter has been guilty of a fraud in the sale of the estate (*s*); neither could he by the common law recover the money so expended from the party who evicted him. But, in equity, if the land was known to have been purchased for the erection of buildings, and the purchaser was evicted after having expended money in building, the purchaser had, in certain cases, a claim upon the land for the amount of his expenditure (*t*). So, where land was sold for building purposes and the purchaser having built a house upon it discovered that there was a right of way over part of the land which had been innocently undisclosed by the vendor, it was held that there had been a breach of the covenant for title, the damages in respect of which were the difference between the value of the property as conveyed and its value as the vendor had power to convey it (*u*). If the purchaser has not been evicted, but has entered into a fair compromise with the real owner or party having title paramount, he will be entitled to recover the whole amount paid by way of compromise, together with his costs and expenses (*x*). If an estate has been sold as freehold, with a general covenant that the vendor is seised in fee, and the estate proves to be copyhold, the measure of damages will be the difference between the value of a freehold and copyhold estate (*y*). Where, however, after a conveyance of land with a covenant of title, a decree was made that the land was subject to a general right of common, it was held that, without express evidence of the grant of such a right by the grantor, or his predecessors in title, there was no breach of the covenant (*z*).

Non-payment of purchase-money after execution of conveyance.—If the conveyance expresses, contrary to the fact, that the purchase-money is paid, though the legal estate passes, the vendor may, in circumstances, have a lien on the property for the unpaid purchase-money, for in equity the estate does

(*r*) 2 Saund. 181, b; Shep. Touch. 170; *King* v. *Jones*, 5 Taunt. 418; *ante*, p. 507.

(*s*) *Lewis* v. *Campbell*, 8 Taunt. 715, 727, 729; *Worthington* v. *Warrington*, 8 C.B. 134; 18 L.J. C.P. 350.

(*t*) *Bunny* v. *Hopkinson*, 29 L.J. Ch. 93; 27 Beav. 565.

(*u*) *Turner* v. *Moon*, (1901) 2 Ch. 825; 70 L.J. Ch. 822.

(*x*) *Smith* v. *Compton*, 3 B. & Ad. 407; 3 L.J. (O.S.) K. B. 40.

(*y*) *Gray* v. *Briscoe*, Noy, 142.

(*z*) *Howard* v. *Maitland*, 11 Q.B.D. 695; 53 L.J. Q.B. 42.

not pass until the actual payment of the price—until the vendor has received that consideration for which it appears by the deed he contracted to part with his estate (*a*).

Sale of pretenced titles.—A pretenced right or title is where one is in possession or receipt of the rents and profits of lands, &c., as owner, and another that is out of possession claims them or sues for them (*b*). By 32 Hen. 8, c. 9, s. 4, persons in possession of lands, &c., and in receipt of the rents and profits thereof, may buy or acquire the pretenced title of other persons afterwards to be made. And, since the repeal of s. 2 by the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, s. 11, it is no longer necessary that the seller or grantor or their predecessors in title should have been in possession for one whole year previously to the disposition being made. So, by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 6, a grant of lands to which the grantor has a title in fact, though he has never been in possession, will be valid although litigation is pending (*c*). The onus is on the plaintiff to prove not only that the title purchased was bad, but that the buyer knew it to be fictitious or bad in fact (*d*).

Fraudulent concealment—Avoiding sales on the ground of.—Where a vendor, knowing that he has no right or title to property, or being cognizant of the existence of incumbrances or outgoings, or of latent defects materially lowering its value in the market, sells it without disclosing these matters to the purchaser (*e*), there is a fraudulent concealment vitiating the contract; and conditions of sale, not drawn *bonâ fide*, but intended to cover difficulties arising from such uncommunicated defects, will not preclude the purchaser from objecting to them (*f*). So it is where the vendor of a lease, liable to forfeiture for non-repair of the premises after notice, sells the premises in a dilapidated state, after receipt of notice, without informing the purchaser of the fact (*g*). There may also be fraudulent concealment by a purchaser such as to vitiate a sale, as where a person having secret information of the death of one of two

(*a*) *Winter* v. *Anson* (*Lord*), 3 Russ. 488; 6 L.J. (O.S.) Ch. 7; that no lien was created by the circumstances was held in *Clarke* v. *Royle*, 3 Sim. 499; *Parrott* v. *Sweetland*, 3 My. & K. 655; *Jersey* (*Earl of*) v. *Briton Ferry Floating Dock Co.*, L.R. 7 Eq. 409; *Brentwood Brick and Coal Co., In re*, 4 Ch.D. 562; 46 L.J. Ch. 554.

(*b*) *Partridge* v. *Strange*, Plowd. 77, 88; *Jenkins* v. *Jones*, 9 Q.B.D. 128, 134; 51 L.J. Q.B. 438.

(*c*) *Jenkins* v. *Jones*, *supra*.

(*d*) *Kennedy* v. *Lyell*, 15 Q.B.D. 491.

(*e*) *Shirley* v. *Stratton*, 1 Br. C.C. 440; *Edwards* v. *M'Leay*, 2 Swanst. 287; Coop. Ch.C. 308; *Peto* v. *Blades*, 5 Taunt. 657; *Fuller* v. *Wilson*, 3 Q.B. 58; 11 L.J. Q.B. 251; cp. *Leyland and Taylor's Contract, In re*, (1900) 2 Ch. 625; 69 L.J. Ch. 764.

(*f*) *Jackson* v. *Whitehead*, 28 Beav. 154; *Hume* v. *Pocock*, L.R. 1 Ch. 379; 35 L.J. Ch. 731.

(*g*) *Stevens* v. *Adamson*, 2 Stark. 422.

tenants for life, purchases the reversion without disclosing the fact to selling reversioners (*h*). But in a general sale of an estate, if the vendor has said or done nothing to throw the purchaser off his guard or to conceal a patent defect, there is no fraudulent concealment on the part of the vendor (*i*). So, where a meadow is sold without notice being given to the purchaser of a public footway around the meadow and another across it, there is no fraudulent concealment on the part of the vendor (*k*). And where an estate was described as being within a ring-fence, but did not answer the description, and it appeared that the purchaser had lived in the neighbourhood all his life, and had gone over the estate before he entered into the contract, it was held that there was no warranty and no deceit (*l*). On the other hand, the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property; thus, if an estate is offered for sale, and a person treats for it, knowing that there is a mine under it, and the vendor makes no inquiry, that person is not bound to give him any information of it (*m*).

Sale subject to any defect or error.—If it be made a term of the contract that the subject-matter of the sale is to be taken with all faults, this stipulation will release the vendor from the obligation of disclosing all such defects as are susceptible of discovery by a rigid examination of the subject-matter of sale (*n*). But where the vendor of a house, knowing of a defect in the main wall, plastered it up and papered it over for the purpose of concealing it from the purchaser, this was held to be a direct fraud, which avoided the contract of sale and enabled the purchaser to recover the purchase-money (*o*).

SECTION II.

ORDINARY CONTRACTS FOR SALE OF GOODS.

Preliminary.—The subject of buying and selling goods and chattels is now dealt with in the Sale of Goods Act, 1893 (*p*), but it is still necessary for the proper understanding of the subject-matter that reference should be made to the cases decided prior to that Act, and therefore many of the authorities

(*h*) *Turner* v. *Harvey*, 1 Jac. 169.

(*i*) *Jones* v. *Bright*, 3 Moo. & P. 155, 175; 7 L.J. (O.S.) C.P. 213; Fitzh. N.B. 94, C.

(*k*) *Bowles* v. *Round*, 5 Ves. 508.

(*l*) *Dyer* v. *Hargrave*, 10 Ves. 505.

(*m*) *Turner* v. *Harvey*, Jac. 169, 178; *Walters* v. *Morgan*, 3 De G. F. & J. 718, 723; *Coaks* v. *Boswell*, 11 App.Cas. 232; 55 L.J. Ch. 761; *Davis* v. *Ohrly* 14 T.L.R. 260.

(*n*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*o*) *Anon.*, cited in *Pickering* v. *Dowson*, *supra*, at p. 785.

(*p*) 56 & 57 Vict. c. 71.

are retained as illustrations. It must be borne in mind that although the Act of 1893 is mainly a codification of the law, it is also in part an amending Act (*q*).

It should further be noticed in dealing with contracts of sale that the Act also provides generally that "where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract" (*r*).

Sale and agreement to sell (*s*).—"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another (*t*). A contract of sale may be absolute or conditional (*u*). Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an 'agreement to sell' (*x*). An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred" (*y*).

A condition cannot be imposed on a sale of goods so as to

(*q*) The following are the principal saving clauses to the Act:—

By sect. 60 "the enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest."

By sect. 61, "(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

"(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

"(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

"(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

(*r*) 56 & 57 Vict. c. 71, s. 55.

(*s*) The following terms, which are used in sect. 1, are defined by sect. 62 of the Act:—

"Buyer" means a person who buys or agrees to buy goods.

"Goods" include all chattels personal other than things in action or money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Property" means the general property in goods, and not merely a special property.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods.

(*t*) 56 & 57 Vict. c. 71, s. 1 (1).

(*u*) *Ib.*, s. 1 (2).

(*x*) *Ib.*, s. 1 (3).

(*y*) *Ib.*, s. 1 (4).

run with the goods and be enforceable against subsequent purchasers by the original vendor, even though the subsequent purchasers had notice of it at the time of their purchase (*z*).

Capacity to buy and sell.—"Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessaries are sold and delivered to an infant (*a*), or to a person who by reason of mental incapacity (*b*) or drunkenness (*c*) is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery" (*d*).

Contract of sale, how made.—Subject to the provisions of the Act and of any statute in that behalf, "a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the law relating to corporations" (*e*). A person takes a chattel as a general rule subject to what may turn out to be flaws in the title (*f*).

Contract of sale for 10*l. and upwards.*—"A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part (*ff*) of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (*g*). The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery (*h*), or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (*i*). There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale

(*z*) *McGruther* v. *Pitcher*, (1904) 2 Ch. 306; 73 L.J. Ch. 653; *Taddy & Co.* v. *Sterious & Co.*, (1904) 1 Ch. 354; 73 L.J. Ch. 191.

(*a*) As to infants' necessaries, see *ante*, pp. 408—412.

(*b*) As to contracts with persons of mental incapacity, see *ante*, p. 435.

(*c*) As to contracts with drunken persons, see *ante*, p. 435.

(*d*) 56 & 57 Vict. c. 71, s. 2.

(*e*) *Ib.*, s. 3.

(*f*) *Cundy* v. *Lindsay*, 3 App.Cas. 459; 47 L.J. Q.B. 481.

(*ff*) *Prested Mines, &c. Lamp Co.* v. *Garner*, (1910) 2 K.B. 776; 79 L.J. K.B. 1143; affirmed, (1911) K.B. 425.

(*g*) 56 & 57 Vict. c. 71, s. 4 (1).

(*h*) "Delivery" means voluntary transfer of possession from one person to another: sect. 62.

(*i*) 56 & 57 Vict. c. 71, s. 4 (2).

whether there be an acceptance in performance of the contract or not" (*k*).

The provisions of sect. 4, sub-sect. 1, are substituted for the repealed sect. 17 of the Statute of Frauds, while sub-sect. 2 is practically a re-enactment of the repealed sect. 7 of 9 Geo. 4, c. 14 (see also, *ante*, p. 28).

Memorandum.—Requisites.—The absence of a memorandum in writing and of the other conditions mentioned in sect. 4, sub-sect. 1, does not make the contract void or voidable; the only effect is that it is not enforceable. It would seem that the contract being good, all the legal consequences of a contract follow, so that if the contract is for the sale of specific goods the property in them passes to the buyer; and if the buyer after making the purchase refuses to fulfil any of the statutory conditions, the seller may call on the buyer to pay for the goods, and if he fails to comply may treat the contract as rescinded (*l*). The note or memorandum of the bargain should disclose the names of the vendor and purchaser, or their agents (*m*), the thing sold, and the price to be paid, if the price was agreed upon at the time of the making of the contract (*n*); but if no price was definitely agreed upon, the note or memorandum will be sufficient without any statement of price, and the law will infer that a reasonable price was to be paid (*o*) whether the goods were in existence at the date of the contract (*p*) or not (*q*). Any entry in a book, or any letter acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the party to be charged or his agent, will take the case out of the statute (*r*), although it subsequently contains a repudiation of the bargain on bad and insufficient grounds (*s*). The contract may also be authenticated through the medium of bills of parcels, entries in books, letters, and separate writings, provided they refer to each other and to the same presons and things, and manifestly relate to the same contract (*t*). Where divers articles ordered by the defendant

(*k*) *Ib.*, s. 4 (3).

(*l*) *Taylor* v. *G. E. Ry.*, (1901) 1 K.B. 774; 70 L.J. K.B. 499; *Nicholson* v. *Bower*, 1 E. & B. 172; 28 L.J. Q.B. 97.

(*m*) *Ante*, p. 36.

(*n*) *Elmore* v. *Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Goodman* v. *Griffiths*, 1 H. & N. 574; 26 L.J. Ex. 145; *ante*, p. 38.

(*o*) *Hoadly* v. *Maclaine*, 4 M. & Sc. 340; 3 L.J. C.P. 162; *Ashcroft* v. *Morrin*, 4 M. & Gr. 450.

(*p*) *Acebal* v. *Levy*, 4 Moo. & Sc. 217; 3 L.J. C.P. 98; *Joyce* v. *Swann*, 17 C.B. N.S. 84, 103; *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 248.

(*q*) *Hoadly* v. *Maclaine*, *supra*.

(*r*) *Newell* v. *Radford*, L.R. 3 C.P. 52; 37 L.J. C.P. 1; *ante*, p. 37.

(*s*) *Bailey* v. *Sweeting*, 9 C.B. N.S. 843; 30 L.J. C.P. 150; *M'Clean* v. *Nicolle*, 9 W.R. 811.

(*t*) *Saunderson* v. *Jackson*, 2 Bos. & P. 238; *Allen* v. *Bennet*, 3 Taunt. 169; *Boydell* v. *Drummond*, 11 East, 142; *Long* v. *Millar*, 4 C.P.D. 450; 48 L.J. C.P. 596; *Ridgway* v. *Wharton*, 8 H.L. Cas. 238; 27 L.J. Ch. 46.

were entered in the plaintiff's order-book, and the defendant wrote his name at the foot of the entry, it was held that the entry and signature of the defendant might be taken in connection with an entry of the plaintiff's name in the book showing the book to be his book, so as to establish the requisite written memorandum of the contract (*u*). Where goods were sold by auction to an agent acting on behalf of an undisclosed principal, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, it was held that the entry in the catalogue and a letter afterwards written by the principal to the agent, recognising the purchase, might be coupled together to constitute the requisite written memorandum of the contract (*x*). And, where a buyer wrote to the seller: "I give you notice that the corn you delivered to me, in part performance of my contract with you for one hundred sacks of good English seconds flour, at 45*s*. per sack, is so bad that I cannot make it into saleable bread, dated this 24th of September," and the seller replied: "I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract as far as it has gone," it was held that the first letter and the answer might be coupled together, and were sufficient evidence in writing to satisfy the terms of the Statute of Frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned in the buyer's letter (*y*).

But if there is any material discrepancy between the letters and entries—if they describe the quality or quantity of the thing sold differently, or otherwise vary in the statement of the terms of the contract—they will fail in establishing the bargain (*z*). Where an entry in the plaintiff's book, unsigned by the defendant, referred to an unconditional contract of sale, and a letter written by the defendant referred to certain conditions as to the time of delivery, which were never assented to by the plaintiff, it was held that the plaintiff could not avail himself of the letter for one purpose—to bind the defendant within the statute—and renounce it for another purpose, but that he must take it altogether; and then it was no recognition, but a repudiation, of

(*u*) *Sarl* v. *Bourdillon*, 1 C.B.N.S. 195; 26 L.J. C.P. 78.

(*x*) *Phillimore* v. *Barry*, 1 Campb. 513; *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5.

(*y*) *Jackson* v. *Lowe*, 7 Moore, 219, 228; 1 Bing. 9. As to insufficient connection between advice note and invoice of goods to constitute a memorandum in writing, see *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331.

(*z*) *Smith* v. *Surman*, 9 B. & C. 561, 569; 7 L.J. (O.S.) K.B. 296.

the contract sought to be established by the entry (*a*). But, if the letter acknowledges the essential particulars of the contract, and then repudiates it on insufficient grounds, there will, as we have seen, be a good memorandum of the bargain (*b*).

Memorandum.—Brokers' bought and sold notes.—When sales are effected through the medium of brokers acting between the parties buying and selling, the broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of buyer and seller (*c*); but, where the broker delivers notes of the contract materially differing in their terms, and there is no signed entry in the broker's books to cure the discrepancy, there is no proof of the assent of the parties to the same terms, and no valid bargain between them (*d*). It is the duty, but not always the practice, of brokers to make a memorandum of the contract in their books, to sign such memorandum, and to transcribe therefrom the bought and sold notes. If these notes are signed by the broker and agree, but differ from an unsigned entry in the book, the notes constitute the contract. If they agree, but differ from a signed entry, and the signed notes so agreeing have been adopted by the vendor and purchaser, they will, it seems, constitute a new contract in substitution of the contract evidenced by the signed entry (*e*). If they differ from each other, and one of them agrees with the signed entry, the entry and note agreeing with it may, it seems, be taken together as constituting the contract, to the exclusion of the other note. A broker in his book signed both the bought and sold note, but he did not sign the note he sent to the purchaser, who declined to accept on that ground; it was held that the purchaser by his conduct admitted that the broker had his authority, and consequently he was bound by the sold note signed and sent to the seller, and also that the entry in the broker's book was a sufficient memorandum to satisfy the Statute of Frauds (*f*). "A broker has only a special authority, not a general one; and, if you employ a broker to buy one kind of goods, and he buys another, you are not bound by his act" (*g*).

(*a*) *Cooper* v. *Smith*, 15 East, 103, 108; *Richards* v. *Porter*, 6 B. & C. 437; 5 L.J. (O.S.) K.B. 175; *Jordan* v. *Norton*, 4 M. & W. 155; 7 L.J. Ex. 281; *Archer* v. *Baynes*, 5 Exch. 625; 20 L.J. Ex. 55.

(*b*) *Ante*, p. 38.

(*c*) *Heyman* v. *Neale*, 2 Campb. 337.

(*d*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Gregson* v. *Ruck*, 4 Q.B. 737; *Thornton* v. *Kempster*, 5 Taunt. 786, 788. But an unimportant or immaterial variation will not avoid the bargain: *Maclean* v. *Dunn*, 1 Moo. & P. 778; 6 L.J. (O.S.) C.P. 184.

(*e*) *Thornton* v. *Charles*, 9 M. & W. 807; 11 L.J. Ex. 302; *Sievewright* v. *Archibald*, 17 Q.B. 103; 20 L.J. Q.B. 535; *Goom* v. *Aflalo*, 6 B. & C. 117; 5 L.J. (O.S.) K.B. 31; *Thornton* v. *Meux*, 1 Moo. & M. 43.

(*f*) *Thompson* v. *Gardiner*, 1 C.P.D. 777.

(*g*) *Pitts* v. *Beckett*, 13 M. & W. 743, 747; 14 L.J. Ex. 358; *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

In an action by the purchaser against the vendor on a contract made through a broker, it is sufficient for the purchaser to produce the bought note handed to him by the broker, and to show the employment of the latter by the vendor; if the sold note varies from the bought note, it lies on the vendor to prove that variance by producing the sold note (*h*). So, if the action be brought against the purchaser for not accepting goods sold, the sold note bearing the signature of the broker acting for both buyer and seller is a sufficient memorandum of the bargain (*i*). An apparent variance between bought and sold notes may be explained by mercantile usage (*k*). Letters constituting a sufficient contract to satisfy the Statute of Frauds are not annulled by bought and sold notes differing from them, unless it plainly appears that the notes were to constitute the contract to the exclusion of the letters (*l*). A custom of trade to the effect that, whenever a broker purchases or sells for his principal without disclosing the name of such principal, the broker himself is liable to be looked to as purchaser or seller, may be given in evidence to fix the broker on the contract (*m*), unless such custom is inconsistent with the particular contract in question (*n*).

Memorandum.—Signature.—The question has already been considered (*ante*, pp. 39—43) as to what is and what is not a signing of a contract so as to meet the requirements of the Statute of Frauds, and now also of sect. 4 of the Sale of Goods Act, 1893.

Acceptance and actual receipt of goods.—The acceptance of the goods may be either before or at the time of the receipt of them (*o*). Thus, if the purchaser selects the goods himself, and writes his name upon them (*p*), or sends his own packer and packs the goods (*q*), or orders them to be sent to his residence or place of business, and the selected goods are delivered to him or his servant, at the place indicated by him, there is evidence of an acceptance and an actual receipt of the goods within the meaning of the statute (*r*). The acceptance need not be an absolute acceptance; all that is necessary is an accept-

(*h*) *Hawes* v. *Forster*, 1 Moo. & R. 368.
(*i*) *Parton* v. *Crofts*, 16 C.B. N.S. 11; 33 L.J. C.P. 189; *Thompson* v. *Gardiner*, 1 C.P.D. 777.
(*k*) *Bold* v. *Rayner*, 1 M. & W. 343; 5 L.J. Ex. 172; *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L.J. Ex. 191.
(*l*) *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.
(*m*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Hutcheson* v. *Eaton*, 13 Q.B.D. 861; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49.
(*n*) *Barrow* v. *Dyster*, 13 Q.B.D. 635.
(*o*) *Morton* v. *Tibbett*, 15 Q.B. 428; 19 L.J. Q.B. 382.
(*p*) *Hodgson* v. *Le Bret*, 1 Campb. 233.
(*q*) *Kershaw* v. *Ogden*, 3 H. & C. 717; 34 L.J. Ex. 159.
(*r*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

ance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract (*s*). So, where there was a sale of wheat by sample, and the purchaser, having received a number of sacks of wheat delivered under the contract into his premises, opened them to see if they were equal to sample, and immediately afterwards gave the seller notice that he refused the wheat, it was held that there had been an acceptance and actual receipt by him (*t*). Again, where the purchaser selected some sheep from the plaintiff's flock, and had them sent down to his own residence, and there counted them over, and said, "It is all right," and then sent them into his field, and the day after refused to keep them, saying they were not the sheep he bought, it was held that there was evidence for the jury of an acceptance of the sheep, and that, if the defendant had once really accepted them, his rejection of them afterwards would be of no avail unless they were not according to the contract (*u*). The acceptance must be made before the rescission of the contract; and if after goods are delivered to a carrier consigned to the vendee, and before any order has been given or act done constituting an acceptance of the goods, the contract is rescinded, no subsequent act by the vendee or by his trustee in bankruptcy will amount to an acceptance, so as to change the property in the goods, without the consent of the vendor (*x*).

To satisfy the section the purchaser must "accept" as well as "actually receive" the goods. The distinction between these two expressions is best shown where the purchaser separates the two acts by appointing an agent with authority to receive but not to accept. Thus, where a purchaser was alleged to have ordered goods to be separated from the bulk and sent to a wharfinger or carrier, and after this had been done refused to accept them, it was held that though there had been an actual receipt by the wharfinger or carrier there was no evidence of acceptance (*y*); for a carrier, though named by the purchaser, has *primâ facie* no authority to accept on his behalf (*z*).

(*s*) *Kibble* v. *Gough*, 38 L.T. 204; *Morton* v. *Tibbett*, 15 Q.B. 428; *Abbott* v. *Wolsey*, (1895) 2 Q.B. 67; 64 L.J. Q.B. 587; notwithstanding *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; and *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331.

(*t*) *Page* v. *Morgan*, 15 Q.B.D. 228; 54 L.J. Q.B. 434; *Taylor* v. *Smith*, *supra*.

(*u*) *Saunders* v. *Topp*, 4 Exch. 390; 18 L.J. Ex. 374.

(*x*) *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*y*) *Hunt* v. *Hecht*, 8 Exch. 814; 22 L.J. Ex. 293; *Hart* v. *Bush*, E. B. & E. 494; 27 L.J. Q.B. 271; see also *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*z*) *Hanson* v. *Armitage*, 5 B. & Ald. 557; *Meredith* v. *Meigh*, 2 E. & B. 364; 22 L.J. Q.B. 401; *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; *Vigers* v. *Sanderson*, (1901) 1 K.B. 608; 70 L.J. K.B. 383.

To constitute an actual receipt as well as an acceptance of the goods, it must appear that the vendor has parted with the possession of the goods, and placed them under the control of the purchaser, so as to put a complete end to all the rights of the unpaid vendor as such (*a*). Although, therefore, goods are selected by a purchaser, and ordered to be sent to the residence of the latter, yet, if the purchaser refuses to take them in when they arrive, there is no acceptance or actual receipt of them by the purchaser (*b*).

Receipt for inspection and approval.—When the specific articles have not been selected by the purchaser, there is no acceptance until he has had an opportunity of exercising his judgment with respect to the things sent; for he cannot be made the acceptor of whatever the vendor chooses to send him (*c*). If a purchaser sends his servant for goods, and, after they have been brought to him, sends them back, there is no acceptance and receipt. And the delivery of the goods into the hands of the intended purchaser, and the unpacking of them by the latter, are not sufficient if it appears that he has had them in his possession for no greater time than would reasonably suffice for him to examine the quantity and nature of the goods (*d*). Where a pair of earrings at a sale by auction were knocked down to the defendant, a foreigner, and delivered into his hands, but in a few minutes he handed them back and declined the purchase, on the ground that he had been mistaken as to the price at which they had been knocked down, it was held that, as by the conditions of sale the defendant had no right to remove the earrings until the deposit was paid, the mere delivery of them into his hands the moment he was declared the purchaser was not of itself evidence of an intention to part entirely with the possession of them, and that consequently there was not a complete delivery nor an acceptance and actual receipt (*e*). But acceptance may be inferred from the goods having been kept an unreasonable time (*f*).

Acceptance and receipt where goods purchased by bailee.—Whenever goods are in the hands of a hirer or bailee of them, and an oral bargain is made by him for the purchase of the

(*a*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

(*b*) *Baldey* v. *Parker*, 2 B. & C. 37; 1 L.J. (O.S.) K.B. 229.

(*c*) *Hunt* v. *Hecht*, 8 Exch. 814; 22 L.J. Ex. 293.

(*d*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Jordan* v. *Norton*, 4 M. & W. 155; 7 L.J. Ex. 281; *Lucy* v. *Mouflet*, 5 H. & N. 233; 29 L.J. Ex. 110.

(*e*) *Phillips* v. *Bistolli*, 2 B. & C. 511; 2 L.J. (O.S.) K.B. 116; see also *Hunt* v. *Hecht*, *supra*; *Coombs* v. *Bristol and Exeter Ry.*, 3 H. & N. 510; 27 L.J. Ex. 401; *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*f*) *Coleman* v. *Gibson*, 1 Moo. & R. 168; *Lucy* v. *Mouflet*, *supra*.

goods, and the bailee then takes to the goods as purchaser, and so changes the character in which he holds them, it is an acceptance as against him, and there will be a binding contract for the purchase of the goods (*g*); but if the parol authority to take to the goods as owner, resulting from the oral bargain with the vendor, has been revoked, and the vendor has withdrawn from the bargain, a subsequent taking to the goods by the buyer is unauthorised and tortious, and cannot be an acceptance, which to bind the bargain must be with the assent of the vendor (*h*).

Constructive acceptance. — There may be a constructive acceptance within the meaning of the statute, although the goods remain in the possession of the vendor (*i*). The question whether there has been such an acceptance is a question of fact depending on the inference to be drawn from the acts of the alleged purchaser in reference to the goods (*k*). Thus, an acceptance may be evidenced by acts of domination and ownership over things incapable of manual occupation and transfer from hand to hand (*l*). If the purchaser sells (*m*) or offers to sell (*n*) the chattel, or deals with it in a manner which is inconsistent with the right of property and possession being in anyone but himself, his conduct affords evidence of an acceptance and actual receipt of the thing (*o*). But it has been held that, so long as the vendor retains his right of lien for the price over the *whole* commodity sold, there can be no such acceptance and receipt as the statute requires (*p*).

Constructive possession by purchaser and extinction of right of lien.—Possession of goods may be given up, and the right of lien extinguished, although the goods are never actually removed from the premises of the vendor (*q*); and it has been held that, if an oral bargain is made for the purchase of goods, and the purchaser desires the vendor to keep them in his possession for an especial purpose, and the vendor assents thereto, there may

(*g*) *Edan* v. *Dudfield*, 1 Q.B. 302.

(*h*) *Taylor* v. *Wakefield*, 6 E. & B. 765, 769.

(*i*) *Elmore* v. *Stone*, 1 Taunt. 458; *Beaumont* v. *Brengeri*, 5 C.B. 301.

(*k*) *Edan* v. *Dudfield*, *supra*.

(*l*) Williams, J., *Bushel* v. *Wheeler*, 15 Q.B. 445; as to acceptance inferred from conduct, see *Parker* v. *Wallis*, 5 E. & B. 28; *Currie* v. *Anderson*, 2 E. & E. 592; 29 L.J. Q.B. 87.

(*m*) *Morton* v. *Tibbett*, 15 Q.B. 428; 19 L.J. Q.B. 382; *Castle* v. *Sworder*, 6 H. & N. 828; 30 L.J. Ex. 310.

(*n*) *Blenkinsop* v. *Clayton*, 1 Moore, 328; 7 Taunt. 597.

(*o*) *Taylor* v. *G. E. Ry.*, (1901) 1 K.B. 774; 70 L.J. K.B. 499; *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331; as to what amounts to evidence of acceptance, see *Abbott* v. *Wolsey*, (1895) 2 Q.B. 97; 64 L.J. Q.B. 587.

(*p*) *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680; *Carter* v. *Toussaint*, 5 B. & Ald. 855; *Maberley* v. *Sheppard*, 10 Bing. 99; 2 L.J. C.P. 181; *Holmes* v. *Hoskins*, 9 Exch. 753; *Smith* v. *Surman*, 9 B. & C. 561, 577; 7 L.J. (O.S.) K.B. 296; *Acraman* v. *Morrice*, 8 C.B. 449; 19 L.J. C.P. 57; *Bill* v. *Bament*, 9 M. & W. 36; 11 L.J. Ex. 81.

(*q*) *Jacobs* v. *Latour*, 2 Moo. & P. 201; 6 L.J. (O.S.) C.P. 243; *Martin* v. *Reid*, 11 C.B. N.S. 730; 31 L.J. C.P. 126.

be a constructive acceptance and constructive actual receipt, so as to satisfy the words of the statute. In cases of this sort the question will be whether the vendor had the subject-matter of the sale in his own possession, retaining his right of lien for the price, or whether he had the bare custody of the chattel as the servant of the purchaser, having no possession and no right of lien (*r*). Where a couple of horses had been sold by a livery-stable keeper at a fixed price, and the purchaser told the vendor that, as he had neither servant nor stable, the vendor must keep the horses at livery for him, whereupon the latter removed them from his *sale*-stable to his *livery*-stable, and there kept them at livery; it was held that this amounted to an actual delivery of the horses, that the vendor had parted with the possession of them, lost his lien for the price, and held the horses only as any other livery-stable keeper might have held them, having the bare custody of the horses and not the right of possession(*s*). And where there was an oral bargain for the sale of a horse, and the vendor asked the purchaser to lend him the horse for a few days till he got another, and the purchaser agreed to this, and the vendor kept the horse for a week and then sent it to the purchaser, who refused to receive it or pay for it: it was held that the purchaser by lending the horse to the seller had taken it as owner, and that the possession of the vendor under the loan was the possession of the purchaser (*t*).

Acceptance of bills of lading, delivery orders, and dock warrants.—The mere acceptance of a bill of lading of goods on board ship *in transitu* to the purchaser is not an acceptance and receipt of the goods; but if the purchaser retains possession of or exercises dominion and ownership over the bill of lading, this will be evidence of an acceptance and actual receipt (*u*). So the mere acceptance and receipt by a purchaser of a delivery order or dock-warrant is not an acceptance and actual receipt of the goods mentioned or comprised in such order or warrant until it has been presented to the warehouse-keeper or dock-keeper, and the latter has attorned to the purchaser, and consented to hold the goods on his account (*x*); but as soon as he has attorned, whether orally or by writing, and whether the documents are or are not filed in the warehouse, the warehouse-

(*r*) *Castle* v. *Sworder*, 6 H. & N. 828; 30 L.J. Ex. 310; *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

(*s*) *Elmore* v. *Stone*, 2 Taunt. 458.

(*t*) *Marvin* v. *Wallis*, 6 E. & B. 735; 25 L.J. Q.B. 369.

(*u*) *Meredith* v. *Meigh*, 2 E. & B. 368; 22 L.J. Q.B. 403; *Currie* v. *Anderson*, 2 E. & E. 592; 29 L.J. Q.B. 87.

(*x*) *Bentall* v. *Burn*, 3 B. & C. 423; 3 L.J. (O.S.) K.B. 42; *Farina* v. *Home*, 16 M. & W. 119; 16 L.J. Ex. 75; *Lackington* v. *Atherton*, 7 M. & Gr. 360; 13 L.J. C.P. 140.

keeper becomes the agent or trustee of the purchaser, and is bound to hold the goods at the disposal of the latter, and there is then an executed delivery as much as if the goods had been delivered into the purchaser's own hands, or had been removed to his warehouse, and there put under lock and key (*y*). A wharfinger who, receiving a delivery order for goods which at the time are not in his actual possession, promises to deliver them to the purchaser, is bound, if they afterwards come to hand, to hold them at the disposal of the party in whose favour the order has been made (*z*).

Acceptance and receipt of goods by carriers, forwarding agents, and agents for custody.—The acceptance and receipt of a carrier or wharfinger, or mere forwarding agent, appointed by the purchaser to be the vehicle of transmission to him, are not the acceptance and receipt of the purchaser (*a*), unless the latter so deals with the carrier or forwarding agent as to convert him into an *agent for custody* holding the goods as the purchaser's servant or agent (*post*, p. 615). When the purchaser refuses to receive the goods from the carrier, the latter holds them as the agent of the consignor from whom he received them, and there is no acceptance and actual receipt by the purchaser within the meaning of the statute, although the latter has directed the mode of conveyance, and pointed out the particular carrier to be employed (*b*). But a purchaser may, by his conduct and course of dealing with the carrier, convert the latter into an agent for custody holding the goods on his, the purchaser's, behalf (*c*). Thus, where a purchaser directs goods to be taken to a place of deposit indicated by him, and they are accordingly sent there, and dealt with under his directions, it is the same as if they are sent to his own warehouse (*d*).

Part acceptance and actual receipt binding the contract.—Where the acceptance of a part of goods sold is relied upon to take the case out of the statute, it must be an acceptance of a part of goods bought under the contract sought to be enforced. If two separate contracts are made, acceptance of goods under one of these contracts will not take the other out of the

(*y*) *Pearson* v. *Dawson*, E. B. & E. 456; 27 L.J. Q.B. 248; *Harman* v. *Anderson*, 2 Campb. 243; *Dickinson* v. *Marrow*, 14 M. & W. 713.

(*z*) *Holl* v. *Griffin*, 10 Bing. 246; 3 L.J. C.P. 17.

(*a*) *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145; *ante*, p. 533.

(*b*) *Astey* v. *Emery*, 4 M. & S. 262; *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; *Hanson* v. *Armitage*, 5 B. & Ald. 557; 1 D. & R. 128; *Meredith* v. *Meigh*, 22 L.J. Q.B. 401; 2 E. & B. 364; *Hart* v. *Bush*, E. B. & E. 494; 27 L.J. Q.B. 271.

(*c*) *Post*, p. 615; *Bushel* v. *Wheeler*, 15 Q.B. 442.

(*d*) *Dodsley* v. *Varley*, 12 Ad. & E. 632.

statute (*e*). Generally speaking, when a person goes into a shop and buys several different articles at the same time, he does not make as many different contracts as there are articles purchased (*f*); but there is one contract for the whole, and the acceptance and receipt of any one of the articles so purchased will take the contract as to all of them out of the operation of the statute. Where the traveller of a steel manufacturer at Sheffield took an oral order from an edge-tool maker at Birmingham for thirty-five bundles of common steel at 34*s*., and five bundles of cast steel at 48*s*., it was held that this was one entire contract, and that the acceptance of the common steel took the cast steel out of the operation of the statute (*g*). But, where growing crops were put up to auction in several lots, and separately knocked down to a bidder at separate prices, it was held that there was a distinct contract of sale as to each lot (*h*). Where a party under one contract purchases goods ready made, and orders others to be made, an acceptance of the former goods will be a sufficient compliance with sect. 4 of the Sale of Goods Act, 1893 (*i*). If after a purchase the purchaser draws samples from the bulk of the commodity, this amounts to an acceptance of it (*k*). Certain sugars in a warehouse were advertised for sale by auction, and samples of half a pound weight from each hogshead, drawn after the sugars had been weighed, were produced to the assembled bidders, and after the biddings were closed, the samples were delivered to and accepted by each purchaser, as part of his purchase, to make up the quantity and weight of each lot, as specified in the catalogue, and it was held that the delivery and acceptance of the sample were an acceptance and receipt of part of the things sold, so as to remove the contract from the operation of the statute (*l*).

The acceptance takes the whole contract out of the statute, leaving it open to the parties to supply the terms of the bargain by oral evidence (*m*). If, therefore, the contract is made defeasible on certain conditions, the conditions will stand good as part of the contract. Where a mare was sold on the terms

(*e*) *Price* v. *Lea*, 1 B. & C. 156; *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*f*) Alderson, B., *Scott* v. *Eastern Counties Ry.*, 12 M. & W. 38; 13 L.J. Ex. 14. See also *Champion* v. *Short*, 1 Campb. 53; *Baldey* v. *Parker*, 2 B. & C. 37; 1 L.J. (O.S.) K.B. 229.

(*g*) *Elliott* v. *Thomas*, 3 M. & W. 170; 7 L.J. Ex. 129; *Rohde* v. *Thwaites*, 6 B. & C. 388; 5 L.J. (O.S.) K.B. 163; *Bigg* v. *Whisking*, 14 C.B. 195, 198.

(*h*) *Roots* v. *Dormer* (*Lord*), 4 B. & Ad. 77; 1 N. & M. 667.

(*i*) 56 & 57 Vict. c. 71, s. 4; also Lord Abinger, C.B., *Scott* v. *Eastern Counties Ry.*, 12 M. & W. 38; 13 L.J. Ex. 14.

(*k*) *Gardner* v. *Grout*, 2 C.B. N.S. 340; *Talver* v. *West*, Holt, N.P. 178.

(*l*) *Hinde* v. *Whitehouse*, 7 East, 558, 570.

(*m*) *Tomkinson* v. *Staight*, 17 C.B. 697, 707; 25 L.J. C.P. 85.

that, in case she should prove in foal, she should be returned together with part of the price; and the mare was delivered and accepted, and afterwards proved to be in foal, but the purchaser refused to return her; it was held that the acceptance took the whole agreement out of the statute, and that the plaintiff might sue the defendant for the refusal to return the mare (*n*).

Earnest and part payment within second exception of statute.—The mere offer of earnest or part payment which is not accepted is not sufficient to bind the bargain (*o*). But the giving of any quantity of money, however small, by way of earnest or part payment, has the effect of taking the whole contract out of the operation of the statute. It binds the bargain as between the parties, provided the other requisites necessary to the completion of a contract of sale have been duly complied with, and operates as a transfer of the right of property to the purchaser (*p*). The vendor cannot sell to another until he has requested the vendee to remove the goods and pay the price, and the latter has repudiated his obligation to perform his part of the contract of sale (*q*). If there is a bargain for the sale of goods at a certain price, and subsequently an agreement that a debt due from the purchaser shall be wiped off from the amount of the price, and the debt is accordingly released and discharged, this may be equivalent to earnest and part payment (*r*).

Subject-matter of contract—Existing or future goods.—"The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called 'future goods' (*s*). There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen (*t*). Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods" (*u*). As a general rule a person may sell or offer for sale at any price whatsoever, remunerative or not, goods of which he is not the

(*n*) *Williams* v. *Burgess*, 10 Ad. & E. 499; 8 L.J. Q.B. 286.

(*o*) *Blenkinsop* v. *Clayton*, 1 Moo. 328; 7 Taunt. 597.

(*p*) *Bach* v. *Owen*, 5 T.R. 409; *Blakey* v. *Dinsdale*, Cowp. 664.

(*q*) *Langfort* v. *Tiler* (*Administratrix*), 1 Salk. 113; *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

(*r*) *Walker* v. *Nussey*, 16 M. & W. 305; 16 L.J. Ex. 120; *Norton* v. *Davison*, (1899) 1 Q.B. 401; 68 L.J. Q.B. 265.

(*s*) 56 & 57 Vict. c. 71, s. 5 (1). "Future goods" are defined by sect. 62 as "goods to be manufactured or acquired by the seller after the making of the contract of sale."

(*t*) 56 & 57 Vict. c. 71, s. 5 (2).

(*u*) Sect. 5 (3).

owner, but which he hopes or expects to acquire, provided that he is acting honestly (*x*).

"Where there is a contract for the sale of specific goods (*y*), and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (*z*). Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided" (*a*). Every contract for the sale of specific goods is made on the assumption that they are, or at the time of the sale shall be, in existence, and capable of being transferred; and if they have ceased to exist, and the vendor has not the power of making the transfer, there is no consideration for the payment of the purchase-money (*b*). Where a contract was made between two merchants, for the sale and purchase, at a fixed price, of an ascertained cargo of corn then on board a vessel at sea on its way from Turkey to Great Britain, and at the time of the making of the contract the vessel had been driven by stress of weather into an African port, and the cargo had become heated, and had been sold by the shipmaster to prevent its total destruction, it was held that the contract of sale made between the two merchants was a void sale, as the vendor had nothing to sell at the time of making the bargain; but it would have been otherwise if the cargo had been in existence on board the ship at the time of making the contract, and had been subsequently damaged and sold (*c*). A vendor may bind himself absolutely to deliver certain goods on a certain day, in which case he will be liable in damages if they have ceased to exist (*d*).

The price.—"The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties (*e*). Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact

(*x*) *Ajello* v. *Worsley*, (1898) 1 Ch. 274; 67 L.J. Ch. 172.

(*y*) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made (sect. 62).

(*z*) 56 & 57 Vict. c. 71, s. 6.

(*a*) Sect. 7. "Fault" means wrongful act or default (sect. 62).

(*b*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147; *Nickoll* v. *Ashton*, (1901) 2 K.B. 126; 70 L.J. K.B. 600.

(*c*) *Hastie* v. *Couturier*, 9 Exch. 102; 22 L.J. Ex. 299; 5 H.L. Cas. 673; 25 L.J. Ex. 253; *Barr* v. *Gibson*, 3 M. & W. 390; 7 L.J. Ex. 124.

(*d*) *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; 38 L.J. Q.B. 98.

(*e*) 56 & 57 Vict. c. 71, s. 8 (1). As to selling at any price whatsoever, see *Ajello* v. *Worsley*, (1898) 1 Ch. 274; 68 L.J. Ch. 172.

dependent on the circumstances of each particular case (*f*). Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor (*g*). Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault" (*h*).

Increased customs duty upon goods warehoused added to price. —By sect. 10 of the Finance Act, 1901 (*i*), "(1) Where any new customs, import duty, or new excise duty is imposed or where any customs, import duty or excise duty is increased, and any goods in respect of which the duty is payable are delivered after the day on which the new or increased duty takes effect in pursuance of a contract made before that day, the seller of the goods may, in the absence of agreement to the contrary, recover, as an addition to the contract price, a sum equal to any amount paid by him in respect of the goods on account of the new duty or the increase of duty, as the case may be. (2) Where any customs, import duty or excise duty is repealed or decreased, and any goods affected by the duty are delivered after the day on which the duty ceases or the decrease in duty takes effect in pursuance of a contract made before that day, the purchaser of the goods, in the absence of agreement to the contrary, may, if the seller of the goods has had in respect of those goods the benefit of the repeal or decrease of the duty, deduct from the contract price a sum equal to the amount of the duty or decrease of duty, as the case may be. (3) Where any addition to or deduction from the contract price may be made under this section on account of any new or repealed duty, such sum as may be agreed upon or in default of agreement determined" in the manner provided in the sub-section "as representing in the case of a new duty any new expenses incurred, and in the case of a repealed duty any expenses saved, may be included in the addition to or deduction from the contract price, and may be recovered or deducted accordingly." And by sect. 9 of the Finance Act, 1900 (*k*), the duty to be paid on goods or commodities deposited in a customs or excise office is declared

(*f*) 56 & 57 Vict. c. 71, s. 8 (2).
(*g*) Sect. 9 (1).
(*h*) Sect. 9 (2). As to transfer of property, see sect. 16, *post*, p. 579.
(*i*) 1 Edw. 7, c. 7, s. 10, which, by sub-sect. 4, repeals 38 & 39 Vict. c. 35, s. 20.
(*k*) 63 Vict. c. 7, s. 9.

to be the duty chargeable at the date of the actual removal of those goods or commodities from the warehouse, and if before that date any sums shall have been paid in respect of duty, the difference (if any) between the sums so paid and the actual duty chargeable shall be paid or repaid as the case may be.

Conditions and warranties as to time.—"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract (*l*). In a contract of sale 'month' means *primâ facie* calendar month" (*m*).

The question whether in a contract of sale the time for delivery of the goods, or payment of the price, or performance of any other term, is of the essence of the contract, so as to give the party insisting on performance a right to rescind the contract if the other party is in default, is, like all such questions, one of the intention of the parties. On the sale of a specific chattel where nothing is said as to the time for delivery or payment, it is usually the intention of the parties that the property in the chattel shall pass there and then, and that possession shall be given and taken and the price paid within a reasonable time after the date of the contract; the question of what is a reasonable time being one of fact depending on all the circumstances (*n*). But if delivery is unreasonably delayed, that of itself does not re-vest the property in the vendor, or excuse the purchaser from payment if the vendor afterwards tenders delivery. Similarly, if payment is unreasonably delayed that does not re-vest the property in the vendor, or excuse him from delivering if the price is subsequently tendered (*o*). If subsequently the purchaser absolutely refuses to take the chattel and pay the price, the vendor may rescind the sale (*p*); but mere default in payment not amounting to an absolute refusal does not entitle the vendor to rescind. Again, where goods are sold on credit and a time is specified for payment, it is clear that this time is not of the essence of the contract, because the property and right of possession have both passed to the purchaser before

(*l*) 56 & 57 Vict. c. 71, s. 10 (1). As to stipulations as to time or otherwise, see Jud. Act, 1873, s. 25 (7), and *per* Cotton, L.J., *Reuter* v. *Sala*, 4 C.P.D. 249; 28 L.J. C.P. 492.

(*m*) 56 & 57 Vict. c. 71, s. 10 (2).

(*n*) *Ellis* v. *Thompson*, 3 M. & W. 445; 7 L.J. Ex. 185.

(*o*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Chinery* v. *Viall*, 5 H & N. 288; 29 L.J. Ex. 180; *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534; *Page* v. *Cowasjee*, L.R. 1 P.C. 127.

(*p*) *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184.

the time for payment has arrived (*q*). Therefore, in cases of sale of specific ascertained chattels, delay in delivery or payment may give a right of action, but no right to rescind the contract, and it would require a clear expression of intention to make the time for delivery or payment of the essence of the contract, or in other words to make the contract conditional on payment or delivery at the time named.

The case of a contract for the sale of unascertained goods is somewhat different. There it is not intended that the property shall pass at the date of the contract, but at some future date, which may well be of the essence of the contract (*r*); if the day for delivery be of the essence of the contract and payment is to be made upon delivery, then it would follow that the time for payment would also be of the essence of the contract. If by the terms of a contract delivery is to be made by instalments over a considerable period of time, the various dates for acceptance or delivery are not, as a general rule, of the essence of the contract (*s*), unless the delay amounts to a repudiation of the obligation to accept or deliver (*t*). Payment for each instalment as it falls due is not a condition precedent to the right to claim delivery of future instalments (*u*), unless expressly made so by contract, or in case of the insolvency of the purchaser (*x*), or under other circumstances involving a repudiation of his obligation (*y*). Whether the party insisting on performance can by notice to the party in default specify a time within which the contract must be performed or rescinded, would seem to depend upon whether the property in the goods had passed or not at the time of the notice (*z*); if it has not passed, it would seem that such a notice would be effectual provided a reasonable time were specified (*a*).

When a particular day is appointed for the delivery of the goods, or the payment of the price, the party has the whole of the day, and if one of several days, the whole of those days, for the performance on his part of the contract; but he must do all he can to make the payment or perform the act at a con-

(*q*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

(*r*) *Bowes* v. *Shand*, 2 App.Cas. at p. 467; 46 L.J. Q.B. 561; *Coddington* v. *Paleologo*, L.R. 2 Ex. 193; 36 L.J. Ex. 73.

(*s*) *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28.

(*t*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529.

(*u*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497.

(*x*) *Chalmers, Ex parte*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

(*y*) *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588; 43 L.J. C.P. 375.

(*z*) *Martindale* v. *Smith*, *supra*.

(*a*) *Parkin* v. *Thorold*, 16 Beav. 59; 22 L.J. Ch. 170; *Crawford* v. *Toogood*, 13 Ch.D. 153; 49 L.J. Ch. 108.

venient hour before midnight. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to receive it. If he is to deliver goods, he must deliver them in sufficient time for examination and receipt. If the payment or delivery is to be performed at a certain place on a specific day, the tender must be to the other party at that place; and, as the attendance of the other is necessary at that place to complete the act, the law, though it requires the other to be present, does not require him to be present through the whole day and therefore it fixes a particular part of the day; and it is enough if he is at the place a convenient time before sunset, so that the act may be completed; and, if the party who is to perform tenders to the party present, or, if absent, if the tender is made, before sunset, that is sufficient (*b*). Demand or tender of delivery may be treated as ineffectual, unless made at a reasonable hour; and what is a reasonable hour is a question of fact (*c*). Orders for goods to be delivered as soon as possible do not oblige the vendor who accepts the order to put everything else aside and execute it without any delay at all. He is only bound to execute the order within a reasonable time (*d*).

Enlargement of time of performance.—In the case of contracts required by sect. 4 of the Sale of Goods Act, 1893, to be in writing, it often appears that the time specified for delivery or acceptance of the goods or payment of the price is enlarged by one party at the verbal request of the other. The promise to deliver or pay at the substituted time cannot be sued on, and it appears that the original agreement is no longer the agreement between the parties. The difficulty on this point, which has been the subject of consideration in many cases (*e*), has now been set at rest, and the plaintiff must rely on the original agreement or nothing (*f*). If he can aver and prove that he was ready and willing to perform his part of it, and that the defendant made default on his part, the plaintiff proves a cause of action. Thus, where the time for delivery is extended at the request of the defendant, the plaintiff can prove that he was

(*b*) *Startup* v. *Macdonald*, 6 M. & Gr. 593; 12 L.J. Ex. 483. See *ante*, pp. 142, 146.

(*c*) 56 & 57 Vict. c. 71, s. 29 (4).

(*d*) *Attwood* v. *Emery*, 1 C.B. N.S. 110; 26 L.J. C.P. 73; *Tennant* v. *Bell*, 9 Q.B. 684; 16 L.J. M.C. 31; *Staunton* v. *Wood*, 16 Q.B. 638; *Duncan* v. *Topham*, 8 C.B. 225; 18 L.J. C.P. 310.

(*e*) *Cuff* v. *Penn*, 1 M. & S. 21; *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58: 2 L.J. K.B. 127; *Stead* v. *Dawber*, 10 Ad. & E. 57; 9 L.J. Q.B. 101; *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L.J. Ex. 126; *Moore* v. *Campbell*, 10 Exch. 323; 23 L.J. Ex. 310; *Noble* v. *Ward*, L.R. 2 Ex. 135; 36 L.J. Ex. 91; *Ogle* v. *Vane* (*Lord*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77; *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130; *Leather Cloth Co.* v. *Hieronimus*, L.R. 10 Q.B. 140; 44 L.J. Q.B. 54; *Hickman* v. *Haynes*, L.R. 10 C.P. 598; 44 L.J. C.P. 358; *Plevins* v. *Downing*, 1 C.P.D. 220; 45 L.J. C.P. 695.

(*f*) *Plevins* v. *Downing*, *supra*.

ready and willing to deliver at the time mentioned in the written agreement (*g*). But if the time were extended at the plaintiff's own request, he cannot sue on the original contract, since he was not ready and willing to perform his part; nor can he sue on the substituted agreement, because the term on which he insists is not in writing (*h*).

Conditions and warranties.—Express.—A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it (*i*). These statements may obviously vary in importance. On the one hand they may be such as, if untrue, to entitle a purchaser to rescind the contract of sale. On the other, they may be such as only to give rise to a claim for damages. It would be more convenient if the term "warranty" had been applied exclusively to statements of the latter kind, those of the former being termed "conditions"; this distinction has now been drawn in the Sale of Goods Act, 1893 (*k*); but for the present, until sect. 11 of the Act is dealt with, the term "warranty" will be used in the wider sense as including statements of both kinds.

Warranties made pending negotiation for sale of property.—The declaration in an action for breach of warranty always averred *warrantizando vendidit* (*l*), which meant that the defendant had sold by warranting. "As to the *warrantizando vendidit*," observes Holt, C.J., "that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling" with a warranty. "But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such a warranty is not good. But in the other case the warranty is part of the contract" (*m*).

Private representations made prior to sale by auction forming

(*g*) *Hickman* v. *Haynes*, *ante*, p. 544.
(*h*) *Plevins* v. *Downing*, *ante*, p. 544.
(*i*) *Per* Ld. Abinger, C.B., *Chanter* v. *Hopkins*, 4 M. & W. 399, 404; 8 L.J. Ex. 14.
(*k*) 56 & 57 Vict. c. 71, ss. 11, 12—14, 53, *post*.
(*l*) *Margetson* v. *Wright*, 8 Bing. 454; 1 L.J. C.P. 128.
(*m*) *Lysney* v. *Selby*, 2 Ld. Raym. 1120; *Roscorla* v. *Thomas*, 3 Q.B. 234; 11 L.J. Q.B. 214.

no part of public contract of sale.—If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observed Maule, J., during the argument, "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a person who attends the sale and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at a public auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud (*n*).

Representations amounting to warranty.—Many representations of the subject-matter of a contract are of such a nature, and have been made under such circumstances, that the party making them may fairly be considered to warrant his knowledge of their truth, so as to be estopped from afterwards setting up his want of knowledge. This is the case when the means of information are peculiarly within his reach, or he pretends to have informed himself upon the subject, when in truth he knows nothing at all about it (*o*). If a jeweller represents a piece of crystal to be a diamond, or a common stone to be a bezoar stone, this would now be considered to amount to a warranty of the fact to a purchaser, and the jeweller would be responsible accordingly, whethre he knew the representation to be true or false (*p*); for, wherever the means of obtaining correct information lie peculiarly with the seller, it is probable the purchaser relies on the assertion, and if the seller asserts a falsehood to be the truth, not knowing whether it is or is not, he probably would be liable as on a breach of warranty (*q*). Thus, if the vendor of a house and the goodwill of a business represents the business done on the premises to be greater than it really is, this amounts to a warranty of the facts stated, although the statement may have been the result of a mistake,

(*n*) *Hopkins* v. *Tanqueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*o*) *Schneider* v. *Heath*, 3 Campb. 508; *Pawson* v. *Watson*, Cowp. 785; *Adamson* v. *Jarvis*, 4 Bing. 73; 5 L.J. (O.S.) C.P. 68.

(*p*) *Chandelor* v. *Lopus*, Cro.Jac. 4; and the note, 2 Smith's L.C. 52 (10th ed.).

(*q*) *Rawlins* v. *Wickham*, *ante*, p. 125.

because the annual profit of the trade lies peculiarly within the private knowledge of the vendor (*r*). It must be imputed to him that he knew the fact; and whether he did or did not is of no matter: "he undertook to know, by undertaking to give the description" (*s*). A purchaser of a house gave 7,350*l*. for the house upon the faith of letters from the vendor stating that "the house was in so good a state as not to require any repairs whatever," whereas the house was, at the time the letters were written, affected with the dry rot, and the floors gave way shortly after the purchaser took possession of it; and it was held that the vendor was responsible to the purchaser for such a sum as would put the house into the state he had represented it to be in (*t*). It is not sufficient to show that an article delivered is equally good with that which was bargained for, although it is of a different description. If the article sold is described, the description amounts to a warranty that it shall be an article of the kind described (*u*).

Warranty on sales of horses.—The owner of a horse who has used and driven it, or has had the means of doing so, has greater means of knowledge than a stranger who knows nothing about the animal. If, therefore, the owner offers the horse for sale, every representation that he makes to the buyer respecting the qualities of the animal amounts to a warranty, although the word "warrant" is never used by him. "If parties are dealing for a horse, and the seller says, 'You may depend upon it that the horse is perfectly free from vice,' that is a very sufficient warranty, though the word WARRANT was not used" (*x*). If the purchaser of a horse tells the vendor in a letter, "You represented the horse to me as a five-year-old," and the defendant answers, "The horse is as I represented," this is evidence from which a WARRANTY may be inferred (*y*). If a horse offered for sale has a cough and running at the nose, and the vendor says that it is a mere cold, and that he will deliver the horse sound and free from blemish in a week, that amounts to a warranty to a purchaser that the horse has nothing more than a cold upon him and will be sound at the end of the week (*z*). "If a purchaser," observes Best, C.J., "asks

(*r*) *Risney* v. *Selby*, 1 Salk. 211; *Taylor* v. *Green*, 8 C. & P. 319; *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 192; but see *Joliffe* v. *Baker*, 11 Q.B.D. 255; 52 L.J. Q.B. 609.

(*s*) *Calverley* v. *Williams*, 1 Ves. jun. 212.

(*t*) *Grant* v. *Munt*, Coop. Ch.C. 173. See also *Redgrave* v. *Hurd*, 20 Ch.D. 1; 51 L.J. Ch. 113; *Smith* v. *Land Corporation*, 28 Ch.D. 7.

(*u*) *Bowes* v. *Shand*, 2 App.Cas. 455; 46 L.J. Q.B. 561.

(*x*) *Cave* v. *Coleman*, 7 L.J. (O.S.) K.B. 26; 3 M. & R. 2; *Hopkins* v. *Tanqueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*y*) *Salmon* v. *Ward*, 2 C. & P. 211.

(*z*) *Liddard* v. *Kain*, 9 Moore, 356; 3 L.J. (O.S.) C.P. 246.

for a carriage horse, or a horse fit to carry a lady or a timid or infirm person, the seller who knows the qualities of the horse he supplies in answer to the demand, undertakes, on every principle of honesty, that it is fit for the purpose specified" (*a*). A warranty will not bind a man in a thing that is apparent (*post*, p. 549), as to warrant that a horse has both his eyes, when he has manifestly lost one of them (*b*). If, therefore, at the time of the sale of a horse the animal is warranted sound in wind and limb, that is understood to mean saving those manifest and visible defects which were obvious to all observers; and, if the horse was manifestly blind or obviously lame, and the purchaser examined the animal before he bought it, and must have been aware of these patent defects, the vendor's representation will give no cause of action. But a purchaser who relies upon a warranty is not bound to make a close or searching examination of a horse before he buys to ascertain whether a defect exists. If, relying upon a warranty, he omits to make such an examination of the animal, and consequently fails to discover a defect which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action (*c*); and, if a manifest defect is not necessarily of a permanent nature—if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation — the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased (*d*).

Evidence of breach of warranty of horse.—What constitutes unsoundness.—The rule as to unsoundness is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound (*e*). The word "sound" means, that the animal is free from disease at the time he is warranted. Of course, if the disease be slight, the unsoundness is proportionably so, and so also ought to be the damages (*f*). Convexity of the cornea, rendering a horse short-sighted, and causing him to shy, is un-

(*a*) *Jones* v. *Bright*, 3 Moo. & P. 155, 175; 7 L.J. (O.S.) C.P. 213.
(*b*) *Ekins* v. *Tresham*, 1 Lev. 102.
(*c*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*d*) *Liddard* v. *Kain*, *supra*.
(*e*) *Coates* v. *Stevens*, 2 Moo. & R. 157.
(*f*) *Kiddell* v. *Burnard*, 9 M. & W. 668; 11 L.J. Ex. 268.

soundness (*g*). It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt he is not entitled to recover (*h*).

Proof of manifest defects in horse not covered by warranty.—If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty. If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoes so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty (*i*). The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness, if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame (*k*). But bone spavin in the hock is unsoundness, although it may not produce lameness for years (*l*). A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect; but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal (*m*).

Proof of vice.—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term 'vice'" (*n*).

Representations not amounting to warranty.—There is no warranty of the party's knowledge, or of the fact being as it is stated to be, if the representation is made concerning some matter the knowledge of which lies as much within the power of the one party as the other, and the correctness of which may

(*g*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*h*) *Eares* v. *Dixon*, 2 Taunt. 343.
(*i*) Alderson, J., *Dickinson* v. *Follett*, 1 M. & Rob. 300.
(*k*) *Brown* v. *Elkington*, 8 M. & W. 132; 10 L.J. Ex. 336.
(*l*) *Watson* v. *Denton*, 7 C. & P. 85.
(*m*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*n*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.

be ascertained by the party interested in knowing the truth by the exercise of ordinary diligence, provided the representation is not made for the purpose of preventing him from making those inquiries which every prudent person ought to make(*o*). Where the statement is ambiguous, the party complaining of it must prove that he interpreted the words in the false sense in order to succeed in rescinding the contract (*p*). When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action (*q*). "If one sells purple to another, and saith to him, 'This is *scarlet*,' the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good" (*r*).

Representations of matters of opinion and belief.—A representation, moreover, frequently amounts to a mere statement of the party's own opinion and belief upon a matter concerning which the other contracting party is to exercise his own judgment, and does not amount to a positive statement of a fact. Thus, if the vendor of a picture, submitted to the inspection of the purchaser, states it to be the work of a particular artist, it is always a question for the jury to determine whether the statement amounted to a mere expression of the vendor's own opinion and belief upon a matter concerning which the buyer was to exercise his own judgment, or whether it was understood to be a positive warranty of the fact (*s*). Where a purchaser inquires for himself, and acts upon his own opinion, he cannot say that he has been misled by the false statement of another(*t*); and, if he examines the article for himself, and selects it after exercising his own judgment upon it, the vendor only warrants that the article is, so far as he knows, what it appeared to be, and what he believed it to be, at the time he sold it (*u*). Thus, where the plaintiff, having heard that the defendant had some barley to sell, went to the defendant's counting-house, where a person who managed the defendant's business produced a sample of barley which he said was seed barley, and the plaintiff then looked at the barley, and said it was a good sample of seed

(*o*) *Attwood* v. *Small*, 6 Cl. & Fin. 338; *Clapham* v. *Shillito*, 7 Beav. 146.

(*p*) *Smith* v. *Chadwick*, 9 App.Cas. 187; 51 L.J. Ch. 597.

(*q*) *Margetson* v. *Wright*, 8 Bing. 454; 1 L.J. C.P. 128; *Ekins* v. *Tresham*, 1 Lev. 102.

(*r*) *Baily* v. *Merrell*, 3 Bulstr. 95.

(*s*) *Jendwine* v. *Slade*, 2 Esp. 572; *Lomi* v. *Tucker*, 4 C. & P. 15; *De Sewhanberg* v. *Buchanan*, 5 C. & P. 343; *Power* v. *Barham*, 4 Ad. & E. 473; 5 L.J. K.B. 88.

(*t*) *Jennings* v. *Braughton*, 22 L.J. Ch. 584; 17 Beav. 234.

(*u*) *Ormrod* v. *Huth*, 14 M. & W. 664; 14 L.J. Ex. 366.

barley, and bought it; and it turned out that both parties were mistaken, and that the barley was not what was ordinarily known in the market as "seed barley," but what was called "barley bigg"; and it appeared that both parties had equal means of knowledge of the true character of the article, that both had believed it to be seed barley, and that it was bought and sold as such; it was held that what the defendant's servant said about the article amounted, under the circumstances, merely to an expression of his own opinion and belief about it, and did not amount to a warranty (*x*). But, where the purchaser has not examined for himself, and has not relied upon his own judgment in the matter, but has acted upon the faith of the representation made to him, then the representation amounts, as we have seen, to a warranty of the fact.

Proof of warranties.—It has been held that a warranty made orally, on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of the warranty, as it is a rule of law that oral evidence shall not be given "to superadd any term to a written agreement, for it would be setting aside all written contracts, and rendering them of no effect" (*y*). But, although a warranty cannot be superadded to a written contract by oral testimony, yet, if it can be shown that the contract was induced by an oral warranty made by one of two contracting parties, which was false to the knowledge of the party making it, and was made for the purpose of throwing the other contracting party off his guard, and fraudulently obtaining his consent to the bargain, this is a circumstance altogether collateral to the contract, and proof of it by oral testimony does not in anywise infringe upon the preceding rule of law. The oral evidence cannot be received to show that the contract itself was different from that authenticated by the written instrument; but it is admissible to show that the assent of the party to the contract was obtained under false pretences, and that the contract is bottomed in fraud, and has therefore no legal existence. *Ex dolo non oritur contractus.* The oral evidence of the false and fraudulent representation in such a case has not the effect of altering or adding to a written contract; but, admitting the contract in all its terms, it seeks to show that the party guilty of the fraud ought not to have the assistance of a court of justice for the enforcement of it. "If duress be pleaded, or a false reading

(*x*) *Carter* v. *Crick*, 4 H. & N. 412; 28 L.J. Ex. 238.

(*y*) *Powell* v. *Edmunds*, 12 East, 6, 11.

of the deed, you avoid the deed at law by parol evidence: but then these facts are collateral to the import of the instrument; they do not vary or alter it" (*z*). The oral evidence is offered, not to affect the terms of the contract itself, but to destroy the remedy by way of action upon it (*a*). The facts may be pleaded not only as a defence to an action on the contract (*b*), but also as ground for an action of deceit (*c*). Where representations which may amount to a warranty are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of showing that no warranty was contemplated by the parties (*d*).

Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.—"Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is a matter of inference from some-

(*z*) *Davis* v. *Symonds*, 1 Cox, Eq.Cas. 405.

(*a*) *Collins* v. *Blantern*, 2 Wils. 347; *Wright* v. *Crookes*, 1 Sc. N.R. 698; *Hutchinson* v. *Morley*, 7 Sc. 341.

(*b*) *Canham* v. *Barry*, 15 C.B. 597; 24 L.J. C.P. 100.

(*c*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L.J. (O.S.) K.B. 89; *Meyer* v. *Everth*, 4 Campb. 22; *Canham* v. *Barry*, *supra*.

(*d*) *Stucley* v. *Baily*, 1 H. & C. 405; 35 L.J. Ex. 483.

thing else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other" (*e*).

Construction of express warranties.—Where there was an agreement for the sale and purchase of all the naphtha the defendant might make during two years, "say from 1,000 to 1,200 gallons a month," it was held that these words did not amount to a warranty that that quantity of naphtha should be manufactured and sold per month (*f*). But where the agreement was to prepare and sell "say not less than 100," &c., it was held that the words did amount to a warranty or undertaking that at least the quantity specified should be prepared and sold (*g*). Warranties of quantity and quality made on sales of goods will be regulated by the apparent intention of the parties at the time the contract was entered into. There is no necessity that the word "warrant" or "promise" should occur in the bargain; but the representation must form part of the contract of sale (*h*). Where a sale-note made on the purchase of a horse described the animal as "a black gelding, about five years old constantly driven in the plough—warranted," it was held that, if the word "warranted" had been placed at the commencement of the sentence, it would have extended to the sex and age of the horse and his fitness for the plough; but, as it concluded the sentence, it extended only to the soundness of the animal, the preceding sentences being merely descriptive of the horse, and of the work to which it had been accustomed (*i*). And, where the seller gave the purchaser a written receipt for the purchase-money, describing the horse as a bay gelding got by Cheshire Cheese, warranted sound, it was held that the warranty was confined to the soundness of the animal, and did not extend to the description of his parentage (*k*). So, where a written receipt described the horse sold as "a gray four years old colt, warranted sound in every respect," it was held that the warranty did not extend to the description of the age of the animal, and that if the parties had meant to warrant the age as

(*e*) Lord Langdale, *Clapham* v. *Shillito*, 7 Beav. 149; *Shrewsbury* v. *Blount*, 2 Sc. N.R. 594.

(*f*) *Gwillim* v. *Daniell*, 2 Cr. M. & R. 61; 4 L.J. Ex. 174.

(*g*) *Leeming* v. *Snaith*, 16 Q.B. 275; 20 L.J. Q.B. 164; as to the effect of the words "about" or "more or less," see s. 30, *post*, p. 600; *Bourne* v. *Seymour*, 16 C.B. 337; 24 L.J. C.P. 202; *McConnel* v. *Murphy*, L.R. 5 P.C. 203.

(*h*) *Hopkins* v. *Tanqueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*i*) *Richardson* v. *Brown*, 8 Moore, 338.

(*k*) *Dickenson* v. *Gapp*, cited 1 Moo. & Sc. 78.

well as the soundness of the colt, the words should have been "warranted a four years old colt, and sound in every respect" (*l*). Where, on the sale of a horse, the seller signed the following warranty,—"Mr. C. bought of Mr. G. G. a bay horse for ninety pounds, warranted sound. 90*l*. Warranted sound for one month"—it was held that the latter words limited the duration of the warranty, and meant that it was to continue in force for one month only, and that complaint of unsoundness must, therefore, be made by the purchaser within one month of the sale (*m*). But the construction to be put upon contracts of this description will be regulated by the surrounding circumstances of each particular case, which must be regarded, in order that the true meaning of the parties may be discovered.

Warranties by agents.—The general presumption is that, where a principal intrusts property to an agent to sell, he authorises him to make all such warranties as are usual in the ordinary course of that particular business of selling, and that, if it is usual to sell with a warranty, he has an implied authority to warrant (*n*). The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even although (unknown to the buyer) he has express orders not to warrant; and evidence of an alleged custom among horse-dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority (*o*). But a servant intrusted on one particular occasion to sell has no implied authority to warrant so as to bind the owner (*p*).

Distinction between condition and warranty. The foregoing statements with reference to warranties generally apply equally to warranties strictly so called and to warranties which amount to conditions. A warranty strictly so called is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*q*).

When condition to be treated as warranty.—"(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat

(*l*) *Budd* v. *Fairmaner*, 1 Moo. & Sc. 74; 1 L.J. C.P. 16; as to unsoundness, see *Kiddell* v. *Burnard*, 9 M. & W. 668; 11 L.J. Ex. 268.

(*m*) *Chapman* v. *Gwyther*, L.R. 1 Q.B. 463; 35 L.J. Q.B. 142.

(*n*) *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 148.

(*o*) *Howard* v. *Sheward*, L.R. 2 C.P. 148; 36 L.J. C.P. 42.

(*p*) *Brady* v. *Tod*, 9 C.B. N.S. 592; 30 L.J. C.P. 223; but as to this, see *ante*, p. 334.

(*q*) 56 & 57 Vict. c. 71, s. 62.

the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. (b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer (*qq*), the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect" (*r*).

Nothing in sect. 11 is to affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise (*s*).

Conditional and defeasible sales.—If on the sale of a horse it is part of the bargain that the animal shall be taken back if it is unsound, the purchaser will be entitled to return the animal, and recover back the purchase-money, on proof of the unsoundness of the horse. Where an agent intrusted to sell a mare, but not being authorised to warrant her, refused to do so, but at the time of the sale told the purchaser that, if the mare was not all right, she was not his, and the purchaser then paid the price and took away the mare, and, the animal proving to be unsound, he returned her and sued for the price, it was held that the proper question for the jury was whether it was part of the contract that the mare should be returned if she proved to be unsound (*t*); so, where, pending a negotiation for a sale of hops, the growth of 300 acres, the purchaser declared that he would not have the hops if the bine had been sulphured, and required and received a written undertaking from the vendor that no sulphur had been used, and the hops were then delivered to and received by the purchaser, and it was then ascertained that sulphur had been used on five acres by way of experiment without the knowledge of the vendor, and that these sulphured hops were so mixed with the unsulphured as to be undistinguishable, it was held that the purchaser had a right to avail

(*qq*) *Wallis, Son & Wells* v. *Pratt*, (1910) 2 K.B. 1003; 79 L.J. K.B. 1013.
(*r*) 56 & 57 Vict. c. 71, s. 11.
(*s*) *Ib.*, s. 11 (3); *Behn* v. *Burness*, 3 B. & S. 756; 32 L.J. Q.B. 204.
(*t*) *Foster* v. *Smith*, 18 C.B. 156.

himself of the breach of the condition and annul the bargain (*u*). If goods are sold on the terms that the buyer is to have them a certain time on trial, the sale is conditional on the purchaser's approval after trial, so that, if he returns them after trial, there is no sale. In these cases no property passes until the purchaser has received and adopted the goods (*x*). In other cases the right of property in the specific thing sold passes subject to a condition. If the condition is fulfilled or waived, the sale becomes an absolute sale (*y*); if it is not fulfilled or waived, the party in whose favour and for whose protection the condition was imposed is entitled to repudiate the contract and return the subject-matter of the sale and recover the price (*z*). Where a mare was sold on the terms that, if she proved in foal, she was to be returned, and the mare proved in foal, it was held that the vendor had a right to have the animal returned to him (*a*). Where the sale is defeasible within a certain time, the fact that the thing sold has within that time and without any negligence on the part of the purchaser ceased to exist, does not disable the purchaser from avoiding the contract. Where a horse was sold with a condition that he might be returned within a specified time if he did not answer the description given of him, and within the time the horse injured itself without any negligence on the part of the purchaser, it was held that the latter was entitled to rescind the contract and recover the price of the horse which did not answer the description (*b*): and the same has been held where the horse died (*c*). Where a horse was sold with the condition that if it did not correspond with the warranty it must be returned on the second day after the sale, and while being ridden it fell and was so injured that it could not be returned on that day, it was held that the purchaser could, nevertheless, sue for breach of warranty (*d*).

A contract for the sale of goods "on arrival" (*e*), or to arrive (*f*), or that may be loaded (*g*), or expected to arrive (*h*), is conditional on the arrival or loading of the goods, so that, if no goods arrive or are shipped, there is no sale and no liability to deliver on the part of the vendor; but, it may be that if a man

(*u*) *Bannerman* v. *White*, 10 C.B. N.S. 844; 31 L.J. C.P. 28.

(*x*) *Swain* v. *Shepherd*, 1 Moo. & R. 223.

(*y*) *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167.

(*z*) *Head* v. *Tattersall*, L.R. 7 Ex. 7; 41 L.J. Ex. 4.

(*a*) *Williams* v. *Burgess*, 10 Ad. & E. 499; 8 L.J. Q.B. 286.

(*b*) *Head* v. *Tattersall*, *supra*.

(*c*) *Elphick* v. *Barnes*, 5 C.P.D. 321; 49 L.J. C.P. 698.

(*d*) *Chapman* v. *Withers*, 20 Q.B.D. 824; 57 L.J. Q.B. 457.

(*e*) *Boyd* v. *Siffkin*, 2 Campb. 326.

(*f*) *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Johnson* v. *Macdonald*, 9 M. & W. 600; 12 L.J. Ex. 99.

(*g*) *Hayward* v. *Scougall*, 2 Campb. 56.

(*h*) *Smith* v. *Myers*, L.R. 7 Q.B. 139; 41 L.J. Q.B. 91.

takes upon himself to sell goods expected to arrive by a certain ship, and the goods afterwards arrive consigned to some third party, so that the intended vendor has no power of disposing of them, he is precluded from setting up that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. Having dealt with them as his own, he cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his (*i*); for, whenever the agreement is conditional upon an event which happens, the vendor will be liable for non-performance, although he is prevented from fulfilling his contract by reason of some mistake or accident over which he had no control; for he ought to have provided against the possible contingency by his contract. If, therefore, he agrees to sell certain cases of East Indian tallow to be delivered to the purchaser on the safe arrival of a certain ship, and the ship arrives, but without the tallow, the vendor is responsible for the non-performance of his contract (*k*), for a vendor may bind himself to deliver goods in any event (*l*).

Effect of a breach of warranty by the vendor.—If it appears to have been the intention of the parties that a sale of chattels should be an absolute sale with a warranty superadded, the purchaser cannot annul the sale and return the thing sold, unless there has been actual fraud, and the vendor knew, at the time of the sale, that the thing sold did not answer the warranty; but, if the sale is conditional on the thing sold being in accordance with the warranty, the purchaser will be entitled to annul the sale, and return the article and recover the price, if the condition is not fulfilled (*m*). Lord Eldon is reported to have said that, if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might return the horse and bring an action to recover the full money paid, but that the seller had a right to expect that the horse should be returned in the same state he was in when sold, and not by any means diminished in value (*n*). "It is, however, extremely difficult, indeed impossible," justly observes Lord Tenterden, "to reconcile this doctrine with those cases in which it has been held that, where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the

(*i*) *Fischel* v. *Scott*, 15 C.B. 69; *Gorrissen* v. *Perrin*, 2 C.B. N.S. 681; 27 L.J. C.P. 29.

(*k*) *Hale* v. *Rawson*, 4 C.B. N.S. 85; 27 L.J. C.P. 189.

(*l*) *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164; *Nickoll* v. *Ashton*, (1901) 2 K.B. 126; 70 L.J. K.B. 600.

(*m*) *Emanuel* v. *Dane*, 3 Campb. 299.

(*n*) *Curtis* v. *Hannay*, 3 Esp. 82.

breach of the warranty, to return the article and re-vest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." "If these cases," observes his lordship, after referring to certain authorities, "are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, re-vest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration" (*o*).

Rejection and non-acceptance of goods sold.—In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed (*p*). In cases of executory contracts when there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty; but, even after they have been delivered by the vendor, he may reject them after discovering the defect, and, if he has paid for them, he may recover back the price. It is, however, generally necessary to enable a purchaser to reject goods after delivery, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, that he should reject the goods within a reasonable time (*q*), and that he should not have done any act to alter the position of the vendor or to delay the return of the goods (*r*). If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them (*s*). In determining what is a reasonable time for rejecting goods the conduct of the seller may be taken into consideration, as, for instance, a sub-

(*o*) *Street* v. *Blay*, 2 B. & Ad. 456; *Dawson* v. *Collis*, 10 C.B. 523; 20 L.J. C.P. 116; *Parsons* v. *Sexton*, 4 C.B. 899; 16 L.J C.P. 184; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Foster* v. *Smith*, 18 C.B. 156; *Heyworth* v. *Hutchinson*, L.R. 2 Q.B. 447; 36 L.J. Q.B. 270.

(*p*) *Behn* v. *Burness*, 3 B. & S. 756; 32 L.J. Q.B. 204.

(*q*) See 56 & 57 Vict. c. 71, ss. 35, 56.

(*r*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Street* v. *Blay*, 2 B. & Ad. 456; *Chapman* v. *Morton*, 11 M. & W. 534; 12 L.J. Ex. 292.

(*s*) Bovill, C.J., *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

sequent misrepresentation whereby he has induced the purchaser to prolong the trial (*t*).

Conditions and warranties—Implied undertaking as to title, &c.—"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass: (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods: (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made" (*u*).

In Noy's Maxims it is affirmed to be a principle of law that "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, *et caveat emptor*" (*x*). However true this may have been when Noy wrote, it is certainly not true as a general proposition at the present day. Wherever a man sells goods *as owner*, he impliedly undertakes that the goods are his own goods, and that he has a right to make the sale he professes to make; and, if he was not the owner at the time of the sale, and was not selling his own goods but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking (*y*). "By the civil law," observes Blackstone, "an implied warranty was annexed to every sale in respect of the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose" (*z*). If goods are sold by a person who is not the owner, and the owner is found out and paid for the goods, the vendor who sold them cannot then call upon the purchaser for payment (*a*). "If a man takes the goods of S. tortiously and sells them to me for money as his own goods, and afterwards S. takes them away from me, I may have an action on the case

(*t*) *Adam* v. *Richards*, 2 H.Bl. 573.

(*u*) 56 & 57 Vict. c. 71, s. 12.

(*x*) Noy's Maxims, ch. 42, p. 89.

(*y*) *Eichholz* v. *Bannister*, 17 C.B. N.S. 708; 34 L.J. C.P. 105.

(*z*) 2 Bl. Com. 451; 2 Kent's Com. s. 478; 2 Stephen's Com. 84 (ed. 11); see also Lee, C.J., in *Ryall* v. *Rowles*, 1 Ves. senr. 351, commenting on the unreported case of *L'Apostre* v. *L'Plaistrier; Simms* v. *Marryatt*, 17 Q.B. 281; 20 L.J. Q.B. 458.

(*a*) *Dickenson* v. *Naul*, 4 B. & Ad. 638; *Allen* v. *Hopkins*, 13 M. & W. 94; 13 L.J. Ex. 316.

against my vendor." "If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buy them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of a stranger, yet B. shall have an action for this deceit" (*b*).

"Where one, having the possession of any personal chattel, sells it, the bare affirming it to be his amounts to a warranty of the fact: and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out. *Aliter*, where the seller is out of possession; for then there may be room to question the seller's title; and *caveat emptor* in such a case to have either an express warranty or a good title" (*c*). This dictum of Lord Holt's would appear not to be warranted by later authorities. "This distinction by Holt," observes Buller, J., "is not mentioned by Lord Raymond, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot perceive a distinction between the vendor's being in or out of possession. The thing is bought of him in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on" (*d*).

The circumstances of the case may, however, rebut the warranty of title; or, in the words of sect. 12, the circumstances of the contract may be such as to show a different intention. Whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title of his vendor; for there is not, under such circumstances, any implied warranty of title on the part of the vendor (*e*). The latter merely undertakes and promises that he does not, at the time he sells, know of any defect in his authority or title to sell; and he cannot be made responsible for the repayment of the purchase-money, unless it can be proved that he knew he had no right or title to sell, and that consequently his conduct was fraudulent. Thus, in the

(*b*) 1 Rolle Abr. 90, pl. 5; 91, pl. 7; see *Pasley* v. *Freeman*, 3 T.R. 59.

(*c*) *Medina* v. *Stoughton*, 1 Salk. 210; *Crosse* v. *Gardner*, Carth. 90; *Adamson* v. *Jarvis*, 4 Bing. 66; 5 L.J. (O.S.) C.P. 68; *Harding* v. *Freeman*, Sty. 310; *Roswell* v. *Vaughan*, Cro.Jac. 196.

(*d*) *Pasley* v. *Freeman*, 3 T.R. 51, 58; see also *Morley* v. *Attenborough*, 3 Exch. 500; 18 L.J. Ex. 148; *Eichholz* v. *Bannister*, 17 C.B. N.S. 708; 24 L.J. C.P. 105. The distinction taken by Lord Holt is, however, well recognised in America: see 2 Kent's Com. s. 478; Story on Sale, s. 367, n. 5, p. 436 (ed. 4).

(*e*) *Bagueley* v. *Hawley*, L.R. 2 C.P. 625; 36 L.J. C.P. 328.

case of sales by sheriffs of goods and chattels taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority, or that he has no right or title to sell (*f*). So, in the case of sales by pawnbrokers of unredeemed pledges, the pawnbroker only warrants the subject-matter of the sale to be a pledge the time for the redemption of which has expired. He does not warrant or promise that the pledgor had a title to pledge the article; nor does he impliedly warrant the purchaser against eviction. As he has sold in a special character or capacity, he impliedly sells and agrees to transfer his own title and interest in the subject-matter of the sale, and no more; and, that being so, it is the duty of the purchaser to inquire into the title; and, if he neglects so to do, and it subsequently appears that the pledgor had no title to pledge nor the pawnbroker to sell, and the purchaser is evicted, he cannot recover compensation for his loss, unless he can establish a case of fraud (*g*). There may be no implied warranty of title on the part of a vendor, and yet the purchaser may be entitled to recover back the purchase-money, on the ground of a total failure of consideration. Thus, in the case of a sale of stock, scrip, or shares in joint stock companies, the law does not imply any undertaking or warranty from the vendor that the scrip, stock, or shares he sells are genuine; but, if the vendor has innocently sold forged or counterfeit stock, scrip, or shares, the purchaser is entitled, as we have seen, to a return of the purchase-money, on the ground that there has been a total failure of consideration (*h*). Where the plaintiff succeeded the defendant as the tenant of a dwelling-house, and agreed with him for the purchase of the tenant's fixtures in the house, and paid him the purchase-money, and it subsequently appeared that the fixtures belonged to the landlord, and that the tenant had no right to sell them, and the plaintiff was obliged to pay the value of them to the landlord, it was held that he was entitled to recover back the money he had paid to the defendant, on the ground that there had been a total failure of the consideration, and that the money had been paid under a mistake, although it appeared that the defendant had himself bought the fixtures *bonâ fide* of a preceding tenant in ignorance of the title of the landlord (*i*).

(*f*) *Chapman* v. *Speller*, 14 Q.B. 621; 19 L.J. Q.B. 239.

(*g*) *Morley* v. *Attenborough*, 3 Exch. 500; 18 L.J. Ex. 148.

(*h*) *Westropp* v. *Solomon*, 8 C.B. 345, 371; 19 L.J. C.P. 1.

(*i*) *Robinson* v. *Anderton*, 1 Peake, 129; *Wilkinson* v. *Lloyd*, 7 Q.B. 27, 43; sub nom. *Leeman* v. *Lloyd*, 14 L.J. Q.B. 165.

But, if the vendor does not pretend himself to be the owner of the goods he sells, but sells only such a title and interest as the law gives him in the subject-matter of the sale, the purchase-money cannot be recovered back on the ground of a failure of the consideration, if it turns out that the vendor had not the title or interest which he was supposed to have, unless the vendor knew of his want of title at the time of the sale, and there has been a fraudulent concealment (*k*). Where the plaintiff and defendant both attended a sheriff's sale where goods seized under a writ of execution were being sold by auction, and the defendant purchased a lot for 18*l*., and the plaintiff offered the defendant 5*l*. "to let him stand in his shoes," which offer the defendant accepted, and with the assent of the sheriff made over his bargain to the plaintiff, and the plaintiff paid down 23*l*., 18*l*. of which were handed to the sheriff as the price of the lot, and the remaining 5*l*. were retained by the defendant as his share of the purchase-money, and it was subsequently discovered that the goods had been seized by mistake, and were not the property of the debtor against whom execution had been issued, and the plaintiff was obliged to return the goods, and then brought an action against the defendant for the recovery of the 5*l*. on the ground that there had been a total failure of consideration, it was held that the true consideration was the transfer to the plaintiff of the defendant's right, such as it was, to the 18*l*. lot; and, having got that, the plaintiff had got all that he had bargained for, and agreed to buy, and the defendant to sell, and that there was no ground for claiming a return of the purchase-money. In deciding for the defendant, observes the court, "under the circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid" (*l*). On a sale of letters patent there is no warranty that the patent is indefeasible, and the purchaser having the same means of knowledge as to the value of the patent as the seller, the maxim *caveat emptor* applies (*m*).

Conditions and warranties—Sale by description.—"Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds

(*k*) As to effect of fraud, see sect. 61, *post*.

(*l*) *Chapman* v. *Speller*, 14 Q.B. 621; 19 L.J. Q.B. 239.

(*m*) *Hall* v. *Conder*, 2 C.B. N.S. 53; 26 L.J. C.P. 138.

with the sample if the goods do not also correspond with the description" (*n*). If the thing delivered does not answer the description of that which was sold—if, that is, it differs in kind and not in quality only, so as to amount in effect to a different article—the buyer is not bound to take it; and, if he has paid for it, he may recover back the money (*o*).

When the sale is a sale of particular classes and descriptions of goods to be selected by the vendor, such as a sale of so many measures of corn, wine, oil, or fruit, and not of any specific ascertained parcel of goods, the vendor will fulfil his contract by furnishing any goods fairly answering the description given by him. When, on the other hand, the precise article intended to be bought and sold was ascertained at the time of the making of the bargain, the vendor must deliver the identical thing so ascertained, and cannot fulfil his contract by delivering anything else of a corresponding nature. If the purchaser, instead of going in person to a shop, and selecting the goods himself, sends an order describing what he wants, the vendor, if he accepts the order, must select and send an article which fairly corresponds with the description. And this is so whether the purchaser has an opportunity of inspecting the goods and judging for himself or not (*p*). Thus, where a purchaser forwarded a written order to the vendor for "scarlet cuttings," to be shipped on his account for the Chinese market, and the vendor sent on board a different article, it was held that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China the goods which he had ordered (*q*). If, therefore, a shipowner supplies a ship ordered to be copper-fastened which is not copper-fastened, or a silversmith sells plated goods for silver (*r*), or if a merchant sells wine or beer described as "fit," or ordered by the purchaser to be "fit, for the Mediterranean," or "India market," and sends out a liquid which turns sour on the voyage, and is not saleable on its arrival as wine or beer (*s*), he is liable to an action for the breach of an implied undertaking to furnish the article described and

(*n*) 56 & 57 Vict. c. 71, s. 13; *Nichol* v. *Godts*, 10 Exch. 191; 23 L.J. Ex. 314. As to sale by sample, see sect. 15, *post*.

(*o*) *Azémar* v. *Casella*, L.R. 2 C.P. 677; 36 L.J. C.P. 263; *Vigers* v. *Sanderson*, (1901) 1 K.B. 608; 70 L.J. K.B. 383. As to the measure of damages for breach of implied condition on a sale by description, see *Bostock & Co.* v. *Nicholson & Sons*, (1904) 1 K.B. 725; 73 L.J. K.B. 524; and *post*, p. 629.

(*p*) *Tye* v. *Fynmore*, 3 Campb. 462; *Josling* v. *Kingsford*, 3 C.B. N.S. 447; 32 L.J. C.P. 94.

(*q*) *Bridge* v. *Wain*, 1 Stark. 504.

(*r*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

(*s*) *Fisher* v. *Samuda*, 1 Campb. 190.

ordered (*t*). Where a contract was entered into for the supply of a certain quantity of "best palm oil, usual tare and draft, wet, dirty, and inferior, if any, at a fair allowance," it was held that evidence was admissible to show that there was an established usage in the trade regulating the proportions of good and bad oil, and that the vendor under such a contract was bound to supply a certain proportion of the best oil (*u*).

The vendee may refuse to receive the thing proffered to him in performance of the contract on the ground that it does not correspond with the descriptive statement (*x*). A purchaser is not bound to accept goods partly of the quality bargained for and partly of an inferior quality, if they are mixed together so that the whole bulk becomes of an inferior quality to that bargained for (*y*). Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination though he may have bought after inspection of the bulk (*z*).

Where there is a contract for the sale of specific or ascertained goods which the buyer has not seen, and he relies on the description given to him of them by the seller, the contract is for the sale of goods by description, and there is an implied condition that the goods shall correspond with the description (*a*).

Conditions and warranties—Implied conditions as to quality or fitness.—Subject to the provisions of the Act of 1893 and of any statute in that behalf, "there is no implied warranty or condition as to the quality (*b*) or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such pur-

(*t*) *Gardiner* v. *Gray*, 4 Campb. 144; *Powell* v. *Horton*, 2 Bing. N.C. 668; 5 L.J. C.P. 204; *Allan* v. *Lake*, 18 Q.B. 560; *Simond* v. *Braddon*, 2 C.B. N.S. 324; 26 L.J. C.P. 198; *Wieler* v. *Schilizzi*, 17 C.B. 619; 25 L.J. C.P. 89.

(*u*) *Lucas* v. *Bristow*, E. B. & E. 907; 27 L.J. Q.B. 364.

(*x*) *Behn* v. *Burness*, 3 B. & S. 751; 32 L.J. Q.B. 204; *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*y*) *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176.

(*z*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89; *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Randall* v. *Newson*, 2 Q.B.D. 102; 16 L.J. Q.B. 259; *Bowes* v. *Shand*, 2 App.Cas. 455, 480; 46 L.J. Q.B. 561.

(*a*) *Varley* v. *Whipp*, (1900) 1 Q.B. 513; 69 L.J. Q.B. 333.

(*b*) "Quality of goods" includes their state or condition: 56 & 57 Vict. c. 71, s. 62.

pose (*c*), provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose: (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality (*d*); provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed: (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade: (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith" (*e*).

Implied warranty where nothing is said respecting quantity or quality—Caveat emptor.—The law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, as, for instance, where the goods are in existence and can be inspected by the buyer (*f*), and who does not affirm that the article is fit for any particular purpose, any warranty or undertaking beyond the ordinary promise that he makes no false representation calculated to deceive the purchaser, and practises no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods (*g*). "In the general sale of a horse, the seller only warrants it to be an animal of the description it appears to be, and nothing more; and, if the purchaser makes no inquiries as to its soundness or qualities, and it turns out to be unsound and restive, or unfit for use, he cannot recover as against the seller, as it must be assumed that he purchased the animal at a cheaper rate" (*h*). So, on the sale and transfer of wares and merchandise, if nothing is said as to the character or quality of thing sold, the buyer takes the risk of all latent defects unknown to the seller at the time of entering into the contract of sale; all that the seller

(*c*) As to inference of sale for a particular purpose, cp. *Preist* v. *Last*, (1903) 2 K.B. 148; 72 L.J. K.B. 657; *Frost* v. *Aylesbury Dairy Co.*, (1905) 1 K.B. 608; 74 L.J. K.B. 386 (milk supplied for domestic use). As to reasonable fitness, cp. *Clarke* v. *Army and Navy Co-operative Society*, (1903) 1 K.B. 155; 72 L.J. K.B. 153. As to damages recoverable, cp. *Jackson* v. *Watson & Sons*, (1909) 2 K.B. 193; 78 L.J. K.B. 587.

(*d*) *Wren* v. *Holt*, (1903) 1 K.B. 610; 72 L.J. K.B. 340 (case of illness caused by arsenical poison in beer); *Bristol Tramways Co.* v. *Fiat Motors*, (1910) 2 K.B. 831; 79 L.J. K.B. 1107.

(*e*) 56 & 57 Vict. c. 71, s. 14.

(*f*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89.

(*g*) *Barr* v. *Gibson*, 3 M. & W. 390; 7 L.J. Ex. 124.

(*h*) *Per* Best, C.J., *Jones* v. *Bright*, 3 Moo. & P. at p. 175; 7 L.J. (O.S.) C.P. 213.

answers for being that the article is, as far as he knows, what it appears to be.

Implied warranty where article sold to be used for specific purpose.—If the vendor is informed that an article of a certain quality, or description, suited for some specified purpose, is required, the law implies a promise from him that he will supply to the purchaser an article of the quality or description ordered, and reasonably fit for the purpose for which it is required. If a person purchases goods from a dealer in such goods, explaining the purpose for which they are to be used and leaving the selection of them to the seller, the latter thereby impliedly warrants that they are fit for the purpose for which they are so used, and is liable to the purchaser for damage occasioned by their unfitness, even though he was not the manufacturer of the goods sold by him (*i*). This warranty is of a general character and includes latent defects (*k*); as, for instance, in the case of milk supplied by a dairy company for domestic use, where the buyer relied upon the company's skill and judgment (*l*). Where an article which is *primâ facie* applicable to one purpose only, such as a hot water bottle, is sold by its ordinary recognised description, then, inasmuch as there is a sale for a particular purpose which is known both to the seller and buyer, the fact that the buyer does not make known to the seller the particular purpose for which the article is required, otherwise than by the ordinary description of the article, does not prevent the implication of a warranty, within sect. 14 (1) of the Act of 1893, that the article is reasonably fit for the purpose in question (*m*). It would seem that a rule of a co-operative society that "no warranties are given with the goods sold by the society, except on the written authority of one of the managing directors or the assistant manager" will not exclude from the contract of sale the implied warranty arising under sect. 14 (1) of the Act of 1893, that goods sold for a particular purpose are reasonably fit for such purpose (*n*).

The law generally implies a promise from a manufacturer that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit for the

(*i*) *Brown* v. *Edgington*, 2 M. & Gr. 279; 10 L.J. C.P. 66; and see *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*k*) *Randall* v. *Newson*, 2 Q.B.D. 102; 46 L.J. Q.B. 259; the doctrine of *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169, does not apply.

(*l*) *Frost* v. *Aylesbury Dairy Co.*, (1905) 1 K.B. 608; 74 L.J. K.B. 386.

(*m*) *Preist* v. *Last*, (1903) 2 K.B. 148; 72 L.J. K.B. 657.

(*n*) *Clarke* v. *Army and Navy Co-operative Society*, (1903) 1 K.B. 155; 72 L.J. K.B. 153. As to the duty of a seller of dangerous goods to warn the buyer, see Addison on Torts, 721 (ed. 8).

purpose for which he professes to make them, and for which they are known to be required. Thus, where the plaintiff bought a pole for his carriage from the defendant, who supplied a pole which broke short off and which the jury found was not reasonably fit for a carriage pole, it was held that the defendant was liable in an action for damages, though he did not know of any defect in the pole (*o*); again, where a tradesman manufactured and sold copper sheathing for vessels, it was held that he impliedly warranted that the copper he manufactured was reasonably fit for the purpose of sheathing vessels (*p*); and it would seem, indeed, that the mere seller of copper described as fit for sheathing vessels would be presumed to have a reasonable knowledge of the article so described, and that the law would imply a warranty that the article was reasonably fit for the purpose specified (*q*). Where a contract for the sale of goods is silent as to the purpose for which they are required, the antecedent course of conduct of the buyer and seller, and the fact that a document stating the purpose for which the goods are required was brought to the knowledge of the seller, are admissible in evidence in an action for breach of warranty brought upon the contract to show that the buyer relied on the seller's skill and judgment, and that there is an implied condition that the goods shall be reasonably fit for such purpose (*r*). But, when a known and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, yet, if the known and defined thing is actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Thus, where a manufacturer invented and sold a "smoke-consuming furnace," and the defendant ordered it for his brewery, it was held that the law would imply no warranty that the machine was fit for the defendant's brewing-copper, and that the utmost that the vendor could be considered to undertake under such circumstances was that the machine would consume smoke, which it appeared to have done in other instances when applied to a different purpose. If the vendor had said, "I will send you one of my smoke-consuming furnaces which will suit your brewery," in such a case that would be a warranty that it would suit a brewery (*s*). In an action for the price of a printing-machine, it appeared that

(*o*) *Randall* v. *Newson*, 2 Q.B.D. 102; 46 L.J. Q.B. 259.

(*p*) *Jones* v. *Bright*, 3 Moo. & P. 155; 7 L.J. (O.S.) C.P. 213.

(*q*) *Gray* v. *Cox*, 6 D. & R. 200; 4 B. & C. 108.

(*r*) *Gillespie* v. *Cheney*, (1896) 2 Q.B. 59; 65 L.J. Q.B. 552.

(*s*) *Chanter* v. *Hopkins*, 4 M. & W. 399; 8 L.J. Ex. 14; *Camac* v. *Warriner*, 1 C.B. 367; *Prideaux* v. *Bunnett*, 1 C.B. N.S. 613; *Shepherd* v. *Pybus*, 4 Sc. N.R. 434; 11 L.J. C.P. 101.

the plaintiff had obtained a patent for a machine of which he was the inventor, which he called "Ollivant's patent printing machine," the object of which was to print calico in two colours; that the defendant, hearing of the invention, wrote to the plaintiff to know the price; when the latter in reply said, "I undertake to make you a two colour printing machine on my patent principle"; whereupon the defendant ordered the machine, but could not make it print two colours, and therefore refused to pay the price; but it was held that, as the defendant had got a machine made on the plaintiff's "patent principle," he had got all he had bargained for, and that there was no implied undertaking that it would, in the defendant's hands and under his management, answer the purpose for which he wanted it (*t*). But a contract for the sale of goods by description is not "a contract for the sale of a specified article under its patent or other trade name" within the proviso in sect. 14, sub-sect. 1, of Sale of Goods Act, 1893 (*u*); and on a sale of unascertained goods, an express warranty that they shall conform to a certain standard does not exclude the implied warranty that they shall be reasonably fit for the purpose for which the vendor knows they are wanted (*x*). If a manufacturer sells an article which he knows is bought for a particular purpose he impliedly warrants that it is fit for that purpose (*y*), but it is unreasonable to require that he should be cognizant of all the purposes to which the article sold might be applied (*z*).

Warranty of merchantable quality.—Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be merchantable under that description. The maxim *caveat emptor* does not apply to a sale of goods when the buyer has no opportunity of inspection (*a*). Where goods, as for instance beer in a tied house, are bought by description from a seller who deals in goods of that description within the meaning of sect. 14 (2) of the Sale of Goods Act, 1893 (*b*), there is an implied condition arising upon such sale that the goods are of merchantable quality (*c*).

When goods are sold by sample under circumstances in which,

(*t*) *Ollivant* v. *Bailey*, 5 Q.B. 288; 13 L.J. Q.B. 34.

(*u*) *Gillespie* v. *Cheney*, (1896) 2 Q.B. 59; 65 L.J. Q.B. 552.

(*x*) *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*y*) *Jones* v. *Bright*, 5 Bing. 533; 7 L.J. (O.S.) C.P. 213.

(*z*) *Drummond* v. *Van Ingen*, 12 App. Cas. 284; 56 L.J. Q.B. 563; *Jones* v. *Padgett*, 24 Q.B.D. 650; 59 L.J. Q.B. 261.

(*a*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89.

(*b*) 56 & 57 Vict. c. 71, s. 14 (2).

(*c*) *Wren* v. *Holt*, (1903) 1 K.B. 610; 72 L.J. K.B. 340; *Bristol Tramways Co.* v. *Fiat Motors*, (1910) 2 K.B. 831; 79 L.J. K.B. 1107.

in the absence of a sample, there would have been an implied warranty that they were merchantable, such warranty is excluded only with respect to such matters as can be judged of by the sample. Where manufacturers contracted to supply to the plaintiffs a quantity of material to be in quality and weight according to sample, and goods according to sample and of the agreed weight were delivered and accepted, but it was afterwards discovered that owing to a certain defect the goods were unmerchantable, it was held that, although the defect existed in the sample, yet since it could not have been discovered by an ordinary examination, the implied warranty of merchantable quality was not excluded (*d*).

Implied warranties on sales of provisions.—Every victualler and dealer in provisions (*dd*), who sells provisions, impliedly warrants them to be wholesome and fit for food. "If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made sick, an action lies against him without any express warranty, because it is a warranty in law" (*e*). If a man contracts to supply victuals to a ship's crew, he impliedly warrants them to be good and wholesome, and fit for the sustenance of man (*f*). This is clearly so if he contracts as a purveyor of victuals. Before the Sale of Goods Act, 1893, there was a difference according to the character in which the vendor sold. Thus where one farmer sold the carcass of a pig to another, it was held that there was no warranty that the carcass was fit for human consumption (*g*); and even on a sale by a meat-salesman to a butcher it was held that there was no such warranty (*h*). It is at least doubtful how far these decisions can now be supported.

Implied warranty by seller that goods are his own manufacture.—It was formerly held that there was an implied contract on the part of a manufacturer that the goods delivered should be those of his own make (*i*). This, however, is no longer the law; one manufacturer may sell goods manufactured by another provided he complies with the directions of the Merchandise Marks Act, 1887 (*k*).

Warranty as to genuineness of articles with trade-marks.—

(*d*) *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Drummond* v. *Van Ingen*, 12 App.Cas. 284; 56 L.J. Q.B. 563.

(*dd*) *Jackson* v. *Watson & Sons*, (1909) 2 K.B. 193; 78 L.J. K.B. 587.

(*e*) Year Book, 9 Hen. 6, 53; 1 Rolle, Abr. 90, P. pl. 1, 2.

(*f*) *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*g*) *Burnby* v. *Bollett*, 16 M. & W. 644; 17 L.J. Ex. 190.

(*h*) *Emmerton* v. *Matthews*, 7 H. & N. 586; 31 L.J. Ex. 139.

(*i*) *Johnson* v. *Raylton*, 7 Q.B.D. 438; 50 L.J. Q.B. 753.

(*k*) 50 & 51 Vict. c. 28 (amended by 54 & 55 Vict. c. 15).

By sect. 17 of the Merchandise Marks Act, 1887, on the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade description has been applied (*l*), the vendor shall be deemed to warrant that the mark is a genuine trade-mark, and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered at the time of the sale or contract to and accepted by the vendee (*m*).

Warranty of description as to quantity or country.—By sect. 18, where, at the passing of the Act of 1887, "a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied; provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there."

Conditions and warranties—Sale by sample.—"A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect" (*n*).

"In the case of a contract for sale by sample—(a) there is an implied condition that the bulk shall correspond with the sample in quality: (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk by the sample: (c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample" (*o*).

If goods are sold by description merely, without a sample, there is an implied condition that they are merchantable under that description (*p*). If a sample is exhibited at the time of

(*l*) As to what amounts to "applying," see sect. 5.

(*m*) As to warranties on the sale of agricultural fertilisers and feeding stuffs, see 6 Edw. 7, c. 27, s. 1. This Act applies to wholesale as well as retail sales: see sect. 10 (2).

(*n*) 56 & 57 Vict. c. 71, s. 15 (1).

(*o*) *Ib.*, s. 15 (2).

(*p*) See sect. 13, *ante*, p. 562.

the contract, a question may arise whether the description or the sample was intended to be essential. The latter case is not strictly speaking a sale by sample within the Act of 1893, and it is sufficient if the goods correspond with the sample; in the former case they must answer the description as well (*q*). The question which of the two was to be "the touchstone of the contract" depends on the intention and object of the parties using the sample (*r*). Generally the description is the more important, as it goes to the nature of the goods, whilst the sample deals more with the quality (*s*). In any case the implied condition that the goods shall answer the description and be merchantable under it is excluded only in so far as the quality of the goods might have been ascertained by inspection of the sample, and the vendor remains liable for any defect which was not discoverable by reasonable inspection of the sample (*t*). On a sale by sample, if the goods are not equal to sample the purchaser may reject them (*u*). Moreover, he is entitled to inspect the bulk before accepting the goods, and if an opportunity of inspecting them is not given he may reject them (*x*). The place of delivery is usually the place for inspection (*y*).

Before the passing of the Act it was held that on a sale by sample the only warranty was that the sample was fairly taken from the bulk (*z*). The purchaser suing for damages on the ground that the bulk did not correspond with the sample had then to establish either a warranty or a false and fraudulent representation that the bulk was equal to the sample. If he relied on an implied warranty, the implication had to be based on facts other than the mere exhibition of the sample. If he relied on a misrepresentation, he had to prove that it was false to the knowledge of the vendor (*a*). It was formerly a question in each case whether the term that the goods should correspond with the sample was a condition entitling the purchaser in breach of it to rescind the contract, or merely a warranty giving him a right of action for damages; and on the sale of specific chattels the latter construction prevailed (*b*). The same result is now

(*q*) See sect. 13, *ante*, p. 562.
(*r*) *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Hill* v. *Smith*, 4 Taunt. 520; *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, 4 Campb. 144.
(*s*) *Nichol* v. *Godts*, 10 Exch. 191; 23 L.J. Ex. 314.
(*t*) 56 & 57 Vict. c. 71, s. 15 (2) (c); *Drummond* v. *Van Ingen*, 12 App.Cas. 284; 56 L.J. Q.B. 563.
(*u*) *Hibbert* v. *Shee*, 1 Campb. 113.
(*x*) 56 & 57 Vict. c. 71, s. 15 (2) (b); *Lorymer* v. *Smith*, 1 B. & C. 1.
(*y*) *Perkins* v. *Bell*, (1893) 1 Q.B. 193; 62 L.J. Q.B. 91.
(*z*) *Sayers* v. *London and Birmingham Flint Glass Co.*, 27 L.J. Ex. 294.
(*a*) *Ormrod* v. *Huth*, 14 M. & W. 651; 14 L.J. Ex. 306; *Freeman* v. *Baker*, 5 B. & Ad. 797; 3 L.J. K.B. 17; *Moens* v. *Heyworth*, 10 M. & W. 147; 10 L.J. Ex. 177.
(*b*) *Heyworth* v. *Hutchinson*, L.R. 2 Q.B. 447; 36 L.J. Q.B. 270.

arrived at through the combined operation of sects. 15 (2) (a) and 11 (1) (c) of the Act of 1893. The term is a condition, the breach of which gives, in case of unascertained goods, a right to rescind, but in case of specific goods a right to damages only. Where there is a written contract of sale, or any note or memorandum of the bargain in writing, the circumstance of the sale being by sample cannot be imported into the contract and made use of by the purchaser, if the note or memorandum is silent as to the sample (*c*), unless by custom of the trade the goods in question are sold by sample (*d*). Where both parties intended the written contract to contain a stipulation that the article purchased was to be according to sample, and that stipulation is omitted by mistake, the purchaser may decline to accept the article if it does not agree with the sample (*e*). Where goods have been sold by sample, evidence of a custom of trade, as to returning or making an allowance for such of the goods as do not answer the sample, is receivable (*f*). A trade custom, which imports into a contract for the sale of goods by sample a term that the purchaser shall not be entitled to reject the goods on account of variation between the sample and the bulk, provided that the variation is such that it can reasonably be remedied by an abatement of the price, and does not affect the purpose for which the goods were purchased, is a good custom (*g*).

Sales voidable on ground of fraudulent misrepresentation.—The position of a person who enters into a contract for the sale of goods relying upon the misrepresentation of the other party varies according as the misrepresentation is fraudulent or innocent. In the former case the person deceived may rescind the contract, or he may keep the goods and sue for damages. In the latter case, if the representation made amounts to a condition, the party misled may rescind the contract or retain the goods and sue for damages (*h*); if it amounts to a warranty strictly so called, he may sue for damages but cannot rescind the contract; if it does not amount either to a condition or to a warranty, he has no remedy. A contract induced by the fraudulent deceit of one of the parties is not void, but only voidable. But the person deceived can only rescind the contract and demand restitution, where he does not elect to sue for damages, on the terms that he himself makes restitution; and

(*c*) *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, *ib.* 144.
(*d*) *Syers* v. *Jonas*, 2 Exch. 111.
(*e*) *Borrowman* v. *Rossell*, 16 C.B. N.S. 68; 33 L.J. C.P. 11.
(*f*) *Cooke* v. *Riddelien*, 1 Car. & K. 561.
(*g*) *Walkers* v. *Shaw, Son & Co.*, (1904) 2 K.B. 152; 73 L.J. K.B. 325.
(*h*) See *ante*, pp. 546, 547.

if, either from his own act or from misfortune, it is impossible to make such restitution, he is too late to rescind (*i*).

It is not every wilful false statement, made with full knowledge of its falsehood, that will amount in judgment of law to a fraud, so as to enable a purchaser to avoid a contract of sale. The ordinary praise or commendation, for example, bestowed by a vendor on the wares he sells, though embodying statements of fact known by the party making them to be not strictly true, does not vitiate the contract of sale. A misrepresentation, moreover, to enable a purchaser to avoid a sale on the ground of deceit and fraud, must be made concerning some matter material to the value of the contract, so that there may be fair ground for thinking that the contract would never have been entered into if the false statement had not been made. *De minimis non curat lex;* and, therefore, if a man represents his house to be in good repair, and a few tiles are off the roof, or two or three of the joists under the floor near the ground are rotted with the damp, or a pane of glass is broken in a garret window, such trifling defects, to use the language of Lord Kenyon, "are mere bagatelles," and afford no evidence of *mala fides* (*k*). To all trifling representations, not really inducing the contract (*l*), and to all affirmations of matters of opinion, not amounting to positive assertions of fact with knowledge of their falsehood, the maxim of *caveat emptor* must apply (*m*).

False representation through third party.—Where the defendant, who was in negotiation for the sale of a public-house, made a false representation to one Bourner as to the receipts of the house, whereby Bourner was induced to agree to buy it, and Bourner subsequently repeated the false representation to the plaintiff who then agreed to become the purchaser instead of Bourner and paid the purchase-money to the defendant, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party; for the defendant, knowing that the fraudulent representation he had made to a third person had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of that third person's

(*i*) *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317, 338.

(*k*) *Bowles* v. *Atkinson*, cited Sugden's V. & P. 334 (ed. 14); *Geddes* v. *Pennington*, 5 Dow, 164.

(*l*) *Attwood* v. *Small*, 6 Cl. & F. 444; *Smith* v. *Kay*, 7 H.L. Cas. 775; *Lowndes* v. *Lane*, 2 Cox, 363.

(*m*) *Benham* v. *United Guar. Assur. Co.*, 7 Exch. 744; 21 L.J. Ex. 317; as to the avoidance of contracts on the ground of fraudulent misrepresentation, see *ante*, pp. 124—130.

authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself (*n*).

Fraudulent breach of warranty.—Whenever the representation amounts to a warranty of the fact stated, and is untrue, it is immaterial whether there was knowledge or want of knowledge of the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit" (*o*). If, therefore, a watchmaker warrants a watch to go well, or a horsedealer warrants his horse to be sound, or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit state for exportation, or a copper manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys on the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing, this is sufficient, though in each of the cases mentioned the vendor was not aware of the fact at the time he gave the warranty (*p*). The purchaser of a warranted but worthless article is entitled to maintain an action, although he has stipulated that if he dis likes the article it shall be exchanged for another of the same value (*q*).

Counterfeiting trade-marks—Implied warranty on sale of marked goods—Fraudulent use of trade-mark with intent to deceive.— By sect. 17 of the Merchandise Marks Act, 1887 (*r*), on the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade description has been applied (*s*), the vendor is deemed to warrant that the mark is a genuine trade-mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the

(*n*) *Pilmore* v. *Hood*, 5 Bing. N.C. 97, 109; 8 L.J. C.P. 11.

(*o*) *Williamson* v. *Allison*, 2 East, 446, 451.

(*p*) *Wallace* v. *Jarman*, 2 Stark. 162; *Anon.*, Lofft, 146; *Gresham* v. *Postan*, 2 C. & P. 540; *Williamson* v *Allison*, *supra*.

(*q*) *Wallace* v. *Jarman*, *supra*.

(*r*) See 50 & 51 Vict. c. 28, s. 17.

(*s*) 5 Edw. 7, c. 15.

sale or contract to and accepted by the vendee. If a manufacturer has adopted a particular mark or name (*t*) to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the person injured is entitled to an action for the deceit (*u*).

Fraudulent concealment.—If a vendor has resorted to any contrivance for the purpose of concealing any defect in the subject-matter of a contract of sale, the purchaser may avoid the contract on the ground of fraud; but the vendor is not bound to point out defects which may be seen on examination (*x*). It has been held that there was a fraudulent concealment vitiating a contract of sale in the following cases:—where a partner who had the exclusive management and control of the partnership business agreed to purchase the share of his co-partner, but kept back from the knowledge of the latter the true state of the accounts and of the amount of profit realized, and by that means effected the purchase for a less sum than would have been taken if the state of the partnership had been fully disclosed and fairly stated (*y*);—where an intending purchaser of a policy of insurance, having secret information of the alarming illness and imminent danger of death of the party on whose life the policy had been effected, treated with an assignee of the policy for the purchase of it without disclosing the condition and state of health of the assured (*z*);—where the vendor of a mare stated, at the time of sale, that he believed the mare to be sound but would not warrant, and the mare was at the time unsound to his knowledge (*a*);—where the vendor of pimento, knowing it to be sea-damaged, sold it without disclosing the fact to the purchaser, there being a custom of the trade to disclose such defects at the time of the sale (*b*);—where the agent of the vendor of a picture, knowing that he had induced the purchaser to labour under a delusion with respect to the picture, which

(*t*) *Reddaway* v. *Banham*, (1896) A.C. 199; 65 L.J. Q.B. 381; as to *bonâ fide* use of person's own name, see 5 Edw. 7, c. 15, s. 44; and see Addison on Torts, pp. 679 *et seq.* (ed. 8), as to trade marks generally.

(*u*) *Crawshay* v. *Thompson*, 4 M. & Gr. 386, n.; 11 L.J. C.P. 301; see also 33 Eliz., cited by Doderidge, J., *Southern* v. *How*, Cro. Jac. 471, n., as to the action for deceit.

(*x*) *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L.J. Ex. 322.

(*y*) *Maddeford* v. *Austwick*, 1 Sim. 89; *Law* v. *Law*, (1905) 1 Ch. 140; 74 L.J. Ch. 169.

(*z*) *Jones* v. *Keene*, 2 Moo. & R 348.

(*a*) *Wood* v. *Smith*, 5 Man. & R. 124; 8 L.J. (O.S.) K.B. 50.

(*b*) *Jones* v. *Bowden*, 4 Taunt. 847.

materially influenced his judgment as to the value of it, permitted him to purchase without removing the delusion (*c*). But the vendor is not bound to inform the purchaser that the latter is under a mistake, where such mistake is not induced by the act of the vendor. Thus where the plaintiff offered to sell some oats to the defendant, and the defendant agreed to buy them supposing them to be old oats, but the plaintiff did nothing to induce the defendant to suppose so, it was held that the sale was valid (*d*). If the defect is patent, and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have just seen, for wilful deceit. "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth" (*e*). It would seem to follow that if the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception (*f*).

In sales of manufactured articles and provisions, if the vendor is cognizant, at the time he sells the articles, of latent defects materially lowering their value, and rendering them totally unfit for the purpose for which they are known to be required, and neglects to disclose such defects to the purchaser, he is guilty of a fraudulent concealment (*g*). But, in a general sale of a horse, the vendor is not bound to disclose any unsoundness in the animal, although he may be aware of its existence; and, if the purchaser makes no enquiries as to its soundness or qualities, and the vendor has said or done nothing to throw the purchaser off his guard or to conceal a defect, there is no fraudulent concealment on the part of the vendor (*h*). The purchaser has an opportunity of inspecting and judging of the animal himself; and the principle of *caveat emptor* applies. The damage, however, resulting from the spread of infectious and contagious disorders amongst sheep and cattle is so serious, that every vendor who sells an animal knowing it to be labouring under

(*c*) *Hill* v. *Gray*, 1 Stark. 434; see the observations on this case by Jervis, C.J., *Keates* v. *Cadogan* (*Earl*), 10 C.B. 591; 20 L.J. C.P. 78.

(*d*) *Smith* v. *Hughes*, L.R. 6 Q.B. 597; 40 L.J. Q.B. 221.

(*e*) *Southerne* v. *Howe*, 2 Roll. 5.

(*f*) See *Mullett* v. *Mason*, L.R. 1 C.P. 559; 35 L.J. C.P. 299.

(*g*) Cp. p. 525, *ante*.

(*h*) *Jones* v. *Bright*, 3 Moo. & P. 175; Fitz. N.B. 94, C.; *Hill* v. *Balls*, 2 H. & N. 299; 27 L.J. Ex. 48.

a highly contagious or infectious disorder, ought to be held responsible for fraudulent concealment, if he fails to disclose the fact at the time he makes the bargain (*i*). Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor and purchaser, any right on the part of the latter to claim damages arising from loss of his own animals by the spreading of the disease (*k*).

Sale "with all faults."—If it be a term of the contract that the subject-matter of the sale is to be taken with all faults, the stipulation relieves the vendor, where he does nothing to conceal the defects, from all liabilitiy in respect of any defect in the article sold (*l*). In such a sale the purchaser must use his own eyes and understanding to discover what faults there are (*m*). Where the sale is by description "with all faults," that expression means with all faults which an article may have consistently with its being the thing described (*n*). If the vendor is not to be responsible for any defect or "error," the stipulation will protect him from all unintentional misstatement (*o*). But an agreement "to take a thing with all faults does not mean that it is to be taken with all frauds" (*p*); and the stipulation will be of no avail to the vendor, if he has wilfully misled the purchaser, or thrown him off his guard by a wilful false representation, or has resorted to any contrivance to conceal a defect (*q*). Where the vendor of a vessel, "to be taken with all faults," knowingly represented the vessel in his handbills and advertisements as having been built in 1816, in order to get an increased price, whereas she had been launched in 1815, it was held that this was a fraud. "A person," observes Abbott, C.J., "ought either to be silent or speak the truth, and in case he spoke at all, he was bound to disclose the real fact" (*r*). If the defect, moreover, is of such a nature that

(*i*) *Cullen* v. *Trimble*, L.R. 7 Q.B. 416; *Blakemore* v. *Brist. & Ex. Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; *Anderson* v. *Buckton*, 1 Str. 192. By the Contagious Diseases (Animals) Act, 1894 (57 & 58 Vict. c. 57), extensive powers are given to the Board of Agriculture and the local authority to enable them to deal with animals suffering from contagious diseases.

(*k*) *Ward* v. *Hobbs*, 4 App.Cas. 13; 48 L.J. Q.B. 281.

(*l*) *Ward* v. *Hobbs*, *supra*.

(*m*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*n*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

(*o*) *Taylor* v. *Bullen*, 5 Exch. 779; 20 L.J. Ex. 21; see *Ward* v. *Hobbs*, *supra*.

(*p*) Marshall, Serj. arg. *Pickering* v. *Dowson*, *supra*.

(*q*) *Schneider* v. *Heath*, 3 Campb. 506.

(*r*) *Fletcher* v. *Bowsher*, 2 Stark. 561.

a purchaser cannot, by the most diligent examination, discover it, and the defect is known to the vendor at the time of the sale, the latter ought not, according to the opinion of Lord Kenyon, to be permitted to shelter himself from the consequences of a fraudulent concealment under a stipulation that the thing is to be taken with all faults (*s*). According to Lord Ellenborough, however, "where an article is sold with all faults it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent" (*t*). An examination, however, is useless if the defect is of such a nature that it cannot be detected by any examination, however careful; and a vendor who, knowing this, sells with all faults for the purpose of exonerating himself from liability to disclose the secret defect, seems to make use of the stipulation, "to be taken with all faults," in order to cover the perpetration of a fraud (*u*). In a case (*x*), which has been disapproved of by Lord Ellenborough (*y*), the twenty-two broken futtocks of the vessel were concealed only by the ballast. The defect was disclosed as soon as the ballast was taken out after the sale, and might have been easily discovered before the sale by a careful examination of the vessel. It was, therefore, wrongly described as "a defect which the purchaser could not, by any attention, possibly discover." The question whether the ballast had been put there for the purpose of concealing the defect does not appear to have been raised.

Purchaser electing to avoid contract.—If the purchaser is entitled to treat the contract of sale as a void contract, by reason of the fraud or deceit of the vendor, he may return the article and bring an action for the recovery of the money paid under the void contract, or, treating the contract as a subsisting contract, he may retain the thing sold in his own hands, or resell it, and sue to recover the damages he has sustained (*z*). He must make his election within a reasonable time, and when once made it is final (*a*). He must forthwith return or tender the subject-matter of the sale, or give notice to the vendor to take it back;

(*s*) *Mellish* v. *Motteux*, 1 Peake, 115.
(*t*) *Baglehole* v. *Walters*, 3 Campb. 155, 156.
(*u*) Sugd. V. & P. 333, 334 (ed. 14).
(*x*) *Mellish* v. *Motteux*, *supra*.
(*y*) *Baglehole* v. *Walters*, *supra*.
(*z*) *Ante*, pp. 130, 572; *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 26; 41 L.J. Ex. 22.
(*a*) *Ante*, p. 130.

for if he keeps it an unreasonable time (*b*), or exercises the dominion of an owner over it, he cannot afterwards treat the sale as a void sale, and recover the purchase-money on the ground of a failure of consideration (*c*). He must also be in a situation to restore the subject-matter of the sale to the vendor (*d*). If he has changed the nature of it, so that he cannot restore it in the same state in which it was when bought, he cannot avoid the contract, but must resort to his cross action (*e*). Thus, where a log of mahogany was sold on the faith of a representation that the log was sound throughout, and the representation was fraudulently made, but the fraud was not discovered until the log had been cut through by the purchaser, it was said that the latter, by cutting the log, had made it his own property, and could not afterwards return it to the vendor (*f*).

Transfer of property—Intention of parties.—"Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained" (*g*). "Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (*h*). For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case" (*i*).

Rules for ascertaining intention.—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state (*k*), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods,

(*b*) *Clough* v. *L. & N. W. Ry.*, *ante*, p. 578.

(*c*) *Fisher* v. *Samuda*, 1 Campb. 190.

(*d*) *Sheffield Nickel Co.* v. *Unwin*, 2 Q.B.D. 214; 46 L.J. Q.B. 299; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

(*e*) *Clarke* v. *Dickson*, E. B. & E. 148; 27 L.J. Q.B. 222; *Urquhart* v. *Macpherson*, 3 App.Cas. 831; *Tennent* v. *City of Glasgow Bank*, 4 App.Cas. 615.

(*f*) See *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 337.

(*g*) 56 & 57 Vict. c. 71, s. 16. As to passing of property in unascertained goods, see sect. 18, rule 5 (1), *post*.

(*h*) 56 & 57 Vict. c. 71, s. 17 (1).

(*i*) Sect. 17 (2).

(*k*) Goods are in a "deliverable state" within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them (sect. 62 (4)).

for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms (*l*) the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact (*m*).

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made: (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract" (*n*).

A contract for the sale of goods may operate as a direct transfer of the ownership and right of property in the thing sold to the purchaser, or may amount only to an agreement for a future transfer giving the purchaser a right of action against the vendor for a breach of contract, but not effecting any alteration of ownership. When the bargain operates as a transfer of

(*l*) See *Weiner* v. *Gill*, (1906) 2 K.B. 574; 75 L.J. K.B. 516.

(*m*) See also 56 & 57 Vict. c. 71, s. 56, and *Beverley* v. *Lincoln Gas Co.*, 6 Ad. & E. 829; 7 L.J. Q.B. 113; *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167; *Elphick* v. *Barnes*, 5 C.P.D. 321; 49 L.J. C.P. 698.

(*n*) 56 & 57 Vict. c. 71, s. 18. As to delivery to carriers, see sect. 32, *post*.

ownership, the sale is complete; when it amounts only to an agreement to procure or manufacture an article of a given description, and then transfer it to the purchaser, and does not effect any immediate alteration of ownership, the sale is incomplete. A transfer to the purchaser of the right of property in the thing sold is naturally accompanied by a transfer of the risk of loss, so that, if, between the time of the making of the bargain and the delivery, the thing sold is destroyed, without any neglect on the part of the vendor, the loss is the loss of the purchaser, and he may be compelled to pay the price, although he can never have the thing for which he agreed to pay it. To constitute a complete sale, the precise thing sold as well as the price must be ascertained (*o*). Personal engagements may subsist between the parties; but there can be no transfer of ownership until such ascertainment has been accomplished (*p*).

Where ascertained existing goods are the subject of a contract of immediate sale, and whether there is a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done, such as, for instance, in most cases, delivery—in some cases actual payment of the price—and in other cases weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like. Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the property in them passing to the purchaser, and, if it is simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and, in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so. In the case of executory contracts where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but, where certain goods have been selected by the seller, and have been approved of by the buyer, then the case stands, as to the vesting of the property, very much in the same position as

(*o*) As to ascertainment of price, see sects. 8, 9, and 18, rule 3.

(*p*) As to loss of goods by distress for rent after property in them has passed to purchaser, see *Greaves* v. *Hepke*, 2 B. & Ald. 131.

upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts something more will generally remain to be done, as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place the property will pass, if it was intended to do so, equally as in the case of a contract for ascertained goods (*q*).

It may be the intention of the parties that no property shall pass until the price is paid. Thus, where the plaintiff sold to the defendant a certain unascertained quantity of oil, part of a large quantity lying at the plaintiff's wharf, and sent an order to the wharfinger to transfer the oil to the defendant, and the wharfinger made the transfer in his books to the defendant, and gave the plaintiff's clerk a paper acknowledging the transfer, and the clerk went with this paper to the defendant's counting-house and demanded a cheque in payment, and was refused, but the defendant took and retained the paper and sent to the wharfinger and obtained possession of the oil, it was held that, as there was no intention to part with the paper or the property in the goods without payment, there was no change of property in the goods in the hands of the wharfinger, and that the plaintiff was entitled to recover the oil or the value of it from the defendant (*r*).

When the subject-matter of the sale is ascertained at the time the bargain is struck, and the price is likewise agreed upon, the sale is a complete sale from the time of the making of the bargain, and the right of property in the thing sold and the risk of loss are transferred to the purchaser, although the right of possession may continue in the vendor until the purchase-money has been paid or tendered (*s*). The right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the right of possession divested out of the original vendor (*t*). Where the vendor agreed to sell, and the purchaser to buy, "a stack of hay standing in Canonbury Field, Islington, at the sum of 145*l*., the hay to be allowed to stand on the premises until the first of May next, and not to be cut till paid for," it was held that there was an immediate transfer of the right of property to the purchaser, and, the hay

(*q*) *Per* Bovill, C.J., in *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*r*) *Godts* v. *Rose*, 17 C.B. 229; 25 L.J. C.P. 61.

(*s*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Knight* v. *Hopper*, Skin. 647; Noy's Maxims, ch. 42, p. 88; Bro. Abr. Contr. pl. 26.

(*t*) *Scott* v. *England*, 14 L.J. Q.B. 43.

having been accidentally destroyed by fire whilst it remained in the possession of the vendor, that the purchaser must bear the loss (*u*). A sale otherwise complete may, however, be made subject to the condition that if at the time for delivery the subject-matter is not in existence the contract shall be rescinded. Thus, where a crop of potatoes off a specified field was sold (although the crop was not then sown) and the crop failed, it was held that the seller was not liable for damages (*x*).

Although the vendor has given a delivery order, or a dock-warrant, to a warehouse-keeper, wharfinger, or bailee, having the custody of the goods, commanding him to deliver them to the purchaser, yet, so long as the precise quantity of goods to be delivered under the order has not been ascertained, and separated from the bulk, and put into a deliverable state, and placed at the disposal of the purchaser, the sale is not complete, and the right of property is not altered (*y*). If the bulk of the commodity has been identified, and the sale is a sale of an undivided quantity thereof, expressly sold as such at an ascertained price, whether the ownership of the share passes or not (*z*), it would seem that the risk of the loss of the subject-matter thereof will pass to the purchaser where the shares remain unseparated through his default (*a*).

Imperfect sales—Unascertained price.—Generally speaking, to constitute a sale which shall immediately pass the property it is necessary not only that the thing sold should be ascertained, but that there should be a price ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining it, but the price to be afterwards ascertained in the manner fixed by the contract of sale or on a *quantum valebat;* or they may agree that the sale shall be complete and the property pass although the delivery of possession is postponed, and although something shall remain to be done by the seller before the delivery; or they may agree that, nothing remaining to be done for ascertaining the thing sold, yet the sale shall not be complete and the property shall not pass before something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in that respect, and that has to be collected from the terms of the contract. If those terms do not show an

(*u*) *Tarling* v. *Baxter*, 6 B. & C. 360; 5 L.J. (O.S.) K.B. 164.

(*x*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147, *ante*, p. 150; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164.

(*y*) *Busk* v. *Davis*, 4 M. & S. 395; *Shepley* v. *Davis*, 5 Taunt. 617; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273; *Gabarron* v. *Kreeft*, L.R. 10 Ex. 274; 44 L.J. Ex. 238.

(*z*) *Martineau* v. *Kitching*, L.R. 7 Q.B. 454, 456; 41 L.J. Q.B. 227.

(*a*) See 56 & 57 Vict. c. 71, s 37, *post*

intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected and the property does not pass until that thing is done (*b*). Thus it has been said, "If I sell you all my corn for 12*d*. a bushel, you may not take it before it is measured, whereby the number of the bushels may be known and also the certainty of the sum which is to be paid for it, so that before the certainty is known, it cannot be adjudged any good contract or agreement" (*c*). Where a vendor sold the bark stacked at Redbrook at 9*l*. 5*s*. per ton of 21 cwt., to be weighed before delivery, and 8 tons 14 cwt. of the bark were weighed and delivered, but before the residue was weighed and the quantity thereof ascertained, a high flood arose and destroyed it, it was held that the right of property in the unweighed residue had not been altered, neither, consequently, had the risk of loss (*d*). But the distinction must be observed between a sale by measure or weight requiring the measuring or weighing to be accomplished for the purpose of determining and fixing the price, and a sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty of the weight or quantity, where the weighing or measuring is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for (*e*). Moreover, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass, although the goods have still to be weighed, measured, or tested, provided the subject-matter of the sale is ascertained (*f*); and there may be a complete contract so as to pass the property in the goods, although the price has not been definitely agreed on (*g*), or although the goods are still unfinished (*h*), or unweighed (*i*). When the quantity is ascertained, the mere omission to add up the total contents according to weight or measure will not prevent the right of property and the risk from passing to the purchaser (*k*). If certain specific cases, bales, or packages of goods are sold in the lump,

(*b*) *Logan* v. *Le Mesurier*, 11 Jur. 1091; 6 Moo. P.C. 116; 2 Wms.Saund. 122, note (*m*) (ed. 1871).

(*c*) See *Reniger* v. *Fogossa*, Plowd. at p. 7, Bradshaw, *arguendo*.

(*d*) *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Hanson* v. *Meyer*, 6 East, 614; *Zagury* v. *Furnell*, 2 Campb. 240.

(*e*) *Swanwick* v. *Sothern*, 9 Ad. & E. 895, 900; *Gilmour* v. *Supple*, 11 Moore, P.C. 571; *Furley* v. *Bates*, 33 L.J. Ex. 43; *S. C.* nom. *Turley* v. *Bates*, 2 H. & C. 200.

(*f*) *Furley* v. *Bates*, *supra*; *Martineau* v. *Kitching*, L.R. 7 Q.B. 436; 41 L.J. Q.B. 227.

(*g*) *Joyce* v. *Swann*, 17 C.B. N.S. 84.

(*h*) *Young* v. *Matthews*, L.R. 2 C.P. 127; 36 L.J. C.P. 61.

(*i*) *Martineau* v. *Kitching*, *supra*.

(*k*) *Tansley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272.

at the customary and reasonable price paid for such articles, the price is sufficiently ascertained, and the right of property will pass, although no definite sum has been agreed upon, and the time or mode of payment has not been specified (*l*).

Sale or return.—When goods are sold under a contract of "sale or return," the sale is a conditional sale. The property in the goods does not pass to the purchaser until he has done some act adopting the transaction (*m*). If the goods are returned or tendered back to the vendor within a reasonable time, the sale is annulled, and the latter cannot recover the price of them; but, if the purchaser, having got possession of the goods, fails to exercise his option of returning them within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price of the goods may be recovered in an action for goods sold and delivered (*n*). Where goods delivered "on sale or return" are pledged by the buyer, the pledging of the goods by him is "an act adopting the transaction" within sect. 18, rule 4 (a), so as to pass the property in the goods to him (*o*).

Imperfect sales of unascertained chattels (*p*).—Until the parties are agreed on the specific goods, the contract can be no more than a contract to supply goods answering a particular description; and, since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold (*q*). Hence a bargain and sale of 20 tons of oil, the vendor having more than 20 tons in divers cisterns, passes no property (*r*).

Contracts for sale and manufacture of goods.—A man may purchase a chattel whilst in process of making; or he may agree to purchase it when made (*s*); whether he does the one thing or the other depends on the intention of the parties. In

(*l*) *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 248; *Joyce* v. *Swann*, *supra*; *Hoadly* v. *McLaine*, 10 Bing. 482; 3 L.J. C.P. 162.

(*m*) 56 & 57 Vict. c. 71, s. 18, r. 4 (a).

(*n*) *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167 (overruling *Iley* v. *Frankenstein*, as reported 8 Sc. N.R. 841); *Wingfield*, *Ex parte*, 10 Ch.D. 591, 593. See also *Ray* v. *Barker*, 4 Ex.D. 279; 48 L.J. Ex. 569.

(*o*) *Kirkham* v. *Attenborough*, (1897) 1 Q.B. 201; 66 L.J. Q.B. 149. See *Weiner* v. *Gill*, (1906) 2 K.B. 574; 75 L.J. K.B. 916; explained and not applied in *Weiner* v. *Harris*, (1910) 1 K.B. 285; 79 L.J. K.B. 342.

(*p*) See 56 & 57 Vict. c. 71, ss. 16 and 18, r. 5, *ante*, pp. 579. 580.

(*q*) Blackburn on Sale, p. 125 (ed. 2); *Logan* v. *Le Mesurier*, 6 Moo. P.C. 116; 11 Jur. 1091; *Heseltine* v. *Siggers*, 1 Exch. 856; 18 L.J. Ex. 166.

(*r*) *White* v. *Wilks*, 5 Taunt. 176.

(*s*) *Laidler* v. *Burlinson*, 2 M. & W. 602; 6 L.J. Ex. 160.

the latter case, *i.e.*, where a specific chattel is ordered to be made, the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is completed and made ready for delivery, and has been approved of by the purchaser, or some person appointed on his behalf to inspect the materials and workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress, although the purchase-money may have been paid in advance (*t*), but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the description contained in the contract (*u*). Where there was a contract for a complete ship, the property in materials for the ship, although marked with the ship's number and the place in the ship which they were intended to occupy, was held not to vest in the purchaser, but in the trustee of the bankrupt shipbuilder (*x*). Where, under a contract, a ship was to be built and paid for by instalments at certain specified periods of construction, and steam trials at sea were to be held at the builder's expense and delivery was to be considered complete after a satisfactory official trial and approval at a named port, it was held that the contract was for a completed ship and that no property passed to the purchaser until the ship was completed (*y*). On the other hand, it may be that the property was intended to pass before the chattel is completed; thus, where the contract provides that the article shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments regulated by particular stages in the progress of the work, this shows an intention that the general property in the materials used is to vest in the purchaser at the time when they are put together under the approval of the superintendent, or at all events when the first instalment is paid, subject to the right of the builder to retain the fabric, in order to complete it and earn the rest of the price; and the rights of the parties are then in the same state as if so much of the article as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be finished (*z*). Or the true inference may be

(*t*) *Mucklow* v. *Mangles*, 1 Taunt. 318.

(*u*) *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Laidler* v. *Burlinson*, *ante*, p. 585; *Elliott* v. *Pybus*, 4 Moo. & Sc. 389, 397; 3 L.J. C.P. 182.

(*x*) *Reid* v. *Macbeth*, (1904) A.C. 223; 73 L.J. P.C. 57, following *Seath* v. *Moore*, 11 App.Cas. 350; 55 L.J. P.C. 54; *Laing & Sons* v. *Barclay & Co.*, (1908) A.C. 35; 77 L.J. P.C. 33. See further Addison on Torts, 560 (ed. 8).

(*y*) *Laing* v. *Barclay & Co.*, (1908) A.C. 35; 77 L.J. P.C. 33.

(*z*) *Clarke* v. *Spence*, 4 Ad. & E. 448; 5 L.J. K.B. 161; *Woods* v. *Russell*, 5 B. & Ald. 942; *Read* v. *Fairbanks*, 13 C.B.

that the component parts of the chattel as they are added to the fabric are appropriated to the purchaser by way of contract, so that neither could he refuse them when the chattel is completed, nor the vendor compel him to accept any other; and yet that no property in the chattel is to pass until completion(*a*). When the article is completed and made ready for delivery, and has been approved of by the purchaser, the general property therein is transferred to the latter, although the chattel may remain in the hands of the builder for the purpose of receiving some subsequent additions (*b*).

There is a great analogy, it has been observed by the civilians, between this description of contract of sale and the contract of letting and hiring of work and labour; and we are told in the Digest and in the Institutes how to discriminate between the one and the other. If, it is said, the materials for work, as well as the work itself, have been furnished by the workman, then the contract is a contract of sale. If, on the other hand, the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour. Thus, to quote an example from the Roman law, "If Titius should agree with a goldsmith for the making of a certain number of golden rings, of a specified size and weight, for ten *aurei*, the goldsmith to furnish both the gold and workmanship, the contract would be a contract of buying and selling. But, if Titius should give his own gold, and agree to pay only for the workmanship, then the contract would be a contract of letting and hiring simply" (*c*).

Selection and appropriation of goods to use of purchaser.—If the commodity was selected in the bulk by the purchaser, the ownership and risk pass as soon as the quantity sold has been separated from the mass and tendered to the purchaser or placed at his disposal (*d*). If the bulk of the commodity bought and sold has not been selected by the purchaser in the first instance, the sale may be rendered complete, so as to operate as a transfer of the property and risk, by a subsequent selection by the vendor and approval by the purchaser, such subsequent selection and

692; 22 L.J. C.P. 206; *Wood* v. *Bell*, 6 E. & B. 361; 25 L.J. Q.B. 321; *Bellamy* v. *Davey*, (1891) 3 Ch. 540; 60 L.J. Ch. 778.

(*a*) *Clarke* v. *Spence*, *supra*.

(*b*) *Carruthers* v. *Payne*, 2 Moo. & P. 429; 7 L.J. (O.S.) C.P. 84; *Wilkins* v. *Bromhead*, 7 Sc. N.R. 921; 13 L.J. C.P. 74.

(*c*) Dig. lib. 19, tit. 2, lex. 2; Instit. lib. 3, tit. 24, § 4; Cod. lib. 4, tit. 65; *Lee* v. *Griffin*, 1 B. & S. 272; 30 L.J. Q.B. 252; *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Grafton* v. *Armitage*, 2 C.B. 336; 15 L.J. C.P. 20.

(*d*) *Rugg* v. *Minett*, 11 East, 210; *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Aldridge* v. *Johnson*, 7 E. & B. 885; 26 L.J. Q.B. 296; *Langton* v. *Higgins*, 4 H. & N. 402; 28 L.J. Q.B. 252; *Langton* v. *Waring*, 18 C.B. N.S. 315; Blackburn on Sale, p. 128 (ed. 2).

approval being the same as if the article had been fixed upon in the first instance (*e*); but a selection by the vendor only without the approval of the purchaser will not transfer the property in the goods so selected (*f*). If the article is to be selected by the vendor, but the purchaser makes its acceptance dependent upon his approval of it as regards workmanship, convenience, or taste, the latter will be entitled to reject it, if it does not meet his approval upon some one or more of the grounds stated (*g*). When everything that the seller is to do to complete the sale has been performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of possession of the subject-matter of the sale, or perfect control over it, by reason of the non-performance of some act to be done exclusively by him, such as procuring wines and spirits to be gauged by a custom-house officer, in order to ascertain their strength preparatory to the calculation of the duty, payment of the duty when ascertained, or the non-performance of any other act which it is incumbent on the buyer alone to perform (*h*). But it is not competent to the buyer to perfect the contract and vest the property in himself by the performance of acts which it is the duty of the vendor to perform, unless the acts are done by the authority of the vendor (*i*).

Reservation of right of disposal.—"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (*k*). Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal (*l*). Where

(*e*) *Rohde* v. *Thwaites*, 6 B. & C. 388; 5 L.J. (O.S.) K.B. 163; *Sparkes* v. *Marshall*, 2 Bing. N.C. 761; 5 L.J. C.P. 286.

(*f*) *Jenner* v. *Smith*, L.R. 4 C.P. 270; *Campbell* v. *Mersey Docks*, 14 C.B. N.S. 412.

(*g*) *Andrews* v. *Belfield*, 2 C.B. N.S. 779.

(*h*) *Rugg* v. *Minett*, 11 East, 210; *Studdy* v. *Sanders*, 5 B. & C. 628; 4 L.J. (O.S.) K.B. 290; *Hinde* v. *Whitehouse*, 7 East, 558; *Turley* or *Furley* v. *Bates*, 2 H. & C. 200; 33 L.J. Ex. 43; *Sweeting* v. *Turner*, L.R. 7 Q.B. 310; 41 L.J. Q.B. 58.

(*i*) *Acraman* v. *Morrice*, 8 C.B. 449; 19 L.J. C.P. 57.

(*k*) 56 & 57 Vict. c. 71, s. 19 (1). As to the protection afforded to innocent purchasers, see sect. 25, *post*, pp. 595, 596; *Cahn* v. *Pockett's Bristol Channel Co.*, (1899) 1 Q.B. 643; 68 L.J. Q.B. 515; 52 & 53 Vict. c. 45, ss. 2 (1), 9, and 10.

(*l*) 56 & 57 Vict. c. 71, s. 19 (2).

the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him" (*m*).

Delivery under bill of lading—Transfer by bill of lading.—A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent authorised to sign it and stating the terms on which the goods were delivered to and received by the ship. When signed by the carrier or his agent, who is often the master of the ship, the bill of lading is handed to the shipper. If the shipper intends the property in the goods to pass to a purchaser as soon as, or before, they are put on board, the bill of lading will naturally state that the goods are deliverable to the purchaser or his assigns. If he does not intend this, the bill of lading will state that the goods are to be delivered to the shipper or his assigns. A vendor may annex terms to a bill of lading preserving his control over the cargo and the *jus disponendi* of the goods on arrival at their destination (*n*); although they may be shipped on board the purchaser's ship, and may be in the hands of the purchaser's ship-master (*o*). Where a bill of lading states that goods are consigned to a merchant abroad, and that the goods are shipped by order and on account of the consignee, this is strong evidence that the property was intended to vest in the consignee from the time they are put on board (*p*). But, if goods are delivered to a ship-master, to be carried under a bill of lading, whereby the latter undertakes to carry them for and on account of the vendor, and deliver them to the vendor at the port of destination, or to the assignee of the bill of lading, this is evidence of an intention not to transfer the property until the bill of lading has been endorsed to the purchaser (*q*). So where a shipper keeps in his own or his agent's hands a bill of lading making the goods deliverable to his order until certain conditions have been fulfilled by the consignee, the property in the goods will not pass until such conditions are fulfilled by the

(*m*) 56 & 57 Vict. c. 71, s. 19 (3).

(*n*) *Van Casteel* v. *Booker*, 2 Exch. 691; 18 L.J. Ex. 9; *Jenkyns* v. *Brown*, 14 Q.B. 496; 19 L.J. Q.B. 286; *Gabarron* v. *Kreeft*, L.R. 10 Ex. 274; 44 L.J. Ex. 238.

(*o*) *Turner* v. *Liverpool Dock Trustees*, 6 Exch. 543; 20 L.J. Ex. 393; *Rosevear Clay Co., Ex parte*, 11 Ch.D. 560; 48 L.J. Bankr. 100.

(*p*) *Brown* v. *Hodgson*, 2 Campb. 36.

(*q*) *Wait* v. *Baker*, 2 Exch. 1; 17 L.J. Ex. 307; *Jenkyns* v. *Brown*, 14 Q.B. 496; 19 L.J. Q.B. 286; *Joyce* v. *Swann*, 17 C.B. N.S. 84; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex.D. at p. 172; 47 L.J. Ex. 418.

consignee, or at least until he offers to fulfil the conditions, and demands the bill of lading. The vendor retains not only a lien but a power to dispose of the goods so long as the vendee continues in default (r). But if the bill of lading is only dealt with to secure the contract price, then, on payment or tender, the goods vest in the purchaser (s). Where goods destined for a foreign port are put on board ship, and the bill of lading and policy of insurance are handed over in exchange for part payment, this is evidence that the property and risk in the goods are intended forthwith to vest in the purchaser (t).

It is a common practice for the shipper, or other person to whom or to whose assigns the goods are deliverable, to indorse the bill of lading to a third person. The effect of such indorsement in passing the property in the goods from the indorser to the indorsee is often a question of great difficulty. In the absence of evidence to the contrary the indorsement shows an intention to pass the property. But in truth it is only evidence of the intention of the parties which has usually to be gathered from the contract of sale and other facts besides the mere indorsement. In this sense it is true to say that the indorsement passes such property as the parties intend and no more (u). Thus it may pass the property conditionally (x) or not at all (y). At common law the indorsee of a bill of lading could not sue the carrier on the contract contained in the bill of lading: but by sect. 1 of the Bills of Lading Act, 1855 (z), every consignee (a) of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods mentioned therein passes, has transferred to him all such rights of suit, and is subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself; and every bill of lading representing goods to have been shipped on board is conclusive against the master or person signing the same, unless either the holder took the bill with actual notice that the goods were not on board, or the person signing shows that the mistake was made without his default, and wholly by the fraud of the shipper or of the holder or some

(r) *Ogg* v. *Shuter*, 1 C.P.D. 47; 45 L.J. C.P. 47.

(s) *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex.D. 164; 47 L.J. Ex. 418.

(t) *Tregelles* v. *Sewell*, 7 H. & N. 574.

(u) *Sewell* v. *Burdick*, 10 App.Cas. 74; 54 L.J. Q.B. 156.

(x) *Barrow* v. *Coles*, 3 Campb. 92; *Shepherd* v. *Harrison*, L.R. 5 H.L. 116; 40 L.J. Q.B. 148; *Sanders* v. *Maclean*, 11 Q.B.D. 327, 341; 52 L.J. Q.B. 481.

(y) *Chas* v. *Hunton*, 4 East, 211; per Bowen, L.J., in *Burdick* v. *Sewell*, 13 Q.B.D. 170; 53 L.J. Q.B. 399; *Sewell* v. *Burdick*, *supra*.

(z) 18 & 19 Vict. c. 111, ss. 1 and 3; *The Figlia Maggiore*, L.R. 2 Ad. & E. 106; 37 L.J. Adm. 52.

(a) A "consignee" does not cease to be such by merely parting with the beneficial interest in the goods: see *Fowler* v. *Knoop*, 4 Q.B.D. 299; 48 L.J. Q.B. 333.

person under whom the holder claims (*b*). The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass the property in the goods to an indorsee so as to transfer to him all liabilities in respect to the goods within the meaning of the Bills of Lading Act, 1855 (*c*), if the indorsee has neither taken possession nor dealt with the goods.

As between the charterer and the shipowner the charter-party governs the contract, the bill of lading being a mere receipt for the goods (*d*); but where the bill of lading is indorsed over, then, as between the shipowner and the indorsee, the bill of lading contains the contract (*e*). The person who first gets a bill of lading (though only one of a set of three) gets the property which it represents, and need not do any act to ascertain his title which the transfer of the bill of lading of itself renders complete, so that any subsequent dealings with the others of the set are subordinate to the rights passed by that one (*f*); and where goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee or his assigns, "the one of which bills being accomplished, the others to stand void," the warehouseman who has custody of the goods is justified in delivering them to the consignee on the production of one part, even although there has been a prior indorsement for value of another part, provided that the delivery be *bonâ fide*, and without notice or knowledge of the prior indorsement (*g*).

Risk primâ facie *passes with property.*—"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in default as regards any loss which might not have occurred but for such fault. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party" (*h*).

Undivided shares.—In the large majority of cases the risk passes to the purchaser with the property, and the test as to

(*b*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289.

(*c*) 18 & 19 Vict. c. 111, s. 1; *Sewell* v. *Burdick*, 10 App.Cas. 74; 54 L.J. Q.B. 156.

(*d*) *Per* Lord Bramwell, *Sewell* v. *Burdick*, *supra*, at p. 105; *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67; 56 L.J. Q.B. 202.

(*e*) *Leduc* v. *Ward*, 20 Q.B.D. 475; 57 L.J. Q.B. 379.

(*f*) *Barber* v. *Meyerstein*, L.R. 4 H.L. 317; 39 L.J. C.P. 187.

(*g*) *Glyn, Mills & Co.* v. *E. & W. India Dock Co.*, 7 App.Cas. 591; 52 L.J. Q.B. 146.

(*h*) 56 & 57 Vict. c. 71, s. 20.

whether the risk has passed is the same as that to be applied to the question whether the property has passed. But the risk and the property are not inseparable (*i*): they may be separated by the express terms of the contract (*k*). Where a vendor sells an undivided share to be separated by the purchaser from an ascertained bulk, it would seem that the risk would pass to the purchaser if the share remained unseparated through his default, though the property would not pass until the share had been separated from the bulk (*l*).

Sale by person not the owner.—Subject to the provisions of the Act, "where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell" (*m*). Provided also that nothing in the Act shall affect—"(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof: (b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction" (*n*).

It is well established that if one person by his words or conduct induces another to believe in the existence of a state of circumstances and to act on that belief so as to alter his position, he cannot afterwards aver a different state of things against the party whom he has misled (*o*). Thus, the lessee of a public house who allowed another to sell the fixtures and fittings as if they were his own, whereby a third person was induced to purchase them *bonâ fide*, cannot recover them from the purchaser (*p*). But, where a firm of timber merchants kept stocks of timber warehoused in their own name with a dock company, to whom they gave instructions to accept all delivery orders signed by their clerk: and the clerk, who had authority from the timber merchants to sign delivery orders in relation to sales to their customers, fraudulently gave delivery orders in favour

(*i*) *Martineau* v. *Kitching*, L.R. 7 Q.B. 436; 41 L.J. Q.B. 227.

(*k*) *Castle* v. *Playford*, L.R. 7 Ex. 98; 41 L.J. Ex. 44; *Anderson* v. *Morice*, 1 App.Cas. 713; 46 L.J. C.P. 11.

(*l*) *Martineau* v. *Kitching*, *per* Blackburn, J., L.R. 7 Q.B., p. 456: see also s. 37, *post*.

(*m*) 56 & 57 Vict. c. 71, s. 21 (1).

(*n*) *Ib.*, s. 21 (2); as to the Factors Acts, see *post*, pp. 822 *et seq.*; as to sale of pledges by pawnbrokers, see *post* p. 829.

(*o*) *Pickard* v. *Sears*, 6 Ad. & E. 469; see *ante*, p. 72.

(*p*) *Gregg* v. *Wells*, 10 Ad. & E. 90; 8 L.J. Q.B. 193; *Freeman* v. *Cooke*, 2 Exch. 654; 18 L.J. Ex. 114; see further as to sales by ostensible agents, *Ramazotti* v. *Bowring*, 7 C.B. N.S. 851; 29 L.J. C.P. 30; *Pole* v. *Leask*, 9 Jur. N.S. 829; *Edmunds* v. *Bushell*, L.R. 1 Q.B. 97; 35 L.J. Q.B. 20.

of himself under an assumed name, and having procured timber from the dock company sold it to strangers; it was held that the clerk could give no better title than he had himself, and that no question arose of the timber merchants being estopped from denying his authority to dispose of the timber (*q*).

Market overt (*r*).—"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (*s*). Nothing in this section shall affect the law relating to the sale of horses" (*t*).

A sale in market overt forms another exception to the general rule that a bargain and sale passes no better title than the vendor had. By such a sale the purchaser obtains an absolute title against all persons, including the true owner (*u*), except in the case provided for by sect. 24 (*post*), in which stolen property revests in the owner on conviction of the thief. Every shop in the city of London is a market overt, but for such things only as by the trade of the owner are put there for sale; thus, if the sale be openly in a goldsmith's shop in the city so that anyone standing or passing by the shop might see it there, the sale would change the property; but if the sale be in the shop, either behind a hanging or behind a cupboard upon which his plate stands so that one who stood or passed by the shop could not see it, the property would not be changed; so also if the sale be not in the shop, but in the warehouse or other place in the house, it would not change the property (*x*), as, for instance, in a showroom above a jeweller's shop in the city to which access could only be obtained by the jeweller's special permission (*y*). It would seem, however, that the doctrine as to sales in market overt in the city of London does not apply to a sale by a customer to a shopkeeper (*z*). A sale in a warehouse used as a shop, having windows in which goods are exposed for sale, is a sale in market overt (*a*). To constitute a sale in market overt, the goods must be present in the market during the whole of the transaction, from the making of the contract to the delivery (*b*). A sale by sample is not entitled to the privileges

(*q*) *Farquharson* v. *King*, (1902) A.C. 325; 71 L.J. K.B. 667.

(*r*) See also Addison on Torts (ed. 8) at pp. 511 *et seq.*

(*s*) 56 & 57 Vict. c. 71, s. 22 (1).

(*t*) *Ib.*, s. 22 (2).

(*u*) *Cundy* v. *Lindsay*, 3 App.Cas. 459; 47 L. J.Q.B. 481.

(*x*) *Case of Market Overt*, 5 Co. 84; 2 W.Bl. 449; *Wilkinson* v. *King*, 2 Campb. 335.

(*y*) *Hargreaves* v. *Spink*, (1892) 1 Q.B. 25; 61 L.J. Q.B. 318.

(*z*) *Hargreaves* v. *Spink*, *supra*.

(*a*) *Lyons* v. *De Pass*, 11 Ad. & E. 326; 9 L.J. Q.B. 51.

(*b*) *Crane* v. *London Docks Co.*, 5 B. & S. 313; 33 L.J. Q.B. 224.

of a sale in market overt (*c*). The same considerations apply to other markets in England which by custom are markets overt (*d*). The sale of a horse even in market overt does not confer an absolute title unless certain statutory (*e*) formalities are complied with (*f*).

Sale under voidable title.—"When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith (*g*), and without notice of the seller's defect of title" (*h*). If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the part of the purchaser, the contract is voidable, but he cannot, after the goods have been re-sold and passed into the hands of a *bonâ fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property (*i*). But, if the relation of the vendor and vendee does not subsist between the original owner and the person who commits the fraud, and the goods have been obtained by false pretences, in such a way as not to transfer the property in them, and have been afterwards disposed of to a *bonâ fide* purchaser by sale not in market overt, the latter does not acquire a title to the goods as against the person who has been defrauded (*k*).

Revesting of property in stolen goods on conviction of offender (*l*).—"Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (*m*). Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender" (*n*). Formerly if the owner of goods had been induced to part with them by fraud, and they were afterwards

(*c*) *Crane* v. *London Docks Co.*, 5 B. & S. 313; 33 L.J. Q.B. 224.

(*d*) *Case of Market Overt*, 5 Co. 84; 2 W. Bl. 449.

(*e*) See 2 Ph. & M. c. 7; 31 Eliz. c. 12

(*f*) *Moran* v. *Pitt*, 42 L.J. Q.B. 47.

(*g*) A thing is deemed to be done "in good faith" within the meaning of the Act when it is in fact done honestly, whether it be done negligently or not: sect. 62 (2).

(*h*) 56 & 57 Vict. c. 71, s. 23.

(*i*) *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 166; *Sheppard* v. *Shoolbred*, Car. & M. 61; *Attenborough* v. *St. Katharine's Docks Co.*, 3 C.P.D. 450; 47 L.J. C.P. 763; *Whitehorn Brothers* v. *Davison*, (1911) 1 K.B. 463.

(*k*) *Higgons* v. *Burton*, 26 L.J. Ex. 342; *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L.J. Ex. 83; *Cundy* v. *Lindsay*, 3 App.Cas. 459; 47 L.J. Q.B. 481.

(*l*) See also Addison on Torts (ed. 8), at p. 513.

(*m*) 56 & 57 Vict. c. 71, s. 24 (1).

(*n*) *Ib.*, s. 24 (2).

bought, whether in market overt or elsewhere, by an innocent purchaser, nevertheless upon the prosecution and conviction of the fraudulent person, the property in the goods reverted to the original owner (*o*); but since the enactment of sect. 24, sub-sect. 2, the property in the goods does not under such circumstances revert to the original owner, notwithstanding the provisions of sect. 100 of the Larceny Act, 1861 (*p*), and of sect. 27, sub-sect. 3, of the Summary Jurisdiction Act, 1879 (*q*).

Seller or buyer in possession after sale.—"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title (*r*) under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same (*s*). Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*t*). In this section the term 'mercantile agent' has the same meaning as in the Factors Acts" (*u*). These provisions are a re-enactment of ss. 8 and 9 of the Factors Act, 1889 (*x*), with this modification, that they do not apply to the delivery or transfer of goods or documents of title "under any agreement for sale, pledge, or other disposition thereof."

Where a vendor sells goods which are warehoused, and agrees to retain the goods until demanded, and after the sale writes letters to the warehouseman appropriating the goods as security for money advanced by the warehouseman, these letters do not amount to "a delivery of the goods" or "a transfer of the

(*o*) *Bentley* v. *Vilmont*, 12 App.Cas. 471; 57 L.J. Q.B. 18; overruling *Moyce* v. *Newington*, 4 Q.B.D. 32; 48 L.J. Q.B. 125, which is now reinstated by 56 & 57 Vict. c. 71, s. 24 (2).

(*p*) 24 & 25 Vict. c. 96, s. 100.

(*q*) 42 & 43 Vict. c. 49, s. 27 (3).

(*r*) See 52 & 53 Vict. c. 45, s. 1 (4), for definition of "document of title."

(*s*) 56 & 57 Vict. c. 71, s. 25 (1). See, as to Factors Acts, *post*, p. 824.

(*t*) 56 & 57 Vict. c. 71, s. 25 (2).

(*u*) *Ib.*, s. 25 (3); see 52 & 53 Vict. c. 45, s. 1 (1), for definition of "mercantile agent."

(*x*) 52 & 53 Vict. c. 45, ss. 8, 9.

documents of title" within sect. 25 of the Act (*y*). Where a seller of goods sent to the buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, but the buyer never accepted the draft and retained the bill of lading, which he indorsed to a sub-purchaser, who received it in good faith for valuable consideration and without notice of any right of the original seller in respect of the goods, it was held, the buyer having become insolvent, that he was in possession of the bill of lading with the consent of the seller so that its transfer to the sub-purchaser gave the latter a good title to the goods and that the original seller had no right to stop the goods *in transitu* (*z*).

Purchaser having notice of writ of execution.—A writ of *fieri facias* or other writ of execution against goods binds the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; but no such writ is to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff (*a*).

Duties of seller and buyer.—"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale" (*b*). Although a bargain and sale may be so far incomplete as not to operate as an immediate transfer of property, yet the engagements which naturally result from the contract are in existence as soon as it has been entered into. There is an implied promise or undertaking on the part of the vendor to put the vendee into possession of the thing sold without delay, if the contract makes no mention of the time of delivery, and an undertaking by the vendee to accept the goods and pay the price on the delivery of the subject-matter of the sale by the vendor. There is also an implied undertaking, on the part of the vendor of a specific chattel to be delivered at a future day, that he will not do anything inconsistent with the rights of the purchaser; and, if he wastes or re-sells the property, he is responsible in damages (*c*).

(*y*) *Nicholson* v. *Harper*, (1895) 2 Ch. 415; 64 L.J. Ch. 672.
(*z*) *Cahn* v. *Pockett's Bristol Channel Co.*, (1899) 1 Q.B. 643; 68 L.J. Q.B. 515.
(*a*) 56 & 57 Vict. c. 71, s. 26 (1).
(*b*) 56 & 57 Vict. c. 71, s. 27; see also sect. 37, *post*.
(*c*) *Chinery* v. *Viall*, 5 H. & N. 288; 29 L.J. Ex. 180; *Bowdell* v. *Parsons*, 10 East, 359.

Actual and constructive delivery of goods.—The delivery of goods may be either real or symbolical, actual or constructive. When the subject-matter of the sale is capable of manual delivery, such as a watch, a book, or a gun, and is actually transferred from the hand of the vendor to that of the purchaser or his agent, there is an actual delivery. So, if, being a bulky commodity, it is removed from the warehouse of the vendor to that of the purchaser, and placed under the control of the latter, there is an actual delivery. But although there has been no manual transfer from hand to hand, and the goods have not been removed from the place where they were deposited at the time of the sale, if the vendor has handed to the purchaser the key of a box or warehouse where the goods were deposited (*d*) in order that he may remove them (*e*), or has given to the purchaser a delivery order or warrant for their removal (*f*), and placed them at the disposal of the latter, there is a constructive delivery, provided, at the time of the delivery of the key or warrant, the particular goods to be removed had been weighed out or measured, or separated from the bulk, and nothing but delivery remained to be performed by the vendor in order to complete his part of the contract of sale.

When goods are incapable of manual delivery, such as a haystack in a meadow, the same strict evidence of transfer cannot ordinarily be given, and it is enough for the vendor to show that the purchaser was himself to have fetched away the article, and that the vendor has given him the power and opportunity of removing it (*g*). But, if goods sold remain in the vendor's dwelling-house or warehouse, the mere circumstance that he has allowed the purchaser an opportunity of removing a trifling part is consistent with the intention of retaining the vendor's lien on the residue, and therefore would not be conclusive evidence of delivery (*h*). For it must be observed that the mere placing of goods at the disposal of the purchaser, or putting it in his power to remove them, will not in any case constitute a delivery, if the vendor retains his lien for the price or possesses any control over them (*i*).

Proof of delivery.—The question of delivery is a question of

(*d*) *Chaplin* v. *Rogers*, 1 East, 194.

(*e*) *Salter* v. *Woollams*, 2 M. & Gr. 650; 10 L.J. C.P. 145; *Bartlett* v. *Holmes*, 22 L.J. C.P. 182; 13 C.B. 630.

(*f*) *Greaves* v. *Hepke*, 2 B. & Ald. 131; *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153; *Elmore* v. *Stone*, 1 Taunt. 458.

(*g*) *Smith* v. *Chance*, 2 B. & Ald. 753; *Wood* v. *Tassell*, 6 Q.B. 236; *Tansley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272.

(*h*) *Thompson* v. *Maceroni*, 4 Dowl. & R. 619; 2 L.J. (O.S.) K.B. 208.

(*i*) *Goodall* v. *Skelton*, 2 H.Bl. 316; *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261; cf. *Holderness* v. *Shackels*, 8 B. & C. 621; 7 L.J. (O.S.) K.B. 80.

fact, and is to be determined by reference to all the surrounding circumstances, which must be looked at in order to see if there has been a virtual change of possession as well as a change of ownership. The taking of samples, coopering casks, and the general exercise of acts of ownership by the purchaser over the subject-matter of the sale, in those cases where nothing but delivery remains to be performed to execute the contract, are circumstances from which an actual transfer of the possession of the article to the purchaser may be fairly inferred; but they are equivocal acts, open to explanation, and afford no sufficient proof of delivery, if they have been done without the knowledge or sanction of the vendor (*k*). Where goods are sold for ready money and the price is not paid, the marking of the goods and packing them up in boxes or cloths belonging to the purchaser do not constitute a delivery so long as the goods remain in the possession of the vendor, inasmuch as the latter has not, until he has actually parted with the possession of them, lost his lien for the price (*l*); and the delivery of part of the goods does not, unless so intended by the parties, operate as a constructive delivery of the whole, so as to deprive the vendor of his right to possession of the residue until payment of the price (*m*). The unpacking or unloading of goods for the purpose of inspection by a purchaser who has not previously selected (*ante*, p. 534) is not necessarily an acceptance of the goods by the purchaser so as to authenticate the contract of sale, and *à fortiori* is not sufficient to render him liable to an action for the price(*n*). But, if he lands and stores the goods, and keeps them an unreasonable time, or does more than is necessary to be done for inspection, he makes the goods his own (*o*).

Payment and delivery, concurrent conditions.—"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods" (*p*). If a precise time has been appointed for the payment of the

(*k*) *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 L.J. K.B. 198; *Craven* v. *Ryder*, 6 Taunt. 433. See *post*, pp. 612 *et seq.*

(*l*) *Boulter* v. *Arnott*, 1 Cr. & M. 333; 2 L.J. Ex. 97.

(*m*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 2 L.J. K.B. 55; *Dixon* v. *Yates*, *supra*; *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69.

(*n*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Toulmin* v. *Hedley*, 2 Car. & K. 157.

(*o*) *Chapman* v. *Morton*, 11 M. & W. 540; 12 L.J. Ex. 292; see also s. 35, *post*.

(*p*) 56 & 57 Vict. c. 71, s. 28; *Callonel* v. *Briggs*, 1 Salk. 112; *Morton* v. *Lamb*, 7 T.R. 125; *Rawson* v. *Johnson*, 1 East, 203; *Wilks* v. *Atkinson*, 1 Marsh. 412; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Bloxam* v. *Sanders* 4 B. & C. 941.

price, and another and different time is fixed for the delivery, the acts are not concurrent, and do not constitute mutual conditions (*q*) unless they are made so by custom and usage of trade. Thus if a bought note specifies that certain goods have been "bought to be paid for by cash in one month," the buyer is entitled to call for delivery at any reasonable time from the making of the contract; but the vendor has no right to the money until the month has expired, unless a usage of trade, authorising the vendor to keep possession of the goods until the day of payment arrives, can be established (*r*). If the goods are to be delivered "forthwith," and the price is to be paid in a "fortnight" or "month," the delivery must be made within the period named (*s*). Where, by the terms of the contract, the goods were to be taken away at the purchaser's expense in fourteen days from the day of the sale, and the purchase-money was to be paid on or before the delivery of the goods, it was held that the seller was bound to deliver when called upon at any time during the fourteen days, and had not fourteen days to deliver the goods, although the purchaser had fourteen days to take them away (*t*).

Rules as to delivery.—"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery (*u*). (2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time (*x*). (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods (*y*). (4) Demand or tender of delivery may be treated as ineffectual unless made at

(*q*) *Ante*, p. 542; *Thorpe* v. *Thorpe*, 1 Salk. 171; 1 Raym. 665; *Spartali* v. *Benecke*, 10 C.B. 212; 19 L.J. C.P. 293; *Chinery* v. *Viall*, 5 H. & N. 288; 29 L.J. Ex. 180.

(*r*) *Field* v. *Lelean*, 6 H. & N. 617; 30 L.J. Ex. 168.

(*s*) *Staunton* v. *Wood*, 16 Q.B. 638.

(*t*) *Hagedorn* v. *Laing*, 6 Taunt. 162

(*u*) 56 & 57 Vict. c. 71, s. 29 (1).

(*x*) *Ib.*, s. 29 (2).

(*y*) *Ib.*, s. 29 (3).

a reasonable hour. What is a reasonable hour is a question of fact (*z*). (5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller" (*a*).

If the goods are in the hands of a warehouse-keeper, wharfinger, or other agent, for safe custody, and are to be fetched away by the purchaser, and the goods are weighed and set apart for the purchaser, and the agent consents to hold them at the disposal of the latter, there is a sufficient delivery on the part of the vendor; and, if the goods are improperly taken away by a third party, the vendor cannot then be sued for the non-delivery of them (*b*). Some auctioneers sold a rick of hay which had been distrained by a landlord for rent. By the conditions of sale the hay was to be removed by the purchaser, and, the time specified for its removal being considered too short, the tenant gave a written permission for the hay to remain on the land for a longer period. The price of the hay was paid at the time of the sale, and a few days afterwards the purchaser received from the auctioneers a written order, addressed to the tenant, requiring him to permit the purchaser to remove the hay; but the tenant then refused, and would not suffer him to come upon the land to take it. The purchaser then brought an action against the auctioneers for the non-delivery; and the defendants pleaded that they did deliver possession to the plaintiff: and it was held that this plea was supported by the facts; that the permission given by the tenant for the hay to remain on the land for the convenience of the purchaser amounted to an attornment from the tenant to the purchaser, and was equivalent to an express undertaking on the part of the tenant to hold the hay for the purchaser's use and at his disposal (*c*).

Delivery of wrong quantity.—"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate (*d*). Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate (*e*). Where the

(*z*) 56 & 57 Vict. c. 71, s. 29 (4); see *ante*, p. 544.
(*a*) *Ib.*, s. 29 (5).
(*b*) *Wood* v. *Tassell* 6 Q.B. 234.
(*c*) *Salter* v. *Woollams*, 2 M. & Gr. 650; 10 L.J. C.P. 105.
(*d*) 56 & 57 Vict. c. 71, s. 30 (1).
(*e*) *Ib.*, s. 30 (2).

seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole (*f*). The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties "(*g*).

If more goods are sent than the purchaser agreed to buy, he may refuse to receive any portion of the goods so sent, and is not bound to incur risk or trouble in selecting some of the things and sending back others (*h*); still more is this the case where the superfluous goods are not of the quality ordered (*i*). A contract for a cargo of about sixty fathoms of lathwood is not performed by the tender of that quantity out of a cargo of eighty-three fathoms (*k*). Similarly a purchaser cannot be compelled to take less than he has ordered (*l*). If the subject of the contract is the sale of a specific quantity of a given article with a margin for a moderate excess in or diminution of that quantity under the words "about" or "more or less" the seller cannot call upon the buyer to accept any greater or less quantity of the article bargained for than the quantity specified subject to a moderate margin (*m*). Thus, if a purchaser has agreed to buy "about 300 quarters (more or less) of foreign rye, &c.," he is not bound to accept 350 quarters (*n*). If the vendor has agreed to sell, and the purchaser to buy, a certain quantity, "say not less than 100, &c.," the words amount to a contract to deliver at least the quantity specified (*o*). If the quantity is to be between 1,800 and 2,200 quarters, the purchaser is not bound to accept more than 2,200 quarters, nor to accept less than 1,800 (*p*). But it is otherwise where the purpose of the parties is the delivery of the goods in any event, and the statement as to the quality is merely subsidiary. Thus, if the right of property in the subject-matter of the sale has

(*f*) 56 & 57 Vict. c. 71, s. 30 (3); *Levy* v. *Green*, 1 E. & E. 969; 28 L.J. Q.B. 319; *Nicholson* v. *Bradford Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176.

(*g*) 56 & 57 Vict. c. 71, s. 30 (4).

(*h*) *Cunliffe* v. *Harrison*, 6 Exch. 903; 20 L.J. Ex. 325; *Dixon* v. *Fletcher*, 3 M. & W. 146; *Rylands* v. *Kreitman*, 19 C.B. N.S. 351; *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*i*) *Levy* v. *Green*, 1 E. & E. 969; 28 L.J. Q.B. 319.

(*k*) *Kreuger* v. *Blanck*, L.R. 5 Ex. 179; 39 L.J. Ex. 160; *Borrowman* v. *Drayton*, 2 Ex.D. 15; 46 L.J. Ex. 273; *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201.

(*l*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264; *Colonial Ins. Co. of New Zealand* v. *Adelaide Mar. Ins. Co.*, 12 App.Cas. 138; 56 L.J. P.C. 19.

(*m*) *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492.

(*n*) *Cross* v. *Eglin*, 2 B. & Ad. 106; 9 L.J. (O.S.) K.B. 145.

(*o*) *Leeming* v. *Snaith*, 16 Q.B. 275; 20 L.J. Q.B. 165. See *Morris* v. *Levison*, 1 C.P.D. 155; 45 L.J. C.P. 409.

(*p*) *Tamvaco* v. *Lucas*, 1 E. & E. 581; 28 L.J. Q.B. 153; *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492. As to defective deliveries on contracts to deliver by instalments, see sect. 31 (2), *post*, p. 602.

passed by the bargain from the vendor to the purchaser, the latter is not justified in refusing to accept it and pay the price, by reason of some unintentional misrepresentation of the quantity. Where the vendor agreed to sell and the purchaser to buy "the cargo Prima Donna as it stands, consisting of about 1,300 quarters Ibralia corn, at 30s. per quarter, the quantity to be taken from the bill of lading," and the bill of lading described the cargo as being 1,667 quarters; and afterwards when the corn came to be measured it was found to consist of only 1,614 quarters, it was held that the purchaser must put up with the loss, as there had been no intentional misrepresentation, and no fraud on the part of the vendor (*q*). If the right of property has not passed by the bargain, the purchaser cannot be made responsible for the non-acceptance of the subject-matter of the sale and non-payment of the price, unless the vendor can show that the article or chattel tendered for acceptance fairly corresponded in quantity with the thing agreed to be bought; for no man can be compelled to take more than he agreed to buy (*r*). The natural deterioration of an article between the time of the sale and delivery does not entitle the purchaser to refuse acceptance (*s*). With regard to the vendor, if the contract is entire for the purchase of a certain quantity of goods, he cannot be compelled to deliver a part only of the goods; and, if the purchaser declines to take the whole quantity he has ordered, the vendor may at once abandon the contract or sue for damages (*t*).

Delivery by instalments.—"Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments (*u*). Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated" (*x*).

The principle embodied in sect. 31 is the only one which

(*q*) *Cox* v. *Bingham*, 2 E. & B. 836; 23 L.J. Q.B. 27.

(*r*) *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*s*) *Bull* v. *Robison*, 10 Exch. 342; 24 L.J. Ex. 165; *Beer* v. *Walker*, 46 L.J. C.P. 677. See also sect. 33, *post*, p. 605.

(*t*) *Kingdom* v. *Cox*, 5 C.B. 522; 17 L.J. C.P. 155.

(*u*) 56 & 57 Vict. c. 71, s. 31 (1).

(*x*) *Ib.*, s. 31 (2).

can be deduced from the numerous conflicting authorities on the question as to when a single breach by one party to a contract to deliver or accept delivery by instalments entitles the other party to treat the whole contract as repudiated (*y*) or as merely giving rise to a claim for compensation (*z*). When a bargain has been made for the manufacture of a certain specified quantity of goods to be supplied from time to time, and paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for damages (*a*). For in an action on a contract of sale for the non-acceptance of goods sold, it is sufficient, though also necessary, for the vendor to show that he was ready and willing to deliver the goods to the purchaser according to the terms of the contract (*b*). The plaintiffs undertook to supply the defendants with 30,000 tons of ore at 25*s.* 6*d.* per ton, cost freight and insurance, payment to be made by cash on delivery of each shipment, "deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we are able to procure tonnage at or under 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers of the mines, &c." The plaintiffs withheld ore while freights were above the limit, and then sought to deliver ore according to contract, and it was held that they might, but that they might not deliver ore which they had been prevented delivering by dangers of the mines, &c. (*c*). A purchaser of goods for delivery by instalments who has repudiated the contract on a wrong ground before delivery of any instalment has been tendered is not entitled in an action by the seller for breach of the contract to set up as a defence that an instalment which was subsequently tendered by the seller and repudiated on the same ground, such repudiation being accepted by the seller selling the goods, was

(*y*) See *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 65; *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588; 43 L.J. C.P. 375; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529; *Rhymney Ry.* v. *Brecon, &c. Ry.*, 69 L.J. Ch. 813.

(*z*) See *Jonassohn* v. *Young*, 4 B. & S. 296; 32 L.J. Q.B. 385; *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28; *Freeth* v. *Burr* L.R. 9 C.P. 208; 43 L.J. C.P. 91; *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497.

(*a*) *Cort* v. *Ambergate Ry.*, 17 Q.B. 148; 20 L.J. Q.B. 466.

(*b*) *Boyd* v. *Lett*, 1 C.B. 222; 14 L.J. C.P. 111; *Hannuic* v. *Goldner*, 11 M. & W. 849, 856; *Granger* v. *Dacre*, 12 M. & W. 434; 13 L.J. Ex. 93.

(*c*) *De Oleaga* v. *West Cumberland Iron Co.*, 4 Q.B.D. 472; 48 L.J. Q.B. 753.

not according to contract, inasmuch as the wrongful repudiation absolved the seller from performance of the contract on his part (*d*).

Delivery to carrier.—"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery (*e*) of the goods to the buyer (*f*).

"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages (*g*).

"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit" (*h*).

If the vendor is authorised to select the goods and forward them to the purchaser, the selection by the vendor, and the delivery of the goods to a carrier to be conveyed to the purchaser, will have the effect of transferring the ownership and risk to such purchaser provided the selection is made according to the orders or authority given (*i*). As soon as the goods are delivered into the hands of the carrier he becomes responsible to the purchaser to whom they are consigned (*k*), and there is an executed delivery as well as a transfer of the ownership and risk (*l*); but, if by the terms of the contract the delivery of the goods at their place of destination is made a condition precedent to the payment of the price, and the goods perish in

(*d*) *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K.B. 543; 74 L.J. K.B. 688.

(*e*) "Delivery" means voluntary transfer of possession from one person to another: sect. 62.

(*f*) 56 & 57 Vict. c. 71, s. 32 (1).

(*g*) *Ib.*, s. 32 (2).

(*h*) *Ib.*, s. 32 (3).

(*i*) *Fragano* v. *Long*, 4 B. & C. 221; 3 L.J. (O.S.) K.B. 177; *Browne* v. *Hare*, 4 H. & N. 822; 29 L.J. Ex. 6.

(*k*) *Dawes* v. *Peck*, 8 T.R. 330; *Dutton* v. *Solomonson*, 3 Bos. & P. 582; *Bryans* v. *Nix*, 4 M. & W. 791; 8 L.J. Ex. 137; *Swain* v. *Shepherd*, 1 Moo. & R. 223; *Fragano* v. *Long*, *supra*; *Gronin* v. *Mendham*, 5 M. & S. 189; Lord Cottenham, *Dunlop* v. *Lambert*, 6 Cl. & Fin. 621.

(*l*) *Fragano* v. *Long*, *supra*; *Wiltshir Iron Co.*, *In re*, L.R. 3 Ch. 443; 37 L.J Ch. 554; *Calcutta Steam Navigation Co* v. *De Mattos*, 32 L.J. Q.B. 214.

the hands of the carrier, the vendor is not entitled to the price (*m*). And, if the purchaser's right to possession of the goods is made conditional on the prior performance of some act on his part, such as an acceptance of a bill of exchange, or the giving of a promissory note for the price, the vendor may resume the possession of them, if the purchaser neglects to fulfil the condition at the time appointed (*n*). The vendor, after he has once parted with the goods in fulfilment of an unconditional contract of sale, and placed them in a course of transmission to the purchaser, cannot lawfully re-take them from the carrier, unless the purchaser becomes bankrupt whilst they are in the hands of the carrier (*o*), or unless the goods have been sent merely on approval, or upon some condition which the purchaser is bound and fails to perform (*p*).

Deterioration to goods in transit.—"Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit" (*q*).

Buyer's right to examine goods.—"Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract (*r*). Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract" (*s*).

A vendor tendering goods for acceptance must so tender them as to allow the purchaser an opportunity of inspecting them to see whether they are or are not the goods which he has bought; and the purchaser need not accept them if this opportunity is not given (*t*); and if on inspection they turn out to be different from those which were agreed to be sold, he may reject them (*u*). But, if the goods have been selected by the purchaser prior to

(*m*) Lord Cottenham, *Dunlop* v. *Lambert*, 6 Cl. & Fin. 621; *Calcutta Steam Navigation Co.* v. *De Mattos*, *supra*.

(*n*) Com. Dig. CONDITION (B. 13); *Brandt* v. *Bowlby*, 2 B. & Ad. 932; 1 L.J. K.B. 14; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273.

(*o*) *Rosevear Clay Co., Ex parte*, 11 Ch.D. 560; 48 L.J. Bankr. 100.

(*p*) *Wilmshurst* v. *Bowker*, 7 M. & Gr. 882; 12 L.J. C.P. 475.

(*q*) 56 & 57 Vict. c. 71, s. 33; see also s. 30, *ante*, p. 600.

(*r*) *Ib.*, s. 34 (1).

(*s*) *Ib.*, s. 34 (2).

(*t*) *Isherwood* v. *Whitmore*, 11 M. & W. 347; 12 L.J. Ex. 93; *Lorymer* v. *Smith*, 1 B. & C. 1.

(*u*) *Tye* v. *Fynmore*, 3 Campb. 462; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199.

the sale, or have been purchased with all faults, the purchaser has no right of inspection for the purpose of measuring or the like before payment (*x*). The place of delivery is usually the place for inspection (*y*).

Acceptance.—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them" (*z*). Where by the Act of 1893 any reference is made to a reasonable time, the question what is a reasonable time is a question of fact (*a*).

Generally speaking, a purchaser must be taken to have finally accepted goods when he has done more than is necessary for a mere trial of them or for the purpose of examination and comparison, and has done some act to alter the position of the vendor, or to delay the return of the goods (*b*). A purchaser who has exercised acts of dominion over the goods, as by parting with the property in them, or who has altered the position of the vendor in relation to the goods, will, generally speaking, be taken to have finally accepted them (*c*). "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them" (*d*). Thus, he is not bound to place the goods in neutral custody (*e*). It is sufficient if he does some unequivocal act showing an intention to reject, giving notice to the vendor that he does so. The vendor is then bound to take them away, and if he refuses to do so, they remain at his risk, and if they are destroyed by accident the loss will fall on the vendor (*f*).

Liability of buyer—Neglect or refusal to take delivery—Risk.—"When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by

(*x*) *Pettit* v. *Mitchell*, 4 M. & Gr. 836; 12 L.J. C.P. 9.

(*y*) *Perkins* v. *Bell*, (1893) 1 Q.B. 193; 62 L.J. Q.B. 91.

(*z*) 56 & 57 Vict. c. 71, s. 35.

(*a*) *Ib.*, s. 56.

(*b*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Street* v. *Blay*, 2 B. & Ad. 456; *Chapman* v. *Morton*, 11 M. & W. 534; 12 L.J. Ex. 292.

(*c*) *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*d*) 56 & 57 Vict. c. 71, s. 36.

(*e*) *Grimoldby* v. *Wells*, L.R. 10 C.P. 391; 44 L. J. C.P. 203.

(*f*) *Okell* v. *Smith*, 1 Stark. 107; *Grimoldby* v. *Wells*, *supra*.

his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract" (*g*).

Unpaid seller's rights.—"Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller (*h*) of goods, as such, has by implication of law—(a.) A lien on the goods for the price while he is in possession of them (*i*); (b.) In case of the insolvency (*k*) of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them (*l*); (c.) A right of re-sale as limited by this Act" (*m*).

"Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer" (*n*).

The seller of goods is deemed to be an "unpaid seller" within the meaning of the Act of 1893—(a.) When the whole of the price has not been paid or tendered (*o*); (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise (*p*). In Part IV. of the Act—which includes ss. 38-48 inclusive—the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price (*q*).

The following persons have been held to be in the position of unpaid sellers for this purpose—a consignor of goods to be

(*g*) 56 & 57 Vict. c. 71, s. 37. As to the obligation to accept, see sect. 27, *ante*, p. 596.

(*h*) See sect. 38 for definition of "unpaid seller" and "seller" in this part of the Act: ss. 38—48 inclusive.

(*i*) See sect. 41, *post*; *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.

(*k*) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not: sect. 62 (3).

(*l*) See sects. 44 *et seq.*, *post*.

(*m*) 56 & 57 Vict. c. 71, s. 39 (1).

(*n*) *Ib.*, s. 39 (2).

(*o*) *Hodgson* v. *Loy*, 7 T.R. 440; *Sweet* v. *Pym*, 1 East, 4; *Feise* v. *Wray*, 3 East, 93; *New* v. *Swain*, 1 Dan. & Ll. 193; *Edwards* v. *Brewer*, 2 M. & W. 375; 6 L.J. Ex. 135. See *Weguelin* v. *Cellier*, L.R. 6 H.L. 286; 42 L.J. Ch. 758.

(*p*) 56 & 57 Vict. c. 71, s. 38 (1); *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L.J. Q.B. 204; *Valpy* v. *Oakeley*, 6 Q.B. 941; 20 L.J. Q.B. 380.

(*q*) 56 & 57 Vict. c. 71, s. 38 (2); *The Tigress*, 1 Br. & L. 38; 32 L.J. Adm. 97; *Feise* v. *Wray*, 3 East, 93.

sold on the joint account of himself and the consignee (*r*); a person who has an interest in or a right to receive goods and purports to sell them (*s*); but a mere surety for the payment of the price is not a person in this position (*t*), though it would probably be otherwise where he has actually paid it (*u*); and the rights of an unpaid vendor do not extend to persons who have forwarded goods to a creditor by way of payment, or in satisfaction and discharge of a debt due to the consignee (*x*).

Unpaid seller's lien.—Subject to the provisions of the Act of 1893 "the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—(a.) Where the goods have been sold without any stipulation as to credit; (b.) Where the goods have been sold on credit, but the term of credit has expired (*y*); (c.) Where the buyer becomes insolvent" (*z*).

"The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer" (*a*).

Vendor's lien for price of goods sold.—When different times are not expressly appointed for payment and delivery, the acts of payment and delivery are, as we have seen, concurrent, and constitute mutual conditions to be performed at the same time, so that the purchaser cannot demand the thing sold without paying or offering to pay the price, nor the vendor the price without delivering or offering to deliver the subject-matter of the sale. "If I sell you my horse for 10*l.*, if you will have the horse, I must have the money; or, if I will have the money, you must have the horse" (*b*).

Insolvency of purchaser.—When the purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is

(*r*) *Newsom* v. *Thornton*, 6 East, 17.

(*s*) *Jenkins* v. *Usborne*, 7 M. & Gr. 678; 13 L.J. C.P. 196.

(*t*) *Siffken* v. *Ray*, 6 East, 371.

(*u*) *Imperial Bank* v. *London & St. Kath. Docks Co.*, 5 Ch.D. 195; 46 L.J. Ch. 335.

(*x*) *Vertue* v. *Jewell*, 4 Campb. 31.

(*y*) See *New* v. *Swain*, 1 Dan. & Ll. 193; Parsons on Contracts, 546 (ed. 8); Blackburn on Sale, 458 (ed. 2); *Castle* v. *Sworder*, 6 H & N. at p. 833; 30 L.J. Ex. 310.

(*z*) 56 & 57 Vict. c. 71, s. 41 (1).

(*a*) *Ib.*, s. 41 (2); *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.

(*b*) *Callonel* v. *Briggs*, 1 Salk. 112; *Lock* v. *Wright*, 1 Str. 571; *Morton* v. *Lamb*, 7 T.R. 125; *Rawson* v. *Johnson*, 1 East, 203; *Wilks* v. *Atkinson*, 1 Marsh. 412; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Atkinson* v. *Smith*, 14 M. & W. 695; 15 L.J. Ex. 59.

paid the debt due for those already delivered, as well as the price of those still to be delivered (*c*). And it makes no difference in this respect whether the contract is for the sale of specific goods or for the sale of goods to be delivered by instalments (*d*). But there must be such an admission or proof of insolvency as amounts to a refusal to pay (*e*). Until actual possession of goods sold has been delivered to the purchaser the vendor's right of lien can be set up as against the assignee or trustee of the purchaser upon the insolvency of the latter (*f*). The trustee has a right to elect to complete the contract by paying cash within a reasonable time, but if he neglects to do so the vendor may re-sell the goods, and it seems that a sub-purchaser would also have an option of completing the contract (*g*).

Countermand of delivery orders.—Similarly, if possession has not been given, and the delivery completed, under a delivery order or dock-warrant, the vendor may, if the purchaser becomes insolvent before payment, countermand the order or warrant, although it has been accepted by the person to whom it is addressed, and require the latter to hold the goods on his, the vendor's, account, as before the order was made, provided the goods have not been re-sold and the warehouse-keeper or bailee has not attorned to the sub-purchaser in the manner presently mentioned. It has been held that possession had not been given, and that delivery was not complete, so as to prevent the vendor from countermanding his delivery order by reason of the insolvency of the purchaser in the following cases:—where ten tons of Riga flax were sold at 118*l.* per ton, to be paid for by the purchaser's acceptance at three months, and the ten tons were to be separated from a larger quantity lying in bulk upon a wharf, and the vendor gave to the purchaser a delivery order on the wharfinger for the ten tons, which order was accepted by him and entered in his books, but, before the weighing and separation of the ten tons from the bulk, the purchaser became insolvent (*h*);—where fifty tons of oil were sold at a fixed price, and an order for the delivery thereof was given to the purchaser, and forwarded to the wharfinger who had the custody of the oil, but it was the custom of the trade for the casks to be searched by the cooper of the vendor, and

(*c*) *Chalmers, Ex parte, Edwards, In re*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

(*d*) *Chalmers, Ex parte, Edwards, In re, supra.*

(*e*) *Phœniæ Bessemer Steel Co., In re*, 4 Ch.D. 108; 46 L.J. Ch. 115; *Stapleton, Ex parte*, 10 Ch.D. 586.

(*f*) *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.

(*g*) *Stapleton, Ex parte, supra.*

(*h*) *Busk* v. *Davis*, 2 M. & S. 397; *Shepley* v. *Davis*, 5 Taunt. 617.

for the broker of both parties to examine them to ascertain the foot-dirt and water in each, with a view to certain allowances in respect thereof, and then the casks were to be filled up by the cooper at the expense of the vendor, and the purchaser became insolvent before these preliminary acts had been performed (*i*);—where a purchaser agreed to purchase the "small parcel of starch" belonging to the vendor, which he had seen lying at the warehouse of a third party, at 6*l.* per cwt., to be paid for by bill at two months, fourteen days to be allowed for delivery, and the vendor gave a note to the purchaser addressed to the warehouse-keeper, directing him to "weigh and deliver" to the purchaser "all his starch," which order was forthwith lodged at the warehouse, and a large portion of the starch, on that and two subsequent days, was weighed and delivered to the purchaser, and removed pursuant to the order, but the purchaser became bankrupt whilst the residue remained unweighed in the warehouse, and the vendor countermanded the delivery of the unweighed residue (*k*). But the question whether the delivery of dock-warrants or delivery orders will bar the unpaid vendor's lien or not, is really a question of the intention of the parties, and depends largely upon custom and upon the circumstances of each case (*l*).

Where, on the other hand, 130 bales of bacon, lying at a wharf, were sold and weighed by the vendor, and set apart for the purchaser; and the price was ascertained, and was to be paid by bill at two months; and an order was given to the wharfinger to deliver the goods to the purchaser, who went to the wharf and presented the order, and with the assent of the wharfinger took possession of them and weighed the whole, and took away part, but became bankrupt before he had removed the residue, whereupon the vendor countermanded the delivery order; it was held that, the order having been executed and the goods actually delivered under it to the purchaser, they had irrecoverably become the property of the latter (*m*). And, where a specified quantity of oats in a particular bin in a warehouse was sold at an ascertained price, and a delivery order was entered by the warehouse-keeper in his books, and the oats were transferred into the names of the purchasers, and there were no oats in the bin besides the oats in question, it was held that the delivery was complete by the transfer in the books of the

(*i*) *Wallace* v. *Breeds*, 13 East, 522.

(*k*) *Hanson* v. *Meyer*, 6 East, 614.

(*l*) *Imperial Bank* v. *London and St. Katharine Docks Co.*, 5 Ch.D. 195; 46 L.J. Ch. 335; *Merchant Banking Co.* v. *Phœnix Steel Co.*, 5 Ch.D. 205; 46 L.J. Ch. 418.

(*m*) *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69.

warehouse-keeper (*n*). Whenever the vendor has given the purchaser actual possession or what is equivalent to actual possession of the goods sold, all the vendor's rights over them are completely gone, although the things have not been removed from the vendor's premises (*o*).

Shares and undivided quantities sold as such.—If the vendor himself is possessed only of an undivided share of a commodity, such as a quarter of a particular pipe of wine, or cistern of oil, or the half of a specific cargo of sugar in the hands of other part owners, or of a common bailee, and he sells his share and interest as an undivided quantity, just as he possesses it, and gives the purchaser credit for the payment of the price, and hands him a delivery order which is accepted by the party having the custody of the property, the vendor cannot, if the purchaser becomes bankrupt before payment, annul the sale and prevent his assignees from obtaining separate possession of his share (*p*).

Part delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (*q*).

Termination of seller's lien.—"The unpaid seller of goods loses his lien thereon—(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods; (b) when the buyer or his agent lawfully obtains possession of the goods; (c) by waiver thereof" (*r*). "The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment for the price of the goods" (*s*).

Intervention of rights of sub-purchasers.—The indorsement and transfer of a delivery order from one purchaser to another will effect no change of possession of the goods, so long as the delivery order has not been presented to, and accepted by, the warehouse-keeper, or party holding the goods as the agent of the vendor, and will not deprive the unpaid vendor of his right of countermand in case of the insolvency of the first purchaser (*t*). If the vendor is his own warehouseman, and gives to the purchaser a delivery order, or an acknowledgment that

(*n*) *Swanwick* v. *Sothern*, 9 Ad. & E. 895.
(*o*) *Tansley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272; *Cooper* v. *Bill*, 3 H. & C. 722; 34 L.J. Ex. 161.
(*p*) *Whitehouse* v. *Frost*, 12 East, 614.
(*q*) 56 & 57 Vict. c. 71, s. 42. See s. 45, sub-s. (7), *post*.
(*r*) 56 & 57 Vict. c. 71, s. 43 (1).
(*s*) *Ib.*, s. 43 (2).
(*t*) *M'Ewan* v. *Smith*, 2 H. L. Cas. 309.

he holds the goods on account of, or to the order of, the latter, he has a right to revoke the order and retain possession of the goods in case of the insolvency of the purchaser before actual payment, so long as the delivery order remains in the hands of the latter, and the goods have not been re-sold, and the rights of third parties do not intervene (*u*). But, if the goods have been re-sold, and the second purchaser has received from his immediate vendor, the first purchaser, a delivery order addressed to the original vendor, which has been accepted by him, the original vendor cannot, after he has thus attorned to such second purchaser, refuse to deliver the goods to such second purchaser, pursuant to his acceptance, although the first purchaser to whom he sold becomes bankrupt before delivery and before payment of the price (*x*), and even although the goods were not weighed or measured over prior to the bankruptcy of the first purchaser (*y*). But it is otherwise, if the original vendor has given his immediate purchaser, the sub-vendor, no delivery order or dock-warrant, and has not furnished him with any evidence of title, or in any way been a party to the sub-sale (*z*).

Stoppage in transitu.—Subject to the provisions of the Sale of Goods Act, 1893, "when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price" (*a*). The doctrine of stoppage *in transitu* applies only to the case of goods sold and delivered (*b*). If the purchaser becomes bankrupt or insolvent before payment of the price, the vendor is entitled, so long as the goods are *in transitu*, and have not reached their final destination or come into the manual possession of the purchaser, or that of any other party whom he may have appointed his agent finally to take possession of and keep the goods for him, to re-take them and put himself into the same situation as if he had never parted with the actual possession of them (*c*).

(*u*) *Townley* v. *Crump*, 4 Ad. & E. 58; 5 L.J. K.B. 14.

(*x*) *Hawes* v. *Watson*, 2 B. & C. 540; *Green* v. *Haythorne*, 1 Stark. 447; *Stovold* v. *Hughes*, 14 East, 308; *Pearson* v. *Dawson*, E. B. & E. 448; 27 L.J. Q.B. 248; *Cooper* v. *Bill*, 3 H. & C. 722; 34 L.J. Ex. 161.

(*y*) *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L.J. Ex. 185; *Knights* v. *Wiffen*, L.R. 5 Q.B. 660; 40 L.J. Q.B. 15.

(*z*) *Craven* v. *Ryder*, 6 Taunt. 433; *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L.J. Q.B. 294; *Meekes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273. See 56 & 57 Vict. c. 71, s. 47, *post*.

(*a*) 56 & 57 Vict. c. 71, s. 44.

(*b*) *Gibson* v. *Carruthers*, 8 M. & W. 334; 11 L.J. Ex. 138, *per* Parke, B.

(*c*) *Gibson* v. *Carruthers*, 8 M. & W. 338—341; 11 L.J. Ex. 138; *Lickbarrow* v. *Mason*, 6 East, 21; 1 Sm. L.C. 693 (ed. 11); *Kendall* v. *Marshall, Stevens & Co.*, 11 Q.B.D. 356; 52 L.J. Q.B. 313.

But when the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transit is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of someone who holds them for the purchaser or for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles (*d*).

Duration of transit—Carriers and forwarding agents.—"Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee" (*e*).

Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be *in transitu*, although they may have been consigned to a carrier specially appointed by the purchaser to receive them (*f*), or may be under the charge of a general forwarding agent of the purchaser (*g*), or in the hands of a packer (*h*), or wharfinger (*i*), or innkeeper (*k*), or any other middleman forming a mere link in the chain of communication from the vendor to the purchaser, and they remain *in transitu* until they have reached the hands of the purchaser, or of one who is his agent, as a warehouseman, or a packer (*l*), or a shipping agent, to give them a new destination (*m*), or have been actually delivered to the purchaser or his agent for custody, and not a mere intermediary (*n*), although the goods may have been shipped and the prior carriage and wharfage dues paid by the general shipping agent of the purchaser (*o*).

The *transitus* is not determined merely by the arrival of the goods at the place of destination, but is deemed to continue

(*d*) *Per* Cave, J., in *Bethell* v. *Clark*, 19 Q.B.D. 553, 561; affirmed, 20 Q.B.D. 615; 57 L.J. Q.B. 302.

(*e*) 56 & 57 Vict. c. 71, s. 45 (1).

(*f*) *Rosevear Clay Co., Ex parte*, 11 Ch.D. 560; 40 L.J. Bankr. 100.

(*g*) *Nicholls* v. *Le Feuvre*, 2 Bing. N.C. 81; 4 L.J. C.P. 281.

(*h*) *Scott* v. *Pettit*, 3 Bos. & P. 469.

(*i*) *Jackson* v. *Nichol*, 5 Bing. N.C. 508; 8 L.J. C.P. 294.

(*k*) *Hunter* v. *Beale*, 3 T.R. 466.

(*l*) *Leeds* v. *Wright*, 3 Bos. & P. 320.

(*m*) *Dixon* v. *Baldwen*, 5 East, 175; *Allan* v. *Gripper*, 2 Cr. & J. 218; 1 L.J. Ex. 71; *Dodson* v. *Wentworth*, 4 M. & Gr. 1080; 12 L.J. C.P. 59; *Coates* v. *Railton*, 6 B. & C. 422; 5 L.J. (O.S.) K.B. 209; *Bolton* v. *Lancashire and Yorkshire Ry.*, L.R. 1 C.P. 431; 35 L.J. C.P. 137; *Rosevear Clay Co., Ex parte*, *supra*.

(*n*) *James* v. *Griffin*, 2 M. & W. 623; 6 L.J. Ex. 241; *Rosevear Clay Co., Ex parte*, *supra*.

(*o*) *Nicholls* v. *Le Feuvre*, *supra*.

until they have come into the actual or constructive possession of the purchaser (*p*). If, therefore, they are in the hands of custom-house officers at the port of destination, or are placed in quarantine, the *transitus* is not determined, and the right of stoppage is not taken away (*q*). If the goods are not addressed directly to the purchaser, but to the vendor's own agent at the place of destination, accompanied by an order directing him to deliver them to the purchaser, the goods continue in the constructive possession of the vendor until they have been actually handed over to the purchaser, or until the vendor's agent has attorned to the latter and agreed to hold the goods on his account and subject to his orders as previously mentioned. But goods are not *in transitu* when they are journeying in the purchaser's own cart or carriage under the custody or care of his own servant or agent.

"If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end" (*r*).

"If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer" (*s*).

So long as the carrier holds the goods as a mere instrument of conveyance, or in the character of a forwarding agent, the *transitus* continues, and the unpaid vendor has a right to stop them; but, if the carrier enters expressly, or by implication, into a new agreement with the purchaser, distinct from the original contract for carriage, to hold the goods for the purchaser as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given by him, the *transitus* is at an end, and the goods are constructively in the possession of the purchaser, and cannot be re-taken by the vendor (*t*). But the assent of the carrier to hold the goods as an agent for custody on behalf of the purchaser must be

(*p*) *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157; *Coventry* v. *Gladstone*, L.R. 6 Eq. 44; 37 L.J. Ch. 492.

(*q*) *Northey* v. *Field*, 2 Esp. 613; *Holst* v. *Pownal*, 1 Esp. 240.

(*r*) 56 & 57 Vict. c. 71, s. 45 (2); *Whitehead* v. *Anderson* 9 M & W. 518; 11 L.J. Ex. 157; *Ellis* v. *Hunt*, 3 T.R. 464.

(*s*) 56 & 57 Vict. c. 71, s. 45 (3).

(*t*) *Slubey* v. *Heyward*, 2 H.Bl. 504; *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69; *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157; *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

clearly established in order to put an end to the *transitus* and deprive the vendor of his right to stop the goods. A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at is not enough to bring them into the possession, actual or constructive, of the purchaser (*u*). If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his wharfinger, or carrier, or packer, as his own, and of making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end, and the delivery is complete, when the goods arrive at the warehouse and customary place of deposit; although they may immediately afterwards have received a fresh destination by command of the purchaser (*x*).

Goods in the hands of the purchaser's agents for custody, on the other hand, are not *in transitu,* but are in the actual possession of the purchaser, and cannot be re-taken by the unpaid vendor. An agent for custody, as distinguished from a forwarding agent, is a person who has received goods by the direction and authority of the purchaser as a depositary or bailee invested with authority to receive goods and sell them for the purchaser, or to hold them generally on account of the latter at his disposal, and not for the purpose of helping the goods on a stage further in a direct course of transmission to him. The delivery to such agent is a delivery to the principal, and the *transitus,* consequently, is determined as soon as the goods reach his hands; and, if the transit be once at an end, it cannot commence *de novo,* merely because the goods are again sent upon their travels towards a new destination (*y*). Where goods, ordered by a purchaser for the Valparaiso market, were forwarded by railway to the shipping agents of the purchaser at Liverpool, and were put on board a vessel bound for Valparaiso, but were afterwards re-landed by order of an agent of the purchaser to be re-packed, it was held that the *transitus* was determined, and that the goods had come into the actual possession of the purchaser (*z*).

"If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not

(*u*) *Coventry* v. *Gladstone*, L.R. 6 Eq. 44; 37 L.J. Ch. 492.

(*x*) *Scott* v. *Pettit*, 3 Bos. & P. 469; *Allan* v. *Gripper*, 2 Cr. & J. 218; 1 L.J. Ex. 71; *Foster* v. *Frampton*, 6 B. & C. 107; 5 L.J. (O.S.) K.B. 71; *Dodson* v. *Wentworth*, 4 M. & Gr. 1080; 12 L.J. C.P. 59; *Lickbarrow* v. *Mason*, 1 Sm. L.C. 693 (ed. 11).

(*y*) *Dixon* v. *Baldwen*, 5 East, 175; *Leeds* v. *Wright*, 3 Bos. & P. 300; *Kendall* v. *Marshall, Stevens & Co.*, 11 Q.B.D. 356; 52 L.J. Q.B. 313; *Miles, Ex parte, Isaacs, In re*, 15 Q.B.D. 39; 54 L.J. Q.B. 566.

(*z*) *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 241; for instance where transit held not to be ended, see *Watson, Ex parte*, 5 Ch.D. 35; 46 L.J. Bankr. 97.

deemed to be at an end, even if the seller has refused to receive them back "(*a*). The purchaser or consignee may prolong the right to stop *in transitu* by not taking possession of the goods on their arrival at the place of destination. Thus, although the goods may have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, yet, if the latter, finding himself to be in failing circumstances, has previously declared it to be his intention not to accept the goods, and not to take possession of them as owner, there has been no actual delivery, and the unpaid vendor's right of recovering possession has not been destroyed (*b*). On the 27th October goods were delivered by the vendor in London for shipment to Falmouth, and an invoice sent to the purchaser. At Falmouth they were taken to the warehouse of an agent of the Steam Packet Company, who was in the habit of holding goods from steamers at the risk and to the order of the purchasers and giving notice to them. Before the goods were landed the purchaser committed an act of bankruptcy by absconding, and so no notice was given to him, and on November 4th he was adjudicated bankrupt. On that day the vendor stopped the goods in the warehouse. It was held that the *transitus* was not at an end (*c*).

Duration of transit—Delivery on buyer's ship.—"When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer" (*d*). If the purchaser charters and despatches a vessel to a distant port to receive the goods, and they are put on board, the fact of their being *in transitu* will depend upon the character in which the master or commander receives them. If the charter-party amounts, as it generally does, merely to a contract for the carriage of merchandise, the captain having the general control of the vessel, and continuing the servant of the shipowners, the goods will be received by him in the character of a carrier and will be *in transitu* (*e*). But, if the charter-party amounts to a demise or bailment of the ship, the charterer becoming the temporary owner, and the master or commander his servant or agent, the delivery of the

(*a*) 56 & 57 Vict. c. 71, s. 45 (4).

(*b*) *James* v. *Griffin*, 2 M. & W. 623; 6 L.J. Ex. 241; *Bolton* v. *Lancashire and Yorkshire Ry.*, L.R. 1 C.P. 431; 35 L.J. C.P. 137; see also *Nicholson* v. *Bower*, 1 E. & E. 172; 28 L.J. Q.B. 97; *Heinekey* v. *Earle*, 8 E. & B. 410; 28 L.J. Q.B. 79.

(*c*) *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71.

(*d*) 56 & 57 Vict. c. 71, s. 45 (5).

(*e*) *Bothlingk* v. *Inglis*, 3 East, 381; *Watson, Ex parte*, 5 Ch.D. 35; 46 L.J. Bankr. 97; *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 40 L.J. P.C. 1.

goods on board will be a delivery to the charterer or purchaser, and the possession of the master his possession, and the vendor will have no right to re-take them (*f*), unless the goods are shipped under a bill of lading reserving to the vendor the control over them (*g*). A delivery on board the purchaser's own ship and to his own master is not inconsistent with the vendor's annexing terms to the delivery by bill of lading, which may enable him to retain a right to claim the goods, and prevent delivery if the terms are not complied with (*h*). Where goods shipped on board a vessel were to be delivered to the purchaser "in the port of London," and the vessel arrived at her moorings in the river Thames, and the goods were put into the lighters of a wharfinger employed and paid by the purchaser, it was held that the *transitus* was not determined (*i*). Neither is the *transitus* determined by the actual arrival of the goods in boats or lighters alongside the purchaser's wharf, if the boats and lighters are used merely as the vehicle of conveyance, and not as places of deposit and ultimate reception (*k*). Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end (*l*). Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (*m*). Where twenty mats of flax were sold by a merchant of Hull to a manufacturer near Leeds, and were forwarded by railway to Leeds, and arrived at the carriers' shed at the railway terminus at Leeds, and it was the custom of the carriers to give notice to the manufacturer of the arrival of goods consigned to him, and for the latter to send waggons to convey them to his mills to be manufactured; and, on the arrival of the flax, notice was given to the manufacturer by letter that, unless the goods were sent for, they would remain at warehouse rent; and the manufacturer sent his cart, and took away ten of the mats, but, before the others were removed, he became bankrupt; it was held that the goods had arrived at the place of destination,

(*f*) *Hunter* v. *McTaggart*, cited 3 East, 388; *Schotsmans* v. *Lancashire and Yorkshire Ry.*, L.R. 2 Ch. 332; 35 L.J. Ch. 100.

(*g*) *Van Casteel* v. *Booker*, 2 Exch. 691; 18 L.J. Ex. 9; *Turner* v. *Liverpool Docks Trustees*, 6 Exch. 543; 20 L.J. Ex. 393; *Berndtson* v. *Strang*, L.R. 4 Eq. 481; 36 L.J. Ch. 879.

(*h*) *Ogle* v. *Atkinson*, 5 Taunt. 759; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273.

(*i*) *Jackson* v. *Nichol*, 5 Bing. N.C. 508; 8 L.J. C.P. 294.

(*k*) *Tucker* v. *Humphrey*, 4 Bing. 516; 6 L.J. (O.S.) C.P. 92.

(*l*) 56 & 57 Vict. c. 71, s. 45 (6).

(*m*) *Ib.*, s. 45 (7).

and had come into the constructive possession of the vendee, and that the *transitus* consequently was at an end (*n*).

It seems that the delivery of an essential part of a machine would operate as a delivery of the whole, so as to bar the right of stoppage *in transitu* (*o*).

The vendor's right to stop *in transitu* cannot be defeated by any claim of lien on the part of a carrier, wharfinger or any other middleman, to secure payment of a general balance due to such middleman from the consignee (*p*), nor by a foreign attachment laid upon the goods by a creditor (*q*). While a carrier retains his lien, there is no such delivery to the consignee as to take away the consignor's right to stop *in transitu* (*r*).

Mode of stopping in transitu.—"The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer" (*s*). "When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller" (*t*). The old rule of law, that a stoppage *in transitu* could be effected only by the corporeal touch of the goods, no longer prevails (*u*). A notice to a carrier having charge of the goods is sufficient. The stoppage may be effected either by the unpaid seller himself or his authorised agent; but not by a person who has no authority from the seller to stop the goods; and a subsequent ratification by the seller of an unauthorised stoppage is not equivalent to a precedent authority (*x*).

Re-sale by buyer—Rights of sub-purchasers.—"Subject to

(*n*) *Wentworth* v. *Outhwaite*, 10 M. & W. 436; 12 L.J. Ex. 172; see *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 L.J. K.B. 198; *Jones* v. *Jones*, 8 M. & W. 431; 10 L.J. Ex. 481; *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49; *Kemp* v. *Falk*, 7 App.Cas. 573; 52 L.J. Ch. 167.

(*o*) *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*p*) *Oppenheim* v. *Russell*, 3 Bos. & P. 42; *Richardson* v. *Goss*, *ib.* 119.

(*q*) *Salte* v. *Field*, 5 T.R. 211.

(*r*) *Crawshay* v. *Eades*, 1 B. & C. 181; 1 L.J. (O.S.) K.B. 90.

(*s*) 56 & 57 Vict. c. 71, s. 46 (1); *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157.

(*t*) Sect. 46 (2).

(*u*) *Dixon* v. *Baldwen*, 5 East, 175; *Litt* v. *Cowley*, 7 Taunt. 169; 2 Marsh. 457; *Hutchings* v. *Nunes*, 1 Moo. P.C. N.S. 243.

(*x*) *Bird* v. *Brown*, 4 Ex. 786; 19 L.J. Ex. 154; *Hutchings* v. *Nunes*, 1 Moo. P.C. N.S. 243.

the provisions of this Act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods(*y*) has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee" (*z*). Under this section a mere assent by the unpaid seller of unascertained goods to the fact of a sale or other disposition thereof by the buyer will not deprive such unpaid seller of his right of lien(*a*).

If the purchaser re-sells the goods whilst they are *in transitu*, and receives the price, and then becomes insolvent, the first vendor may stop the goods at any time before they have come into the possession of such second purchaser, and hold them as a security for the due payment of the original purchase-money, unless the second purchaser claims as the *bonâ fide* indorsee and holder of a bill of lading. As between a vendor and his immediate vendee, a bill of lading may be countermanded, in case of the insolvency of the latter, at any time before it has been actually executed, like any other order or direction to a common carrier. But, as between a first vendor and *bonâ fide* sub-purchasers, the case is different. The first vendor by indorsing and delivering a bill of lading to his immediate purchaser, accredits the title of the latter to the goods, and holds him out to the mercantile world as the owner of them; and the *bonâ fide* indorsement and delivery by such purchaser of such bill of lading to a second purchaser deprive the first vendor of all power and control over the goods, and destroy his right to stop *in transitu* as against the latter (*b*). If the assignee of the bill of lading, however, has given no consideration for the indorsement of such bill of lading, or if he knew of the insolvency of his

(*y*) "Document of title to goods" has the same meaning as it has in the Factors Acts; and "Factors Acts" mean the Factors Act, 1889, and any enactment amending or substituted for the same: sect. 62.

(*z*) 56 & 57 Vict. c. 71, s. 47.

(*a*) *Mordaunt Bros.* v. *British Oil and Cake Mills, Ltd.*, (1910) 2 K.B. 502; 79 L.J. K.B. 967.

(*b*) *Lickbarrow* v. *Mason*, 6 East, 20 (*a*); 1 H.Bl. 357; 1 Sm. L.C. 693 (ed. 11); *Gurney* v. *Behrend*, 23 L.J. Q.B. 265; 3 E. & B. 622; *Slubey* v. *Heyward*, 2 H.Bl. 504; *Hibbert* v. *Carter*, 1 T.R. 745; *Westzinthus, In re*, 5 B. & Ad. 817; 3 L.J. K.B. 56; *The Argentina*, L.R. 1 A. & E. 370; *Pease* v. *Gloahec*, *The Marie Joseph*, L.R. 1 P.C. 219; 35 L.J. P.C. 66.

vendor at the time he took the bill, he will be in no better situation than the latter (*c*). It was held that a pre-existing debt was not such a consideration for the indorsement of a bill of lading as to defeat the right of the unpaid vendor to stop *in transitu* (*d*). But this has been dissented from, and it has been held that it is immaterial that the consideration was past and not given at the time when the bill of lading was transferred (*e*). A pledge of the bill of lading does not destroy the consignor's right of stoppage *in transitu* altogether; and he will be entitled to the surplus goods after satisfying the charge of the pledgee (*f*); nor does the fact of the bill of lading being made out in the name of a sub-purchaser defeat this right (*g*).

Effect on sale of lien or stoppage in transitu.—"Subject to the provisions of this section"—that is, sect. 48—"a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage *in transitu* (*h*). Where an unpaid seller who has exercised his right of lien or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer" (*i*). It seems to be now established after considerable discussion that stoppage *in transitu* does not operate as a rescission of the contract of sale (*k*), but merely as a re-imposition of the unpaid vendor's lien. Consequently if a specific ascertained chattel has been sold, so that the right of property has passed to the purchaser, the exercise of the right of stoppage *in transitu* will not at once have the effect of re-vesting the right of property in the vendor (*l*).

Stoppage of part of goods sold under one entire contract of sale does not have the effect of re-vesting in the vendor that portion of them which has been actually delivered to the bankrupt purchaser. "What the effect of stoppage *in transitu* is," observed the Court of Exchequer, "whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight

(*c*) *Waring* v. *Cox*, 1 Campb. 369; *Cuming* v. *Brown*, 9 East, 514.

(*d*) *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 38 L.J. P.C. 30.

(*e*) *Leask* v. *Scott*, 2 Q.B.D. 376; 46 L.J. Q.B. 576.

(*f*) *Spalding* v. *Ruding*, 12 L.J. Ch. 503; 6 Beav. 376; *Westzinthus, In re*, 5 B. & Ad. 817; 3 L.J. K.B. 56; *Kemp* v. *Falk*, 7 App.Cas. 573; 52 L.J. Ch. 167.

(*g*) *Golding, Davis & Co., Ex parte*, 13 Ch.D. 628.

(*h*) 56 & 57 Vict. c. 71, s. 48 (1).

(*i*) Sect. 48 (2).

(*k*) *Wentworth* v. *Outhwaite*, 10 M. & W. 452; 12 L.J. Ex. 172; *per* Lord Blackburn in *Kemp* v. *Falk*, 7 App.Cas. 573, 581; 52 L.J. Ch. 167.

(*l*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

of authority), the vendor is entitled to retain the part actually stopped *in transitu* until he is paid the price of the whole, but has no right to re-take that which has arrived at its journey's end. His right of lien on the part stopped is re-vested, but no more" (*m*). If the sale is a sale of things of quantity generally, and the vendor will fulfil his contract by delivering any articles of the character and description mentioned in the contract, the vendor may, after he has recovered possession of the goods by the exercise of the right of stoppage, re-sell them (*n*); but he may be obliged to furnish other goods of a similar character and description to those originally bargained for, on tender of the price by the assignees.

When vendor may re-sell.—"Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract" (*o*). If ascertained chattels have been bargained and sold, and the right of property has passed to the purchaser, the vendor cannot rescind the contract and re-vest the right of property in himself, and re-sell the goods, by reason of the neglect of the vendee to take and pay for the goods at the time appointed (*p*); but, if the purchaser continues in default, and will not perform his part of the contract under such circumstances that his refusal amounts to a repudiation of his obligation, the vendor may rescind the contract and re-sell the goods within a reasonable period after he has given the purchaser express notice of his intention so to do. A mere notice to remove the goods and pay the price will not justify the vendor in re-selling (*q*); but, if the latter gives to the purchaser a distinct intimation of his intention to re-sell in case of the non-removal and non-payment of the goods within a reasonable period from the receipt of the notice, and the purchaser then refuses to pay for the goods, he may fairly be deemed either to have himself repudiated the contract, or to be an assenting party to the sale, or to have given the vendor an implied authority to re-sell (*r*). "Where the

(*m*) *Wentworth* v. *Outhwaite*, 10 M. & W. 451; 12 L.J. Ex. 172; *Tanner* v. *Scovell*, 14 M. & W. 28; 14 L.J. Ex. 321; *Valpy* v. *Oakeley*, 16 Q.B. 941; 20 L.J. Q.B. 380; *Chalmers, Ex parte*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*n*) *Clay* v. *Harrison*, 10 B. & C. 99; 8 L.J. (O.S.) K.B. 90.

(*o*) 56 & 57 Vict. c. 71, s. 48 (3).

(*p*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155; *Wilmshurst* v. *Bowker*, 7 M. & Gr. 882; 12 L.J. C.P. 475; *Key* v. *Cotesworth*, 7 Exch. 607; 22 L.J. Ex. 4; *Page* v. *Cowasjee*, L.R. 1 P.C. 127.

(*q*) *Greaves* v. *Ashlin*, 3 Campb. 426.

(*r*) *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184; *Langfort* v. *Tiler*,

seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages" (*s*).

Actions for breach of the contract—Remedies of seller—Action for price.—"Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods" (*t*). "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract" (*u*).

The price of goods was formerly recoverable under one of two counts—namely, (1) goods bargained and sold, and (2) goods sold and delivered. The former count was applicable where upon the sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and delivery was not part of the consideration for the price or a condition precedent to its recovery (*x*). The count for goods sold and delivered was applicable where upon the sale of goods the property had passed and the goods had been delivered to the purchaser and the price was payable at the time of action brought (*y*). The old forms of action have been abolished, and with them has departed much of the clearness of thought which evolved them and which they maintained. But even now for a clear understanding of the older cases it is advisable to study the different forms of action. The price is recoverable as soon as, but not before, the property has passed (*z*).

Non-payment of price—Goods bargained and sold.—If goods are sold subject to a condition that, if the purchase-money be not paid by a particular day, they may be re-sold by the vendor, and the loss on the re-sale recovered from the purchaser making default, and the right of re-sale is exercised, or if the purchaser has refused to take and pay for the goods, and the goods have been re-sold by the vendor, the vendor cannot, after such re-sale,

1 Salk. 113; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30.

(*s*) 56 & 57 Vict. c. 71, s. 48 (4).

(*t*) Sect. 49 (1).

(*u*) Sect. 49 (2).

(*x*) Bullen & Leake's Prec. p. 39 (ed. 1868).

(*y*) *Ib.*, p. 39.

(*z*) *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Turley* v. *Bates*, 5 H. & C. 200; sub nom. *Furley* v. *Bates*, 33 L.J. Ex. 43.

recover the price of the goods, but only the damage he has sustained by reason of the non-payment of the price (*a*). If the price to be paid for the goods is to be fixed by the valuation or award of a third party to be named by the purchaser, and the latter refuses to name or appoint such valuer, it was doubtful whether the vendor could sue for the price, or must bring an action against the purchaser for refusing to make the nomination or appointment (*b*). Everything that is to be done on the part of the vendor to complete the sale, and transfer the ownership of the thing sold to the purchaser, and place it at his disposal, so far at least as to enable the latter to obtain possession of it, and deal with it as he may think fit, on payment or tender of the price, must be performed before an action for the price can be maintained (*c*). When the right of property in the subject-matter of the sale has passed by the bargain to the purchaser, the latter is not released from his obligation to pay the price, by reason of the vendor's neglect to deliver the goods at the time appointed for delivery, unless the time for delivery is of the essence of the contract, and it appears to have been the intention of the parties that the sale should be at an end in case of non-delivery on the day appointed. If the sale is a sale of an ascertained share of a particular chattel, such as a share of a coach or a horse, or a share of a butt of wine, or a cistern of oil, or a cargo of corn, sold as an undivided quantity at an ascertained price, the sale is complete, and the vendor is entitled to the price as soon as he has transferred his share and interest by a properly authenticated contract. In sales of this kind the vendor only undertakes to sell and transfer the share, and to convey to the purchaser the same right to the undivided quantity that he himself possessed. He does not engage to put the purchaser into possession of the coach, or the horse, or to divide the wine, or measure off the oil or the corn, and put the purchaser into separate possession of the share.

Goods sold and delivered.—An action for the price of goods sold and delivered could not be brought before delivery (*d*). When goods and chattels have been actually delivered to and received by a third party under circumstances fairly giving rise to a presumption that they were bought and sold, a jury may

(*a*) *Lamond* v. *Davall*, 9 Q.B. 1030; 16 L.J. Q.B. 136; *Hore* v. *Milner*, 1 Peake, 58; *Hagedorn* v. *Laing*, 6 Taunt. 162; *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184; *Clarke* v. *Westrope*, 18 C.B. 765; 25 L.J. C.P. 287; *Keys* v. *Harwood*, 2 C.B. 905; 15 L.J. C.P. 207; *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145.

(*b*) *Thurnell* v. *Balbirnie*, 2 M. & W. 786; 6 L.J. Ex. 255.

(*c*) *Smith* v. *Chance*, 2 B. & Ald. 753; *Boswell* v. *Kilborn*, 15 Moo. P.C. 309.

(*d*) *Smith* v. *Chance*, *supra*; *Boulter* v. *Arnott*, 1 Cr. & M. 333; 2 L.J. Ex. 97.

infer the existence of a contract of sale between the parties, although not one word was said about buying and selling, and no price was mentioned (*e*). When an Act of Parliament, for the purpose of protecting buyers, prescribes regulations to be followed in the sale and delivery, the vendor cannot, if he neglects to observe such regulations, recover the price (*f*). Where goods have been sold and delivered, but it is a condition that the goods should be capable of performing certain work, and the buyer prevents the possibility of the seller performing the condition, it must be taken to be performed, and the price is recoverable (*g*).

Goods sold on credit.—If goods are sold on credit, the vendor cannot sue for the price until the period of credit has expired (*h*), unless the giving of credit has been made conditional on the performance of some precedent act by the purchaser and the terms on which it was given have not been performed, in which case the sale is not in truth a sale on credit at all. If a bill not payable on demand is taken for the price, the sale is a sale on credit and no action can be brought until the bill is due (*i*). If the goods are sold upon the terms that the purchaser is to give his acceptance at two or more months for the price, and are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must either sue on the promise to give the acceptance, or wait the termination of the period during which the bill had to run (*k*). If, however, the goods are sold on the terms that the vendor is to have a bill at three months or cash, and the purchaser fails to give the bill, the vendor may at once sue for a fair and reasonable price in cash (*l*). Where, by the terms of a contract of sale, the purchaser was to pay part of the price in cash and the residue by bills, payable in succession every three months, and the purchaser omitted to pay the cash, and to give the bills, it was held that the vendor could not maintain an action for the price of the goods until the expiration of the period at which the last bill would become due, but must sue on the special contract for the non-payment of the money and

(*e*) *Ante*, p. 454; *Bennett* v. *Henderson*, 2 Stark. 550; *Coles* v. *Bulman*, 6 C.B. 184; 17 L.J. C.P. 302; see also *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*f*) *Cundell* v. *Dawson*, 4 C.B. 378; 17 L.J. C.P. 311.

(*g*) *Mackay* v. *Dick*, 6 App.Cas. 251.

(*h*) *Paul* v. *Dod*, 2 C.B. 800; 15 L.J. C.P. 177; *Strutt* v. *Smith*, 1 Cr. M. & R. 312; 3 L.J. Ex. 357; *Price* v. *Nixon*, 5 Taunt. 338.

(*i*) *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L.J. (O.S.) K.B. 258.

(*k*) *Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 Bos. & P. 582.

(*l*) *Rugg* v. *Weir*, 16 C.B. N.S. 477. And see *ante*, p. 555, *Conditional Sale*.

the non-delivery of the bills (*m*). But, where the defendant, when a portion of the goods has been delivered under the contract, repudiates the transaction and refuses to receive any more, the plaintiff has a right to treat the contract as rescinded, and to sue for the value of the goods which have been delivered (*n*). If the contract is entire for the delivery of an undivided quantity of goods at a certain price by a certain time, the vendor cannot, after delivering part of the goods, sue for the price of that part until the whole has been delivered (*o*); but, if he delivers part, and such part is retained and used by the purchaser after the time for the delivery of the whole has expired, the purchaser is bound, notwithstanding the non-performance of the contract by the vendor, to pay what the part retained and used by him may be reasonably worth (*p*). Where delivery is to be made in different parcels over a specified period, the purchaser may be bound to accept such parcels as arrive in time though subsequent parcels may arrive late (*q*).

Damages for non-acceptance.—"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance (*r*). The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract (*s*). Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept" (*t*). If the right of property has not been divested out of the vendor, he cannot bring an action for the price of the goods; for he cannot have both the goods and the price; but he may sue the purchaser for his breach of contract in not accepting them, in which case the measure of damages will be the difference between the agreed price and the marketable value of the goods at the time they were refused acceptance by the purchaser, in addition to the costs, charges, and expenses necessarily incurred by the vendor in fulfilling his part of the contract. But the vendor is not bound to wait until the time

(*m*) *Paul* v. *Dod*, 2 C.B. 800; 15 L.J. C.P. 177.

(*n*) *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145; *Lee* v. *Risdon*, 7 Taunt. 189. See further *Jackson* v. *Rotax Motor Co.*, (1910) 1 K.B. 937; 80 L.T. K.B. 38.

(*o*) *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492.

(*p*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264.

(*q*) *Brandt* v. *Lawrence*, 1 Q.B.D. 344; 46 L.J. Q.B. 237.

(*r*) 56 & 57 Vict. c. 71, s. 50 (1).

(*s*) Sect. 50 (2).

(*t*) Sect. 50 (3).

comes for acceptance. He may treat an unqualified refusal by the purchaser to accept as a repudiation once for all of the contract and sue immediately. The measure of damages is the same in either case; but in the latter the jury have to surmise, instead of merely computing the difference between the contract price and the market price at the date or dates when the goods ought to be accepted(*u*). If the market price of the article has declined after the making of the contract, and the purchaser gives notice to the vendor that he will not accept, the proper measure of damages is not the difference between the contract price and the market price on the day the notice was given, but at the time when the contract ought to have been fulfilled by the acceptance of the goods, if it had been carried into effect as originally intended (*x*). If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realised on the re-sale, with the costs and expenses of the re-sale; but, if the re-sale has been unreasonably delayed until the market has fallen, the price realised on such re-sale will not afford a true criterion of the damage (*y*).

Remedies of the buyer—Damages for non-delivery.—"Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery" (*z*).

"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract" (*a*).

"Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver" (*b*).

Where the defendant did not deliver a quantity of iron in three equal proportions as agreed, it was held that the true

(*u*) *Cort* v. *Ambergate Ry.*, 17 Q.B. 127; 20 L.J. Q.B. 460; *Hochster* v. *De la Tour*, 2 E. & B. 687; 22 L.J. Q.B. 455; *Frost* v. *Knight*, L.R. 2 Ex. 111; 41 L.J. Ex. 78; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 65.

(*x*) *Philpotts* v. *Evans*, 5 M. & W. 475; 9 L.J. Ex. 33; *Boorman* v. *Nash*, 9 B. & C. 145; 7 L.J. (O.S.) K.B. 150; *Startup* v. *Cortazzi*, 2 Cr. M. & R. 165; 4 L.J. Ex. 218.

(*y*) *Stewart* v. *Cauty*, 8 M. & W. 160; 10 L.J. Ex. 348; *Pott* v. *Flather*, 16 L.J. Q.B. 366.

(*z*) 56 & 57 Vict. c. 71, s. 51 (1).

(*a*) Sect. 51 (2). See *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L.J. Ex. 179.

(*b*) Sect. 51 (3); *Barrow* v. *Arnaud*, 8 Q.B. 595, 609; *Gainsford* v. *Carroll*, 2 B. & C. 624; 2 L.J. (O.S.) K.B. 112; *Peterson* v. *Ayre*, 13 C.B. 353; *Josling* v. *Irvine*, 6 H. & N. 512; 30 L.J. Ex. 78.

measure of damages, in the absence of proof by the defendant that the plaintiff might have mitigated the loss, was the sum of the differences between the contract and market prices of each third of the quantity on the respective dates at which they ought to have been delivered (*c*). But the plaintiff cannot by keeping the goods increase the damages. Thus where the plaintiff, as trustee of L., sued the defendant for damages arising from the defendant having sold to L. rupee paper upon a false representation, and L. sold the rupee paper some time after at a great loss, it was held that the true measure of damages was not this loss, but was the difference between the price paid and the price in the market on the same day on which he bought from the defendant (*d*). Where, after breach of a written agreement to deliver goods, the buyer, at the seller's request, waited several months before buying goods in the place of those contracted for, it was held that the true measure of damages was the difference between the contract price and the price of the substituted goods though this price was greater than that of such goods when the contract was first broken (*e*). If there is no market for the article contracted for, the measure of damages is the value of it at the time of the breach, and if the plaintiff does the best he can, and buys the nearest in price and quality that he can get, he is entitled to recover the difference in the price (*f*). If the goods are ordered in England by a merchant abroad, for the purpose of being exported and re-sold in a foreign market, and the order is accepted, and the vendor, knowing that the goods are required for a foreign market, undertakes to forward the goods but neglects so to do, the measure of damages is not the difference between the agreed price and the marketable value of the goods in England, but between the price and the marketable value of the goods at the place where they would have been re-sold by the purchaser (*g*). The purchaser cannot recover as special damage the loss of anticipated profits in the home market; nor, if he has contracted to re-sell the goods at a profit, can he recover such profit (*h*), unless the loss of such

(*c*) *Brown* v. *Muller*, L.R. 7 Ex. 319; 41 L.J. Ex. 214; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 165. See also *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130.

(*d*) *Waddell* v. *Blockey*, 4 Q.B.D. 678; 48 L.J. Ex. 517.

(*e*) *Ogle* v. *Vane* (*Earl*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77.

(*f*) *Hinde* v. *Liddell*, L.R. 10 Q.B. 265; 44 L.J. Q.B. 105.

(*g*) *Bridge* v. *Wain*, 1 Stark. 504; *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154; *Borries* v. *Hutchinson*, 18 C.B. N.S. 445; 34 L.J. C.P. 169. But see as to this case *Elbinger* v. *Armstrong*, L.R. 9 Q.B. 473; 43 L.J. Q.B. 211; *Grebert Borgnis* v. *Nugent*, 15 Q.B.D. 55; 54 L.J. Q.B. 511.

(*h*) *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L.J. Q.B. 221, qualifying and restricting *Dunlop* v. *Higgins*, 1 H.L. Cas. 403, and overruling *Waters* v. *Towers*, 8 Exch. 401; 22 L.J. Ex. 186. See also *Thol* v. *Henderson*, 8 Q.B.D. 457; Mayne on Damages, 62 (ed. 6).

profits was or might reasonably have been contemplated by the vendor as naturally flowing from his breach.

If the vendor has a month, or any specific period of time, allowed to him for making the delivery, and finds, before the time has elapsed, that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made (*i*). If the vendor of shares neglects to deliver the shares or complete the transfer, the measure of damages is the difference between the price agreed to be paid and the market price on the day on which the sale should have been perfected; and the purchaser is not entitled to damages in respect of a further advance of price taking place afterwards (*k*). But when the vendor holds in his hands the money of the purchaser, and thereby prevents him from using it, and from buying other shares therewith, or wrongfully sells the shares, the proper measure of damages would seem to be the highest price for which the same number of shares might be purchased in the market, either on the day the contract was broken, or at any time between that day and the day of trial, if the action has been brought without any unreasonable or improper delay (*l*). When the action is not brought upon the special contract, but for the recovery of the purchase-money, as money had and received, on the ground of a total failure of the consideration for the payment, the whole purchase-money is recoverable (*ante*, p. 136).

Specific performance.—"In any action for breach of contract to deliver specific (*m*) or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment" (*n*).

Damages are in general as complete a remedy for the pur-

(*i*) *Leigh* v. *Paterson*, 8 Taunt. 540; *Loder* v. *Kekulé*, 3 C.B. N.S. 128; 27 L.J. C.P. 27.

(*k*) *Tempest* v. *Kilner*, 3 C.B. 253; 15 L.J. C.P. 10; *Gainsford* v. *Carroll*, 2 B. & C. 624; 2 L.J. (O.S.) K.B. 112; *Shaw* v. *Holland*, 15 M. & W. 138; 15 L.J. Ex. 87.

(*l*) *Owen* v. *Routh*, 14 C.B. 337; 23 L.J. C.P. 105; *Shaw* v. *Holland*, *supra*; *Michael* v. *Hart*, (1902) 1 K.B. 482; 71 L.J. K.B. 265.

(*m*) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made: sect. 62.

(*n*) 56 & 57 Vict. c. 71, s. 52.

chaser as the delivery of the goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like goods (*o*). But a contract for the sale of a specific chattel, such as a barge or a vessel, may be enforced *in specie* (*p*); and the court has an inherent power to order the delivery of a specific chattel having a "*pretium affectionis*," or a peculiar value resting on its individuality, such as "the Pusey Horn" (*q*), St. Margaret's silver tobacco-box (*r*), the silver altar-piece of the Duke of Somerset (*s*), the insignia and decorations of a lodge of freemasons (*t*), and old family pictures (*u*) and heirlooms (*x*), and none the less because the plaintiff's right to possession is founded on a contract of sale (*y*). A contract for the sale of 500 chests of tea is not a contract which can be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell certain chests of a particular kind of tea deposited in a particular locality may be enforced *in specie;* and the purchaser may obtain an injunction to prevent the seller from delivering it to any other person (*z*). Wherever the object of sale is such that there is an uncertainty whether the purchaser can procure another chattel of the same kind and value, or the possession of it is desirable for certain purposes which no other chattel of the same kind will answer, a specific performance will be decreed (*a*).

Remedy for breach of warranty.—"Where there is a breach of warranty (*b*) by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price (*c*); or (b) maintain an action against the seller for damages for the breach of warranty (*d*).

"The measure of damages for breach of warranty is the

(*o*) Story's Eq. Jur. § 717; *Buxton* v. *Lister*, 3 Atk. 383; *Pooley* v. *Budd*, 14 Beav. 34.

(*p*) *Claringbould* v. *Curtis*, 21 L.J. Ch. 541.

(*q*) *Pusey* v. *Pusey*, 1 Vern. 273. See *ante*, p. 292.

(*r*) *Fells* v. *Read*, 3 Ves. 70.

(*s*) *Somerset* (*Duke*) v. *Cookson*, 3 P. Wms. 389.

(*t*) *Lloyd* v. *Loaring*, 6 Ves. 773.

(*u*) *Arundel* (*Lady*) v. *Phipps*, 10 Ves. 139; *Lowther* v. *Lowther*, 13 Ves. 95.

(*x*) *Macclesfield* (*Earl*) v. *Davis*, 3 Ves. & B. 16.

(*y*) *Arundel* (*Lady*) v. *Phipps*, *supra*; *Lowther* v. *Lowther*, *supra*.

(*z*) Ld. Westbury, *Holroyd* v. *Marshall*, 33 L.J. Ch. 196; 10 H.L. Cas. 209.

(*a*) *Falcke* v. *Gray*, 29 L.J. Ch. 28; 4 Drew. 651.

(*b*) See definition of "warranty," sect. 62; *Cutler* v. *Close*, 5 Car. & P. 337; *Allen* v. *Cameron*, 1 Cr. & M. 832; 2 L.J. Ex. 263; *Turner* v. *Diaper*, 2 M. & Gr. 241.

(*c*) See *Bostock & Co.* v. *Nicholson & Sons*, (1904) 1 K.B. 725; 73 L.J. K.B. 524; *Poulton* v. *Lattimore*, 9 B. & C. 259; 7 L.J. (O.S.) K.B. 225.

(*d*) 56 & 57 Vict. c. 71, s. 53 (1).

estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (*e*).

"In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty (*f*).

"The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage" (*g*).

Formerly there was a distinction between an action on the contract itself for the agreed price, and an action upon a bill of exchange or promissory note given by way of payment for the amount. In the former, the value only could be recovered; in the latter, the party holding bills given for the price of the goods supplied could recover on them, unless there had been a total failure of the consideration. If the consideration failed partially, as by the inferiority of the article furnished, the buyer had his remedy by cross-action (*h*). Thus, where a contract was entered into for the purchase of goods of "good quality and moderate price," and the price was estimated at 1,000*l*., and bills were given for that amount, it was held to be no defence to an action on the bills that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid on the bills more than the real value of the goods(*i*).

Breach of warranty—Damages.—If the purchaser brings his action against the vendor for a breach of warranty of the quality or soundness of the thing sold, and the goods have been received back by the vendor (*ante*, pp. 555, 557), the measure of damages is the marketable value which the goods would have possessed in the hands of the purchaser at the time of the delivery, if they had corresponded with the warranty given. If they have not been returned by the purchaser, the measure of damages is then the difference between their marketable value to the purchaser in their defective state at the time of delivery, and the value they would have possessed had they answered the warranty; and, if they have been re-sold by the purchaser without delay, and before any considerable fluctuations in the market have taken place, it is the difference between the price realised

(*e*) 56 & 57 Vict. c. 71, s. 53 (2).

(*f*) Sect. 53 (3).

(*g*) Sect. 53 (4); *Mondel* v. *Steel*, 8 M. & W. 858; 10 L.J. Ex. 426; *Rigge* v. *Burbidge*, 15 M. & W. 598; 15 L.J. Ex. 309.

(*h*) *Tye* v. *Gwynne*, 2 Campb. 346; *Camac* v. *Warriner*, 1 C.B. 357; *Trickey* v. *Larne*, 6 M. & W. 278; 9 L.J. Ex. 141; *Warwick* v. *Nairn*, 10 Exch. 762; compare also *Moggridge* v. *Jones*, 3 Campb. 38.

(*i*) *Obbard* v. *Betham*, M. & M. 483. See as to counterclaim, Ord. XIX. r. 3.

on the re-sale, after deducting the cost and expenses of the re-sale, and the price they would have fetched if they had answered the warranty.

Where goods had been purchased with a warranty in England, to be exported and re-sold in China, and the goods, on their arrival in Canton, were found not to answer the warranty, the measure of damages was held to be, not the difference between the agreed price and the price realised on the re-sale in China, but between the last-named price and what they would have sold for in the Chinese market had they corresponded with the warranty (*k*). Where the plaintiff purchased a horse at Northallerton Fair with a warranty of soundness, and after bringing it to London re-sold it with a similar warranty, but had to return the purchase-money because the horse proved to be unsound, it was held in an action against the original seller for breach of warranty that the plaintiff could not recover as special damage the loss of a bargain on the re-sale of the horse, though the contract of re-sale, at a profit, had been actually completed before the unsoundness was discovered (*l*). At the trial *Lord Denman*, C.J., ruled that in such a case the measure of damages would be the difference between the value of the horse if sound (of which the price given would be only strong evidence) and the sum it would bring as unsound; and he also ruled that the plaintiff was entitled to recover the cost of bringing the horse to London and of its keep, but not the expenses of obtaining a certificate of unsoundness from the Veterinary College, nor any legal expenses which were not the necessary result of the defendant's breach of contract (*m*). If the purchaser, as soon as he has discovered the unsoundness of a horse, and consequent breach of warranty, tenders back the horse to the vendor, he may, on the vendor's refusal to take it back, recover the expense of the keep whilst he is preparing to re-sell the animal to the best advantage (*n*).

Special damages—Re-sale with a warranty—Costs of legal proceedings.—If special damages of which the vendor has notice have been sustained by the purchaser, they may be recovered from the vendor (*ante*, p. 281). Thus, where the plaintiff, having bought of the defendant a horse warranted sound, re-sold the horse with a like warranty, and was sued for a breach thereof by the second purchaser, and then gave the defendant notice

(*k*) *Bridge* v. *Wain*, 1 Stark. 504.

(*l*) *Clare* v. *Maynard*, 6 Ad. & E. 519; 6 L.J. K.B. 138.

(*m*) *Clare* v. *Maynard*, 7 Car. & P. 741; *Cox* v. *Walker*, 7 Car. & P. 744; 6 Ad. & E. 523, note (a).

(*n*) *Caswell* v. *Coare*, 1 Taunt. 566; *M'Kenzie* v. *Hancock*, Ry. & M. 436; *Chesterman* v. *Lamb*, 2 Ad. & E. 129; *Ellis* v. *Chinnock*, 7 Car. & P. 169.

of the action, and offered him the option of defending it, but the defendant gave no answer, and the plaintiff failed in the action and had to pay damages and 88*l.* costs, it was held that he was entitled to recover these costs, in addition to the damages he had been compelled to pay to his immediate purchaser (*o*). So, where the defendant sold the plaintiff a picture warranted to be painted by Claude, and the plaintiff afterwards re-sold the picture with a like warranty, and the picture turned out not to be a Claude, and the second purchaser sued the plaintiff for the breach of warranty, and recovered a certain sum for damages, and costs, and the plaintiff then sued the defendant, it was held that he was entitled to recover the amount of the damages and costs paid to the second purchaser, and also his own costs incurred in defending the action brought by the latter (*p*). But, if the plaintiff has made a rash and improvident defence; if, for instance, he has had an opportunity of testing the thing purchased, and might have ascertained by examination whether it did or did not correspond with the warranty, and has neglected so to do, and runs his chance of an action, he will not be permitted to recover the cost of his defence (*q*). But, even where the purchaser is justified in defending the action brought against him by a sub-purchaser it would seem that he is entitled to recover his costs only as between party and party, and not as between solicitor and client, except in the case of a contract, express or implied, to indemnify (*r*).

Interest and special damages.—Nothing in the Sale of Goods Act, 1893, is to affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed (*s*).

Sale by auction.—"In the case of a sale by auction—(1.) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale: (2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid: (3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller,

(*o*) *Lewis* v. *Peake*, 7 Taunt. 153.

(*p*) *Pennell* v. *Woodburn*, 7 Car. & P. 118; *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 143; *Randall* v. *Raper*, E. B. & E. 84; 27 L.J. Q.B. 266; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 58.

(*q*) *Wrightup* v. *Chamberlain*, 7 Sc. 598.

(*r*) *Howard* v. *Loregrove*, L.R. 6 Ex. 43; 40 L.J. Ex. 13, commenting on *Grace* v. *Morgan*, 2 Bing. N.C. 534; 5 L.J. C.P. 180.

(*s*) 56 & 57 Vict. c. 71, s. 54.

it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer: (4.) A sale by auction may be notified to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller.

"Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction" (*t*).

Sale and transfer of tenant's fixtures and trade fixtures.—If an article affixed to the freehold is sold with a view to its immediate severance therefrom, the contract is simply a contract for the purchase and sale of a chattel (*u*). If it is not purchased with a view to immediate severance, the contract is then a contract for the sale and purchase of a fixture. A contract for the sale and fixing up in a dwelling-house of a copper or a stove is not a contract for the sale of fixtures, but of goods and chattels, and for the performance of work and labour. If a contract is made for the erection upon the soil, or in a dwelling-house, of machinery, presses, &c., the contract would seem to be properly a contract for work and labour and the supply of materials. It is a contract for the erection, and not for the sale, of a fixture, and is the same in principle as a contract to erect a pillar or build a house (*x*).

Authentication of contracts for the sale of fixtures.—A contract for the sale of fixtures, as such, is not a contract for the sale of an interest in land, nor for the sale of goods and chattels (*ante*, p. 28). A signed writing, consequently, is not necessary, as between vendor and purchaser, for the authentication of the contract (*y*). Where fixtures have been sold at a price to be ascertained by valuation, if, after the valuation has been made and delivered to the purchaser, the latter takes possession of the fixtures, or exercises dominion over them, he will be deemed to have adopted the valuation and assented to the price as ascertained by the brokers (*z*).

(*t*) 56 & 57 Vict. c. 71, s. 58; as to sales by auction, see also *ante*, pp. 17, 476. As to claim against an auctioneer for damages for an alleged breach of warranty of authority to sell, see *Rainbow* v. *Howkins*, (1904) 2 K.B. 322; 73 L.J. K.B. 641, commented on in *McManus* v. *Fortescue*, (1907) 2 K.B. 1; 76 L.J. K.B. 393.

(*u*) See 56 & 57 Vict. c. 71, s. 62, under which "goods" includes things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

(*x*) *Pinner* v. *Arnold*, 3 Cr. M. & R. 613; 5 L.J. Ex. 1.

(*y*) *Lee* v. *Gaskell*, 1 Q.B.D. 700; 45 L.J. Q.B. 540.

(*z*) *Salmon* v. *Watson*, 4 Moore, 73.

SECTION III.

OF CONTRACTS FOR THE SALE OF INCORPOREALS.

Grants and transfers of incorporeal rights and incorporeal hereditaments, such as rights of common, rights of way or watercourse, advowsons, tithes, rents, annuities, and profits issuing out of land, must, in order to be valid and irrevocable at common law, be made by DEED (*a*). Thus a right to take tolls for the passage of a ferry or a bridge must be transferred by deed (*b*). A right to go upon another man's land, as to remove fixtures (*c*), or to shoot and sport over a manor, or to fish in the waters thereof, whether it be a mere licence of pleasure authorising the licensee to take, but not to carry away, or a licence of profit authorising him both to take and carry off, the game or the fish, is an incorporeal right lying in grant, and can only be created by deed (*d*). A parol licence or permission will, so long as it has not been countermanded, justify an entry upon the land (*e*); but it can confer no indefeasible right, and may be recalled at the pleasure of the grantor, even although money be paid for it, and without paying back the money paid for it (*f*). A licence properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it would be unlawful (*g*). But, although at common law to the creation of an indefeasible right a deed is required, yet a landowner may, by a writing satisfying the Statute of Frauds, agree to allow another person to come upon his land and take a profit from the soil, or to exercise and enjoy on his land certain privileges, an interruption in the enjoyment of which rights will render him responsible in damages (*h*). If a parol licence or permission is given to another person to enjoy some profit or privilege on the land of the licensor necessarily involving the expenditure of money, and the licensor stands by and allows the licensee to expend his money on the land in reliance on the enjoyment of the privilege, the licence cannot afterwards be withdrawn without tendering the licensee

(*a*) Bac. Abr. Grants, E.; Co. Litt. 9 a, 42 a; 14 Vin. Abr. Grant (G.) (a); 2 Roll. Abr. Grant (G.); *Jones* v. *Robin*, 10 Q.B. 620; 17 L.J. Q.B. 121.

(*b*) *Reg.* v. *Salisbury* (*Marquis*), 8 Ad. & E. 716, 739; 7 L.J. M.C. 110.

(*c*) *Ruffey* v. *Henderson*, 17 Q.B. 574; 21 L.J. Q.B. 49.

(*d*) *Somerset* (*Duke*) v. *Fogwell*, 5 B. & C. 875; 5 L.J. (O.S.) K.B. 49; *Bird* v. *Higginson*, 6 Ad. & E. 824; 6 L.J. Ex. 282; *Thomas* v. *Fredericks*, 10 Q.B. 775; 16 L.J. Q.B. 393; *Ewart* v. *Graham*, 7 H.L.Cas. 331; 29 L.J. Ex. 88.

(*e*) *Feltham* v. *Cartwright*, 7 Sc. 695; 9 L.J. C.P. 67.

(*f*) *Wood* v. *Leadbitter*, 13 M. & W. 838; 14 L.J. Ex. 161.

(*g*) *Per* Vaughan, C.J., in *Thomas* v. *Sorrell*, Vaughan, 351.

(*h*) *Smart* v. *Jones*, 15 C.B. N.S. 717; 33 L.J. C.P. 154; *Kerrison* v. *Smith* (1897) 2 Q.B. 445; 66 L.J. Q.B. 762.

compensation for his expenditure (*i*). Where a colliery proprietor, wanting to construct a railway across the defendant's land, wrote a letter to the defendant, offering a fair price for the land, which letter was not answered, and, under the idea that he had the right to make the railway by virtue of a local Act, entered upon the defendant's land and constructed the railway and used it for three or four years with the acquiescence of the defendant, and the parties afterwards engaged in unsuccessful negotiations for a settlement of the price of the land, whereupon the defendant brought an action of ejectment, an injunction was granted to restrain the defendant from obstructing or interfering with the plaintiff's use of the railway, on a sum of money being paid into court sufficient to secure to the defendant the price of the land (*k*). So, when a party has agreed to pay a certain sum for a licence of profit, and has enjoyed the benefit of the licence, it is no answer, in an action for the money agreed to be paid, to say that the licence was not under seal. Thus, where an action was brought for a sum of money agreed to be paid for the use and enjoyment of a licence to fish, it was held to be no defence to the action that the licence was not under seal (*l*). A profit *a prèndre* cannot be claimed by custom (*m*); nor can there be prescription in a *que* estate for the exercise of such a right without stint *in alieno solo* (*n*). A bare licence to seize chattels cannot be legally assigned (*o*); and before a licence is revoked reasonable time should be allowed to the licensee to move off the premises (*p*). A parol licence to enjoy an easement over or upon the freehold of another is at once determined by a transfer of the property; and the grantee of the licence is consequently a trespasser, if he afterwards enters upon the land in the exercise of his supposed right, although he has received no notice of the transfer (*q*).

A mere licence of pleasure amounts only to a personal con-

(*i*) *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, 170; *Clavering's Case*, 5 Ves. 690; *Bankart* v. *Tennant*, L.R. 10 Eq. 141; 39 L.J. Ch. 809.

(*k*) *Powell* v. *Thomas*, 6 Hare, 300; *Laird* v. *Birkenhead Ry.*, 1 Johns. 500; 29 L.J. Ch. 218.

(*l*) *Holford* v. *Pritchard*, 3 Exch. 793; 18 L.J. Ex. 315; *Smart* v. *Jones*, 15 C.B. N.S. 717; 33 L.J. C.P. 154; *Radcliff* v. *Hayes*, (1907) 1 Ir. R. 101.

(*m*) *Gateward's Case*, 6 Rep. 59, b.

(*n*) *Valentine* v. *Penny*, Noy, 145; *Cheedley* v. *Mellor*, 1 Sid. 313; *Clayton* v. *Corby*, 5 Q.B. 415; 14 L.J. Q.B. 364; *Ramsgate Corporation* v. *Debling*, 70 J.P. 132; 22 T.L.R. 369; *Chesterfield* (*Lord*) v. *Harris*, (1908) 2 Ch. 397; 77 L.J. Ch. 688.

(*o*) *Brown* v. *Metropolitan Counties Life Assurance Society*, 28 L.J. Q.B. 236; *Davis & Co., In re*, *Rawlings*, *Ex parte*, 22 Q.B.D. 193.

(*p*) *Cornish* v. *Stubbs*, L.R. 5 C.P. 334, 339; *Mellor* v. *Watkins*, L.R. 9 Q.B. 400, 405. As to what amounts to reasonable notice, see *Lowe* v. *Adams*, (1901) 2 Ch. 598; 70 L.J. Ch. 783.

(*q*) *Wallis* v. *Harrison*, 4 M. & W. 538; 8 L.J. Ex. 44; *Russell* v. *Harford*, L.R. 2 Eq. 507; *Roberts* v. *Rose*, L.R. 2 Ex. 82; 35 L.J. Ex. 62.

tract, or to an ordinary covenant, and does not transfer to the licensee or his heirs any right to, or interest in, the soil and freehold of the licensor. "If one licence me and my heirs to come and hunt in his park, I must have a writing (that is a deed) of that licence; for a thing passes by the licence which endures in perpetuity: but, if he license me one time to hunt, this is good without deed; for no inheritance passes" (*r*). If the licence be a mere personal licence of pleasure, the licensee cannot take away for his own use the game killed, or go with servants upon the land, still less send servants to kill for him, or assign his licence to another.

A licence under seal to convey coals or timber in carts, or water in drains or channels, across the land of the licensor, is a licence of profit, and not one of pleasure, and will amount to a grant of a right of way or of a watercourse. A licence under seal may be of such a nature as to operate in respect of some things as a licence of pleasure merely, and as to others as a grant of an incorporeal hereditament and a direct transfer of an estate or interest in the land.

In a contract for the sale of a patent right, the vendor does not profess to sell an indefeasible patent right, but merely such a right as he actually possesses under the patent (*s*). If, therefore, subsequently to the sale, the patent turns out to be invalid, without any fraud on the part of the vendor, the purchaser has no ground for claiming back his purchase-money (*t*). A patentee who sells a patented article imposing no condition at the time of the sale cannot impose a condition subsequently, and unless the purchaser knows of a condition and buys subject to it he may use the article free of it; but if a subsequent purchaser buys from the holder of a conditional licence, he is bound by the condition whether he knows of it or not (*u*). A contract for the sale of a patent right may be specifically enforced (*x*).

Nature of shares in limited company.—A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sect. 14 of the Companies (Consolidation) Act, 1908, 8 Edw. 7,

(*r*) Year Book, 11 Hen. 7, fol. 86, cited by Parke, B., *Wickham* v. *Hawker*, 7 M. & W. 79; 10 L.J. Ex. 153. See also *Addison on Torts*, 385 (ed. 8).

(*s*) *Hall* v. *Conder*, 2 C.B. N.S. 22, 41; 26 L.J. C.P. 138.

(*t*) *Lawes* v. *Purser*, 6 E. & B. 935; 26 L.J. Q.B. 25.

(*u*) *Badische Anilin, &c. Fabrik* v. *Isler*, (1906) 1 Ch. 605; 75 L.J. Ch. 411; affirmed on facts, (1906) 2 Ch. 443; 75 L.J. Ch. 749.

(*x*) *Cogent* v. *Gibson*, 33 Beav. 557.

c. 69. It is made up of various rights contained in the contract in the articles of association, including the right to a sum of money of a more or less amount (*y*). The shares or other interest of a member in a company are personal estate, transferable in manner provided by the articles of association (*z*). A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under the company's seal warrants to bearer transferable by delivery (*a*).

Title to shares in mining companies.—The shareholders in joint-stock companies possessed of land are entitled to no direct interest in the land. No part of the realty is held in trust for them; but all they are entitled to is, that the real and personal property held by the company should be used by the company for their benefit (*b*). A purchaser of shares in a mining company is not entitled to a regular deduction of the title of the vendor of the share as on the sale of real estate. The vendor may establish his title by the cost-book or register of the mine (*c*). The partners, in whom the legal right in the mine or minerals is vested by deed of grant, hold the mine and the partnership joint-stock plant and machinery, in trust to exercise the right to search for minerals, and make a profit for the benefit of the co-adventurers; and it has been held that the shares of this profit, and consequently the shares in the mine, are personal property, transferable without note in writing, the transfer passing no interest in the soil, but only a right to participate in the profits of the mine. When mining shares are sold in the share market, it is the practice for each party to make a memorandum of the sale in his own book, in the same manner as is done by brokers and jobbers on the Stock Exchange. The vendor afterwards hands a certificate of the sale to the captain or purser of the mine, authorising him to transfer the shares to the purchaser in the usual way; and the purchaser signs an acceptance of the shares written underneath the certificate of sale, which being presented to the captain or purser of the mine, the name of the purchaser is substituted in the place of the vendor in the cost-book, and the transfer is complete (*d*). And, as soon as the share or interest in the profits of the concern is transferred by the out-

(*y*) *Per* Farwell, J., in *Borland's Trustee* v. *Steel Bros. & Co., Ltd.*, (1901) 1 Ch. 279, 288; 70 L.J. Ch. 51.

(*z*) 8 Edw. 7, c. 69, s. 22 (1).

(*a*) 8 Edw. 7, c. 69, s. 37. Such a share warrant is a negotiable instrument: *Webb, Hale & Co.* v. *Alexandria Water Co.*, 93 L.T. 339.

(*b*) *Watson* v. *Spratley*, 10 Exch. 222, 244; 24 L.J. Ex. 53; *Powell* v. *Jessop*, 18 C.B. 336; 25 L.J. C.P. 199; *Walker* v. *Bartlett*, 18 C.B. 845; 25 L.J. C.P. 263; *Edwards* v. *Hall*, 25 L.J. Ch. 82; 6 De G. M. & G. 74; *Caddick* v. *Skidmore*, 3 Jur. N.S. 1185.

(*c*) *Curling* v. *Flight*, 5 Hare, 242.

(*d*) *Watson* v. *Spratley*, 10 Exch. 222; 24 L.J Ex. 53.

going shareholder, the latter is released from all liability upon contracts subsequently entered into by the purser or managers of the company (*e*).

Title to shares, scrip, and letters of allotment.—The mere possession of letters of allotment of shares or of scrip certificates of shares in projected railway companies is *primâ facie* evidence of ownership and of a power of disposition. But, in the case of registered joint-stock companies, or companies incorporated by Act of Parliament, the title to shares is evidenced by production of a certificate of proprietorship and by reference to the register of the shareholders of the company. The directors of every company must keep in one or more books a register of its members, and enter therein the names, addresses, and occupations of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number (*f*), and of the amount paid or agreed to be considered as paid on the shares of each member; the date at which each person was entered in the register as a member; and the date at which any person ceased to be a shareholder in respect of any share (*g*). Provision is made by the Companies (Consolidation) Act, 1908 (*h*), and by the Railway Acts, for establishing the title to shares in case of the death or bankruptcy of shareholders. A certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name mentioned in the certificate. A person, therefore, who receives such certificates as an equitable mortgage, must inquire into the title of the intended mortgagor, because if he is only trustee, the intending mortgagee's title will be inferior to that of the cestui que trust (*i*). Under the Companies (Consolidation) Act, 1908, a certificate under the common seal of the company, specifying any shares or stock held by any member, is *primâ facie* evidence of the title of the member to the shares or stock (*k*).

(*e*) *Harvey* v. *Kay*, 9 B. & C. 356; 7 L.J. (O.S.) K.B. 167.

(*f*) It would seem that a contract to issue fully paid-up shares need not specify the numbers of the shares: *Delta Syndicate Co., In re*, 30 Ch.D. 153; 54 L.J. Ch. 724; *Jackson & Co., In re*, (1899) 1 Ch. 348.

(*g*) Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69, s. 25 (1). And see sects. 100—102 as to the keeping of a register of debenture-holders.

(*h*) First Sched., Table A., arts. 21—23.

(*i*) *Shropshire Union Ry.* v. *Reg.*, L.R. 7 H.L. 496; 45 L.J. Q.B. 31; *Carritt* v. *Real and Personal Advance Co.*, 42 Ch.D. 263; 58 L.J. Ch. 688 And see *per* Ld. Selborne, *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 28; 55 L.J. Q.B. 169; *Rimmer* v. *Webster*, (1902) 2 Ch. 163, 169; 71 L.J. Ch. 561. As to the value of a certification of shares, see *Bishop* v. *Balkis Consolidated Co.*, 25 Q.B.D. 77, 112; 59 L.J. Q.B. 565; *Balkis Consolidated Co.* v. *Tomkinson*, (1893) A.C. 396; 63 L.J. Q.B. 134; *Dixon* v. *Kennaway*, (1900) 1 Ch. 833; 69 L.J. Ch. 501; *Whitechurch* v. *Cavanagh*, (1902) A.C. 117, 125; 9 Manson, 351.

(*k*) 8 Edw. 7, c. 69, s. 23; cp. *Cornwall Mining Co.* v. *Bennett*, 5 H. & N. 423; 29 L.J. Ex. 157.

A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the latter is not himself a member, be as valid as if he had been a member at the time of the execution of the transfer (*l*). On the application of the transferor of any share or interest, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee (*m*).

Executory contracts for the sale of shares are generally effected by brokers on the Stock Exchange, who enter the transactions in their books, and transmit bought and sold notes to their principals, specifying the number and value of the shares and the price to be paid for them. Executory contracts for the sale of letters of allotment, scrip, and shares in railway companies, or shares in mining companies, or registered joint-stock companies, do not, as we have already seen, come within the operation of the Statute of Frauds, as they are neither an interest in land (*n*), nor goods, wares and merchandises (*o*), within the meaning of that Act. But, by 30 & 31 Vict. c. 29, contracts for the sale or transfer of any shares, stock, or other interest in a joint-stock banking company constituted under or regulated by any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument (except by the Banks of England or Ireland), are null and void, unless they set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished on the register or books of the company. Where there is no register of shares or stock by distinguishing numbers, the contract must set forth the person in whose name such shares, stock, or interest, stand as the registered proprietor in the books of the company (*p*). When a bargain has been made for the sale of a certain number of ascertained shares in a particular railway company or a registered joint-stock company, the property in the shares passes by the bargain to the purchaser, and the latter becomes the

(*l*) Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69, s. 29.

(*m*) Sect. 28.

(*n*) *Humble* v. *Mitchell*, 11 Ad. & E. 205; 9 L.J. Q.B. 29; *Bradley* v. *Holdsworth*, 3 M. & W. 422; 7 L.J. Ex. 153; *Colonial Bank* v. *Whinney*, 11 A.C. 426, 439; 56 L.J. Ch. 43.

(*o*) *Knight* v. *Barber*, 16 M. & W. 66; 16 L.J. Ex. 18.

(*p*) A custom of the Stock Exchange to the contrary is void: see *Neilson* v. *James*, 9 Q.B.D. 546; 51 L.J. Q.B. 369; *Perry* v. *Barnett*, 15 Q.B.D. 388; 54 L.J. Q.B. 466; but see also *Seymour* v. *Bridge*, 14 Q.B.D. 460; 54 L.J. Q.B. 347. As to transfers of shares by executors, see *Barton* v. *L. & N. W. Ry.*, 24 Q.B.D. 77; 59 L.J. Q.B. 33; *Barton* v. *North Staffordshire Ry.*, 38 Ch.D. 458; 57 L.J. Ch. 800.

equitable owner of the shares, and is entitled to a decree for specific performance, when the time for the making of the transfer arrives (*q*). This transfer of the equitable ownership is naturally accompanied by a transfer of the benefit and the burthen incident to the holding of the shares, as in the case of the transfer of the equitable ownership of lands, so that, if a call is made on the shares between the time of the making of the bargain and the time appointed for the transfer of the shares, the purchaser will be bound to pay the call, and the Court will compel him to accept and register a transfer of the shares, and clothe himself with the legal title to them, and do all proper acts to relieve the vendor from liability as the registered legal owner (*r*). If, after the making of a bargain for the sale of shares, a dividend is declared, the dividend will belong to the purchaser (*s*); for by the custom of the Stock Exchange the dividend until it becomes payable is included in the price of the share; and, if the vendor receives it, he will hold it as a trustee for the purchaser. This trust will continue, even after transfer executed, where the company under powers in the articles of association refuses to register the transferee (*t*). If, on the other hand, before the transfer is executed, a petition is presented for winding up the company under the Companies (Consolidation) Act, 1908 (*u*), the contract is not rendered void by section 205 of that Act which avoids transfers made after the commencement of a winding up by or subject to the supervision of the Court or after the commencement of a voluntary winding up except to or with the sanction of the liquidator; and, if the broker has, in accordance with the rules and regulations of the Stock Exchange, been compelled to pay the price of the shares to the vendor, he will be entitled to recover from his principal the money so paid (*x*).

Agreements for transfer of shares.—If the owner of shares, subject to liabilities which deprive them of all marketable value, wishes to divest himself of the shares and the attendant liabilities, and another person is willing to accept the shares, and take the chances of the speculation, and they enter into an agreement for the purpose, the contract will be specifically enforced (*y*). But the court will not enforce an agreement to

(*q*) *Duncuft* v. *Albrecht*, 12 Sim. 189, 199; *Ross* v. *Moses*, 1 C.B. 227; *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.

(*r*) *Straffon, Ex parte*, 22 L.J. Ch. 194; 1 De G. M. & G. 576; *Wynne* v. *Price*, 3 De G. & S. 310; *New Brunswick Co.* v. *Muggeridge*, 4 Dr. 686.

(*s*) *Black* v. *Homersham*, 4 Ex.D. 24; 48 L.J. Ex. 79.

(*t*) *Stevenson* v. *Wilson*, (1907) S.C. 445 (Ct. of Sess.).

(*u*) 8 Edw. 7, c. 69.

(*x*) *Chapman* v. *Shepherd*, L.R. 2 C.P. 228; 36 L.J. C.P. 113.

(*y*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 26 L.J. Ch. 784.

purchase, made after the presentation of a petition to wind up a company but before advertisement, by making the purchaser a contributory, when both parties were ignorant of the pending petition at the time of the agreement (*z*). A transfer of shares which is otherwise *bonâ fide*, cannot be set aside at the instance of the company, either because the vendor paid money to the purchaser to take the shares, or because the certificate of transfer contains false representations as to the consideration paid (*a*).

Mode of performance.—Where shares are bought or sold through a broker on the Stock Exchange, the principal enters into an implied contract to sell or buy according to the customs and usages prevalent in that body (*b*). According to the practice of the Stock Exchange, the broker who buys shares prepares the transfer deed and tenders it to the selling broker for execution (*c*), and pays the price on the transfer being returned to him executed by the vendor and accompanied by the vendor's certificates of proprietorship. Generally there are intermediate sales, and in that case the first purchaser on a day before the selling-day, called the name-day, gives to the vendor's broker the name of an ultimate purchaser to whom the shares are to be transferred. The vendor's broker thereupon prepares a deed of transfer to the ultimate purchaser, gets it executed by the vendor, and on the selling-day hands it and the share certificates to the broker of the ultimate purchaser, who pays the price agreed upon between the ultimate purchaser and the jobber, the vendor's broker paying the balance to or receiving it from the broker as the case may require. When this has been done, the liability of the first purchaser ceases, if the ultimate purchaser is a person to whom no reasonable objection can be made (*d*). In order to relieve the jobber from liability, the ultimate purchaser whose name is given on the name-day must be a person of full age (*e*), who is willing to accept and pay for the shares (*f*); but if such purchaser authorises his name to be given, he is bound by the acceptance of the transfer and payment of the price by his brokers on his

(*z*) *Emmerson's Case*, L.R. 1 Ch. 433; 36 L.J. Ch. 177.

(*a*) *Hafod Lead Mining Co., In re*, 35 L.J. Ch. 304; 35 Beav. 391.

(*b*) *Hodgkinson* v. *Kelly*, L.R. 6 Eq. 496; 37 L.J. Ch. 837; *Forget* v. *Baxter*, (1900) A.C. 467; 69 L.J. P.C. 101. As to customs on Stock Exchange, see *post*, p. 950.

(*c*) *Stephens* v. *De Medina*, 4 Q.B. 422; 12 L.J. Q.B. 120.

(*d*) *Paine* v. *Hutchinson*, L.R. 3 Ch. 388; 37 L.J. Ch. 485; *Coles* v. *Bristowe*, L.R. 4 Ch. 3; 38 L.J. Ch. 81; *Grissell* v. *Bristowe*, L.R. 4 C.P. 36; 38 L.J. C.P. 10; *Maxted* v. *Paine*, L.R. 6 Ex. 132; 40 L.J. Ex. 57; *Loring* v. *Davis*, 32 Ch.D. 625; 55 L.J. Ch. 725.

(*e*) *Nickalls* v. *Merry*, L.R. 7 H.L. 530; 45 L.J. Ch. 575.

(*f*) *Maxted* v. *Paine*, L.R. 4 Ex. 81; 38 L.J. Ex. 41.

behalf (*g*). The privity of contract implied between the selling jobber and the client of the purchasing broker is not affected where the purchasing broker has lumped his client's order with other orders provided the circumstances show that the intention of all parties was that privity should be established notwithstanding such lumping of several orders into one contract (*h*). In discovering what was the intention of all parties, the usages of the Stock Exchange may be important, but mere domestic rules of the Stock Exchange will not be allowed to override the rights and liabilities of the outside world (*i*). The jobber may agree to guarantee that the ultimate purchaser shall register the transfer; and, if he does so, and the transfer is not registered, he will be liable to indemnify the vendor against the consequences of such want of registration (*k*). It is not the duty of the vendor or of the selling broker to get the transfer registered. All he has to do is to execute the transfer deed and return it to the purchaser (*l*). It is then the duty of the latter to execute it and leave it, with the certificates of proprietorship, at the office of the company for registration and for new certificates of proprietorship to be granted to him in his own name. Until this is done, and the transfer has been registered, and the new certificates granted, the purchaser's title to the shares is incomplete (*m*). Each prior holder confers on the *bonâ fide* holders for value of certificates with blank transfers, an authority to fill in the names of the transferee, and each prior holder is estopped from denying such authority, and is estopped to this extent and no further from denying the title of such *bonâ fide* holder for the time being (*n*). A contract to deliver shares in a projected company does not require the actual delivery of scrip certificates, which are the mere *indicia* of property; but the party contracting to deliver sufficiently performs his engagement, when he places the other in the position of being the legal owner of them (*o*). It is not incumbent on the vendor to obtain the consent of the directors to the transfer, unless the deed of settlement, or articles of association of the

(*g*) *Bowring* v. *Shepherd*, L.R. 6 Q.B. 309; 40 L.J. Q.B. 129; *Hardoon* v. *Belilios*, (1901) A.C. 118; 70 L.J. P.C. 9.

(*h*) *Scott and Horton* v. *Godfrey*, (1901) 2 K.B. 726; 70 L.J. K.B. 954; cp. *Beckhuson* v. *Hamblet*, (1901) 2 K.B. 73; 70 L.J. K.B. 600.

(*i*) *Levitt* v. *Hamblet*, (1901) 2 K.B. 53; 70 L.J. K.B. 520; *Beckhuson* v. *Hamblet*, *supra*.

(*k*) *Cruse* v. *Paine*, L.R. 4 Ch. 441; 38 L.J. Ch. 225.

(*l*) *Taylor* v. *Stray*, 2 C.B. N.S. 175, 195; 26 L.J. C.P. 287.

(*m*) *Stray* v. *Russell*, 28 L.J. Q.B. 279, 287; 29 L.J.Q.B. 115; *London Founders' Assoc.* v. *Clarke*, 20 Q.B.D. 576; 57 L.J. Q.B. 291.

(*n*) *Colonial Bank* v. *Hepworth*, 36 Ch.D. 36; 56 L.J. Ch. 1089; *Williams* v. *Colonial Bank*, 38 Ch.D. 388; 15 A.C. 268.

(*o*) *Hunt* v. *Gunn*, 13 C.B. N.S. 226.

company, make the approval of the directors a condition precedent to the right of the shareholder to transfer his shares (*p*). A clause in a deed of settlement, that no shareholder shall transfer his shares except in such manner as the directors shall approve, does not prevent a shareholder from entering into a contract for the sale of his shares; and, if such a contract has been entered into, it will be enforced as between the vendor and purchaser, and the latter will be compelled to do all that is necessary to be done by him to obtain the consent of the directors to the registration of the transfer (*q*). But the court will not compel the directors to assent; nor will specific performance be decreed where they within their powers refuse to do so (*r*). Notwithstanding such refusal to register a transferee, the latter has nevertheless the sole beneficial interest in the shares and dividends and the transferor will hold these in trust for the transferee (*s*).

Executory contracts for the sale of shares in railway and parliamentary works' companies are fulfilled on the part of the vendor by a tender of letters of allotment of shares, if there are no shares in the market; and the letters of allotment are commonly bought and received as shares upon the Stock Exchange (*t*). In the case of the sale of scrip or letters of allotment of shares in projected companies which can be lawfully bought and sold, no right of property in any particular scrip or shares passes to the purchaser until actual delivery; and the vendor will fulfil his contract by tendering to the purchaser any scrip that may be in the market (*u*). But a purchaser is not, of course, bound to accept shares or scrip, or any securities, of a different kind from those he bargained for and agreed to buy (*x*). Prompt delivery, on a sale of shares, is an implied condition, and tender of certificates three months after sale is not such delivery of them as the purchaser is bound to accept (*y*). By the rules of the Stock Exchange, ten days are allowed for delivery, and, where this rule is not observed, a purchaser may intimate to his broker that he will not accept

(*p*) *Wilkinson* v. *Lloyd*, 7 Q.B. 27; 14 L.J. Q.B. 165; *Stray* v. *Russell*, 1 E. & E. 888; 29 L.J. Q.B. 115.

(*q*) *Poole* v. *Middleton*, 29 Beav. 646.

(*r*) *Bermingham* v. *Sheridan*, 33 Beav. 660; 33 L.J. Ch. 571; cp. *Moffatt* v. *Farquhar*, 7 Ch.D. 591; 47 L.J. Ch. 355.

(*s*) *Stevenson* v. *Wilson*, (1907) S.C. 445 (Ct. of Sess.).

(*t*) *Stray* v. *Russell*, 28 L.J. Q.B. 284; 29 L.J. Q.B. 115; *Mitchell* v. *Newhall*, 15 M. & W. 309; 15 L.J. Ex. 292; *Tempest* v. *Kilner*, 3 C.B. 249; 15 L.J. C.P. 10; *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*u*) *Heseltine* v. *Siggers*, 1 Exch. 856; 18 L.J. Ex. 166; and see *Hunt* v. *Gunn*, 13 C.B. N.S. 226.

(*x*) *Keele* v. *Wheeler*, 7 M. & Gr. 665; 13 L.J. C.P. 170.

(*y*) *Union Corporation* v. *Charrington and Brodrick*, 19 T.L.R. 129; 8 Com. Cas. 99.

the shares, after which notice, if the broker still accepts and pays for the shares, he cannot call upon his client to indemnify him (*z*). But the regulations of the company issuing the shares must be had regard to, and delay in delivery occasioned by arbitrary conduct of the directors of such company will not be counted (*a*). Where the certificates of shares sold have been pledged, say, with a bank, the seller cannot require his broker to pay the bank or to ask the purchasing jobber to pay the bank and so release the shares (*b*).

Time of performance.—The time for the completion of an executory contract for the sale of shares is regulated by the custom of the Stock Exchange. If particular days are set apart for the settlement of accounts between brokers and their customers, and for the delivery and transfer of shares that have been agreed to be bought and sold in the intervening period, all contracts for the sale and purchase of shares to be completed on a particular day will be deemed to be made for the next settling day that will arrive after the time so appointed (*c*). When no time is specified for the completion of the contract, the printed rules and customs of the Stock Exchange are admissible in evidence to show what is a reasonable time under all the circumstances of the case for the fulfilment of the bargain (*d*). Where a written contract for the sale of mining shares was silent as to the time of the delivery of the shares, but fixed the time for payment of the price, it was held that evidence was admissible to show that, by a custom amongst brokers, the vendor under such a contract was not bound to deliver the shares until he was offered payment of the price (*e*).

Implied undertakings and indemnities annexed to contracts for sale and purchase of shares—Payment of calls.—Where the relation of trustee and cestui que trust has been created between the seller and the purchaser of shares there is a right in the trustee, in the absence of contract to the contrary, to be indemnified by his cestui que trust against calls (*f*). So where the plaintiff sold mining shares to the defendant, and did all that was incumbent on him to do to pass the property in the shares to the defendant, who thus became potentially the owner

(*z*) *Benjamin* v. *Barnett*, 19 T.L.R. 564 ; 8 Com.Cas. 241.

(*a*) *Goldmann* v. *Kann*, 23 T.L.R. 287.

(*b*) *Hawkins* v. *Pearse*, 9 Com.Cas. 87.

(*c*) *Fletcher* v. *Marshall*, 15 M. & W. 755 ; *Bayliffe* v. *Butterworth*, 1 Exch. 425 ; 17 L.J. Ex. 78.

(*d*) *Stewart* v. *Cauty*, 8 M. & W. 160 ; 10 L.J. Ex. 348.

(*e*) *Field* v. *Lelean*, 30 L.J. Ex. 168 ; 6 H. & N. 617 ; commenting on *Spartali* v. *Benecke*, 10 C.B. 212 ; 19 L.J. C.P. 293.

(*f*) *Castellan* v. *Hobson*, L.R. 10 Eq. 47 ; 39 L.J. Ch. 490 ; *James* v. *May*, L.R. 6 H.L. 328 ; 42 L.J. Ch. 802 ; *Loring* v. *Davis*, 32 Ch.D. 625, 634 ; 55 L.J. Ch. 725 ; *Hardoon* v. *Belilios*, (1901) A.C. 118 ; 70 L.J. P.C. 9.

of the shares, and might have made his title perfect at any time; it was held that there was an implied undertaking on the part of the defendant to indemnify the plaintiff in respect of all calls that might lawfully be made on the shares whilst they remained untransferred in the books of the company (*g*). Where shares are again sold, however, there is no implied contract of indemnity between the original vendor and those who buy from the first purchaser. The privity of contract, and the attendant liabilities, are confined to those who deal together as vendors and purchasers, and do not extend to parties who are strangers to each other and have never come together in any way (*h*). But, if shares are sold or bought through a broker on the Stock Exchange, the usages prevalent in that body are impliedly incorporated into the contract; and, therefore, no implied indemnity exists in respect of intermediate sales where the transfer is made by the original vendor direct to the ultimate purchaser; it then becomes the latter's duty to execute the deed and register the transfer (*i*), and this duty he may be compelled specifically to perform (*j*). Where the ultimate purchaser gave the name of one of his workmen as the person to whom the shares were to be transferred, and the transfer was executed to the workman, it was held that the master, as the real purchaser and equitable owner, was bound to indemnify the vendor against all subsequent calls in respect of the shares (*k*). The vendee does not become relieved from his obligation to indemnify his vendor by re-selling and transferring the shares to some third person (*l*).

Rights of scripholders.—Whether the holder of a scrip certificate is to be considered as a shareholder will depend upon the circumstances; he will be so if under his contract he is bound to take shares but not until he has complied with the conditions precedent, *e.g.*, payment of instalments and registration (*m*) if under his contract he must put himself in the position of being entitled to come in and take shares. Where a defendant had signed the subscription contract of a projected railway company, and had received an allotment of shares with scrip certificates, which he sold before the special Act of incor-

(*g*) *Walker* v. *Bartlett*, 18 C.B. 863; 25 L.J. C.P. 263; *Wynne* v. *Price*, 3 De G. & S. 310.

(*h*) *Sayles* v. *Blane*, 14 Q.B. 205; 19 L.J. Q.B. 19.

(*i*) *Hawkins* v. *Maltby*, L.R. 4 Ch. 200; 38 L.J. Ch. 313.

(*j*) *Overend, Gurney & Co., In re, Musgrave and Hart's Case*, L.R. 5 Eq. 193; 37 L.J. Ch. 161.

(*k*) *Castellan* v. *Hobson*, L.R. 10 Eq. 47; 39 L.J. Ch. 490.

(*l*) *Kellock* v. *Enthoren*, L.R. 9 Q.B. 241; 43 L.J. Q.B. 90.

(*m*) *McIlwraith* v. *Dublin Trunk Ry.*, L.R. 7 Ch. 134; 41 L.J. Ch. 262; *Littlehampton, Havre and Honfleur Steamship Co., In re, Ormerod's Case*, L.R. 5 Eq. 110; 37 L.J. Ch. 111; *Eustace* v. *Dublin Trunk Ry.*, L.R. 6 Eq. 182; 37 L.J. Ch. 716.

poration of the company had been obtained, and the shares passed through several hands, and the holder neglected to send the scrip for registration, and the company entered the name of the original allottee in the register as the proprietor of the shares, who, apprehending that a call would be made upon him, again sold the shares; it was held that he was bound to pay over to the scripholder the amount of the purchase-money (*n*).

Transfer deeds.—It is essential to the validity of a deed of transfer of shares that it be duly stamped with the proper *ad valorem* stamp imposed on transfers made upon a sale (*o*), also that the name of the purchaser, the number and distinguishing marks of the shares, and the price to be paid for them, be inserted in the deed before the execution thereof by the vendor; for material blanks in a deed cannot, as we have seen, be afterwards filled up in the absence of the vendor. The rule of law upon this subject cannot be altered or affected by the practice or custom of the Stock Exchange (*p*). But an error in the transfer in distinguishing the numbers is immaterial, if the transferor has at the time a sufficient number of shares (*q*). Where a vendor of shares executed printed forms of deeds of transfer, in which the number of shares to be sold, the distinguishing marks of those shares, and the names of the transferees, were left in blank, but the stamps which the transfer bore were sufficient in value to cover a transfer of all the vendor's shares, and the broker, after the transfer deed had been delivered to him, fraudulently filled up the blanks with the whole of the vendor's shares, when he had been authorised to sell only a portion, and absconded with the purchase-money, and the fraud was discovered before the transfers had been registered, an injunction was granted to restrain the registration of the transfers, and prevent any steps being taken to complete the title of the purchaser (*r*). So where a broker employed to purchase shares procured the instrument of transfer

(*n*) *Beckitt* v. *Billbrough*, 19 L.J. Ch. 522.

(*o*) For stamp duties, see Stamp Act, 1891, 54 & 55 Vict. c. 39, First Sched., "Conveyance or Transfer," and sects. 54 to 61. In *Maynard* v. *Consolidated Kent Collieries Corporation*, (1903) 2 K.B. 121; 72 L.J. K.B. 681, it was held that a company was entitled to go behind what appeared on the face of a transfer in order to determine whether it was properly stamped.

(*p*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; 9 L.J. Ex. 217; *Tayler* v. *Great Indian Peninsular Ry.*, 4 De G. & J. 559, 574; 28 L.J. Ch. 285, 709; *Swan*, *Ex parte*, 7 C.B. N.S. 434, 448; 30 L.J. C.P. 113. See *France* v. *Clark*, 26 Ch.D. 257; 53 L.J. Ch. 585; *Société Générale de Paris* v. *Walker*, 11 App.Cas. 20; 55 L.J. Q.B. 569; *Nanney* v. *Morgan*, 37 Ch.D. 346; 57 L.J. Ch. 311; *Roots* v. *Williamson*, 38 Ch.D. 485; 57 L.J. Ch. 995.

(*q*) *International Contract Co., In re, Ind's Case*, L.R. 7 Ch. 485; 41 L.J. Ch. 564.

(*r*) *Tayler* v. *Great Indian Peninsular Ry., supra*; *Swan, Ex parte, supra*; *Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *France* v. *Clark, supra*.

to the plaintiff and the plaintiff's signature thereto, and received from the plaintiff the certificate and transfer for the purpose of registration, and afterwards fraudulently procured the plaintiff to cancel his signature to the transfer and by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, it was held that the effect of the first transfer was not destroyed by the cancellation, fraudulently procured (*s*).

A contract for the sale of shares on the Stock Exchange does not import an undertaking by the seller that the company will register the transfer (*t*). Where the previous consent of the company is made essential to the validity of a transfer of shares, such consent may be presumed from the conduct and acts of the company (*u*). Transfer deeds of shares generally contain an agreement on the part of the purchaser to take and hold the shares subject to the conditions on which the transferor himself held them, or to hold them subject to the regulations of the particular company. One of these rules generally is that the registered owner shall pay calls. If, therefore, a purchaser of shares, after he has executed a deed of transfer, and had the deed delivered to him or to his agent for the purpose of registration, omits to get the deed registered, and the vendor is compelled to pay calls by reason of his name being left on the register, he is entitled to be indemnified by the transferee (*x*). A transfer of shares to an infant is not void, but only voidable; and, if the infant after arriving at full age keeps the shares, he cannot afterwards avoid the transfer on the ground of his infancy (*y*).

Share certificates.—The title of a registered holder of shares is usually evidenced by a certificate and it is also usual for such certificate to bear a note to the effect that no transfer of any portion of the shares comprised in it will be registered without production of the certificate. Such a certificate estops the company granting it from afterwards denying the title of the person named as proprietor of the shares (*z*). But a share certificate is not a negotiable instrument nor is it a warranty of title on the part of the company granting it and any person relying upon it is liable to find that another and better

(*s*) *Donaldson* v. *Gillot*, L.R. 3 Eq. 274.

(*t*) *Casey* v. *Bentley*, (1902) 1 Ir. R. 376.

(*u*) *Lane, In re*, 33 L.J. Ch. 84; 1 De G. J. & S. 504.

(*x*) *Walker* v. *Bartlett*, 18 C.B. 845, 863; 25 L.J. C.P. 263; distinguishing *Humble* v. *Langston*, 7 M. & W. 517; 10 L.J. Ex. 442.

(*y*) *Lumsden's Case*, L.R. 4 Ch. 31; 39 L.J. Ch. 124. See, however, *ante*, p. 404, 37 & 38 Vict. c. 62.

(*z*) *Tomkinson* v. *Balkis Consolidated Co.*, (1891) 2 Q.B. 614; 60 L.J. Q.B. 558; *Dixon* v. *Kennaway & Co.*, (1900) 1 Ch. 833; 69 L.J. Ch. 501.

title may be brought forward which will supersede that derived from it (*a*). Where a transfer was registered without production of the certificate on a declaration that the certificate was in the possession of a friend but not as a charge against any loan or other consideration and the person in whose possession it was as security for a loan afterwards presented an executed transfer to him with the certificate for registration, it was held that the company was affected with notice of the latter's charge (*b*).

Registration of forged transfers.—If a transfer of shares has been forged, and the forged transfer entered in the company's books, and the name of the shareholder expunged from the register on the strength of the forged document, the shareholder does not thereby lose one iota of his rights against the company; he can compel them to restore his name, and may enforce payment of the dividends due to him, whether his name be restored or not. So, where stock in a railway company stood in the names of two proprietors and the one sold the stock and signed a transfer of the shares, and forged the signature of his co-proprietor, and the company registered the forged transfer and paid the purchaser the dividends, and the forgery was not discovered for many years, the company was held bound to replace the stock (*c*). And where trust-money was invested in railway debentures made payable to three trustees, and the debentures were left in the hands of one of the trustees, who received the interest upon them, and subsequently sold the debentures to a *bonâ fide* purchaser, and forged the names of his co-trustees to a transfer of the debentures, and the purchaser got the debentures transferred into his own name, it was held that the transfer was null and void, and that the trustees were still entitled to the debentures; and the Court ordered them to be delivered up to the trustees, and directed the transfer and entry thereof in the company's books to be cancelled. "No laches," it was observed, "could be imputed to the trustees for suffering one of their number to hold the debentures; for some of them must hold them, unless they are deposited with bankers, or placed in a box secured by a number of different locks of which each trustee shall hold one of the keys; and negligence cannot be imputed to trustees for not taking such

(*a*) *Longman* v. *Bath Electric Tramways, Ltd.*, (1905) 1 Ch. 646; 74 L.J. Ch. 424.

(*b*) *Rainford* v. *James Keith and Blackman Co.*, (1905) 2 Ch. 147; 74 L.J. Ch. 531.

(*c*) *Taylor* v. *Midland Ry.*, 28 Beav. 287; 29 L.J. Ch. 733; *Sloman* v. *Bank of England*, 14 Sim. 475; 14 L.J. Ch. 226; *Barton* v. *N. Staffordshire Ry.*, 38 Ch.D. 458; 57 L.J. Ch. 800.

precautions as these" (*d*). If the company have registered a forged transfer, they are answerable to a purchaser under the forged transfer for the value of the shares (*e*). And, if both the shareholder and the party claiming under the forged transfer bring actions against the company for the recovery of the dividends declared on the shares, the court will not compel them to interplead to establish their rights. If the forgery has been occasioned by the plaintiff's gross negligence and misconduct, amounting to an estoppel or a ratification (*f*), or if he has acted so as to be *particeps criminis*, he will be precluded from setting up or relying upon the forgery (*g*); but the negligence or misconduct must be the proximate cause of the forgery and the direct means of effecting it (*h*). Where a forged transfer has been registered and the company has been compelled to reinstate the true owner of the stock or shares, the company will be entitled to recover the loss from the person at whose request the transfer was registered even though such person may have acted *bonâ fide* and without negligence (*i*).

Specific performance of contracts for purchase and sale of stock and shares.—The court will not decree specific performance of a contract for the sale of stock in the public funds generally, as one portion of stock is as good as another, and it must be the same thing to the purchaser, whether he receives the stock agreed to be sold to him, or the money that will purchase it in the market. The purchaser, therefore, is left to his remedy by way of action for damages (*k*). There is, however, no analogy between a contract for the purchase of a quantity of three per cent. consols, or any other stock generally, and a contract for certain specific, numbered railway shares, mining shares, or scrip (*l*). So, if a contract is for certain specific stock or shares in a particular railway company, or

(*d*) *Cottam* v. *Eastern Counties Ry.*, 1 Jo. & H. 243, 247; 30 L.J. Ch. 217.

(*e*) *Dalton* v. *Midland Ry.*, 13 C.B. 474; 22 L.J. C.P. 177; *Hildyard* v. *South Sea Co.*, 2 P.Wms. 75; *Bahia and San Francisco Ry., In re*, L.R. 3 Q.B. 584; 37 L.J. Q.B. 176; *Shaw* v. *Port Philip Gold Mining Co.*, 13 Q.B.D. 103; 53 L.J. Q.B. 369; *Hart* v. *Frontino and Bolivia, &c. Co.*, L.R. 5 Ex. 111; 39 L.J. Ex. 93; *Johnston* v. *Renton*, L.R. 9 Eq. 181; 39 L.J. Ch. 390; *Sheffield Corporation* v. *Barclay*, (1905) A.C. 392; 74 L.J. K.B. 747; *Bank of England* v. *Cutler*, (1907) 1 K.B. 889; 76 L.J. K.B. 504; see *Simm* v. *Anglo-American Tel. Co.*, 5 Q.B.D. 188; 49 L.J. Q.B. 392; *Balkis Consolidated Co.* v. *Tomkinson*, (1893) A.C. 396; 62 L.J. Q.B. 134. As to power of companies to compensate purchasers of stock for losses by forged transfers, see 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36.

(*f*) *Ireland* (*Bank of*) v. *Evans' Charities*, 5 H.L.C. 389, 413. See *Cooper, In re*, 20 Ch.D. 611; 51 L.J. Ch. 862.

(*g*) *Swan, Ex parte*, 7 C.B. N.S. 434; 30 L.J. C.P. 113.

(*h*) *Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L.J. Ex. 273, *ante*, p. 646.

(*i*) *Sheffield Corporation* v. *Barclay*, (1905) A.C. 392; 74 L.J. K.B. 747; *Bank of England* v. *Cutler*, (1907) 1 K.B. 889; 76 L.J. K.B. 504.

(*k*) *Cud* v. *Rutter*, 20 Vin.Abr. 538, pl. 21; 1 P. Wms. 570.

(*l*) *Duncuft* v. *Albrecht*, 12 Sim. 189, 199.

joint-stock company, the court will decree a specific performance as against the vendor, provided the rights of third parties have not in the meantime intervened (*m*). And a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance (*n*). A sale of an annuity payable out of the dividends of particular stock has been enforced in specie (*o*). Where certain numbered railway shares were sold by auction, and the purchaser paid his purchase-money, but did not take a transfer of the shares, and then sold to a third party who refused to register himself as owner of the shares, and calls were made on the shares which were left unpaid, it was held that the original vendor was entitled to a decree for specific performance against the original purchaser (*p*). The court will not enforce performance of a contract for the purchase of scrip certificates in projected companies, and will not, when the company has been completely registered or incorporated, compel the purchaser to take a transfer of the corresponding shares from his vendor, or to indemnify the latter from calls subsequently made (*q*). Nor will specific performance be decreed where the directors, under the powers conferred by a deed of association, refuse to assent to the transfer (*r*). If a party has signed an application for shares in a registered joint-stock company, and shares have been allotted to him in consequence of his application, the Court of Chancery will compel him to sign the written acceptance of the transfer, and pay the calls due on the shares (*s*).

(*m*) *Doloret* v. *Rothschild*, 1 Sim. & St. 590 ; 2 L.J. (O.S.) Ch. 125 ; *Cheale* v. *Kenward*, 3 De G. & J. 27 ; 27 L.J. Ch. 784.

(*n*) Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69, s. 105.

(*o*) *Withy* v. *Cottle*, 1 Sim. & St. 174 ; 1 L.J. (O.S.) Ch. 117.

(*p*) *Shaw* v. *Fisher*, 12 Jur. 152 ; 2 De G. & S. 11 ; *Paine* v. *Hutchinson*, L.R. 3 Ch. 388 ; 37 L.J. Ch. 485.

(*q*) *Jackson* v. *Cocker*, 4 Beav. 59 ; 10 L.J. Ch. 236 ; *Columbine* v. *Chichester*, 2 Ph. 27 ; 15 L.J. Ch. 408.

(*r*) *Bermingham* v. *Sheridan*, 33 Beav. 660 ; 33 L.J. Ch. 571.

(*s*) *New Brunswick Co.* v. *Muggeridge*, 1 Dr. & S. 363 ; 30 L.J. Ch. 242.

CHAPTER II.

THE CONTRACT OF LETTING.

SECTION I.

LANDLORD AND TENANT.

Leases.—A lease is a contract whereby the temporary use and possession of a house or land are granted by the owner to another for a stipulated or implied remuneration. He who grants the possession and use of the property to be enjoyed for hire is called the lessor or landlord; and he who has the enjoyment of it, paying the rent or hire, is called the lessee or tenant. If the land or realty is granted by deed to be enjoyed for a term, without any payment of rent by the grantee, the grant amounts to a gratuitous loan of the use of the land, and does not create a contract of letting and hiring between the parties. On the other hand a demise for a term of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment (*a*).

Agreements for leases.—All agreements for leases must be authenticated by some note or memorandum, signed according to the provisions of the Statute of Frauds (*ante*, p. 22); and all leases exceeding three years in duration, required by the Statute of Frauds to be evidenced by a signed writing, must now be authenticated by deed (*ante*, p. 42). Every lease, therefore, in writing, not under seal, for a term exceeding three years in duration, amounts only to an agreement to grant a lease for the term specified (*b*). But, if an oral agreement for a lease has been entered into, and the intended lessee, relying on the promise of the lessor to grant the lease, takes possession of the land, and expends money in building, draining, and improving, and there is, therefore, a part performance of the contract, the court will enforce the oral contract, and compel

(*a*) *Parmenter* v. *Webber*, 8 Taunt. 593; *Beardman* v. *Wilson*, L.R. 4 C.P. 57; 38 L.J. C.P. 91.

(*b*) *Bond* v. *Rosling*, *Parker* v. *Taswell*, *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235, *ante*, p. 43; *Burton* v. *Reevell*, 16 M. & W. 307; 16 L.J. Ex. 85; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L.J. Ex. 96.

the lessor to grant the lease agreed upon, on the ground that, by refusing to grant the lease and give the party possession in execution of the contract, he is guilty of a direct fraud (*c*). Part performance by a sub-lessee is equivalent to part performance by the lessee (*d*). When a party has actually been let into possession under an oral contract of demise, and rent has been paid to and received by the landlord, a tenancy from year to year between the parties arises by implication of law (*post*, p. 659). Possession taken before but continued after an oral contract for a lease for more than three years, if unequivocally referable to the contract, constitutes part performance (*e*). Every contract to grant a lease implies an agreement by the party contracting to grant the lease that he has a good right and title so to do (*f*). There may be an independent and collateral agreement to hold land at a rent, which, although it does not operate as a demise without taking possession, yet is a binding undertaking to pay the amount of the rent (*g*).

Present demises.—No precise words are requisite to constitute a present demise. An estate or term of years in the land may be created and vested in a third party, by giving him a licence to enjoy a house, or making an agreement with him that he "shall reside" therein, provided some certain rent or specified service is reserved, or something is given as the consideration of the contract, and possession is given and accepted under the contract (*h*). If there are any words showing a present intention that one is to give and the other to have possession for a determinate term, a tenancy is created (*i*). Thus a licence to cut timber on land for a specified term of years, whereby exclusive possession of the land is conferred on the licensee, amounts to a demise of the land, even though there may be reservations or restrictions of the purposes for which the land is to be used (*k*). The intention may be manifested by expressions contained in a series of letters, as well as by the formal words of a single instrument (*l*). And, on the other hand, although there be formal words of present demise, yet, if there appears from the face of the entire contract a contrary intention, the instru-

(*c*) *Morphett* v. *Jones*, 1 Swanst. 172; *Gregory* v. *Mighell*, 18 Ves. 328; *Mundy* v. *Joliffe*, 5 Myl. & Cr. 167; 8 L.J. Ch. 62; *Parker* v. *Smith*, 1 Coll. 608. See, however, as to this case, the observations of Ld. Selborne, L.C., in *Maddison* v. *Alderson*, 8 App.Cas. 467, at p. 482; 52 L.J. Q.B. 737.

(*d*) *Williams* v. *Evans*, L.R. 19 Eq. 547; 44 L.J. Ch. 319.

(*e*) *Hodson* v. *Heuland*, (1896) 2 Ch. 428; 65 L.J. Ch. 754.

(*f*) *Stranks* v. *St. John*, L.R. 2 C.P. 376; 36 L.J. C.P. 118.

(*g*) *Adams* v. *Hagger*, 4 Q.B.D. 480.

(*h*) Co. Litt. 45, b; Bac.Ab. Leases (K.); *Right* v. *Proctor*, 4 Burr. 2209.

(*i*) *Chapman* v. *Bluck*, 5 Sc. 515, 531; 7 L.J. C.P. 100; *Jones* v. *Reynolds*, 1 Q.B. 506; 10 L.J. Q.B. 193.

(*k*) *Glenwood Lumber Co.* v. *Phillips*, (1904) A.C. 405; 73 L.J. P.C. 62.

(*l*) *Chapman* v. *Bluck*, *supra*; *Jones* v. *Reynolds*, *supra*.

ment will be considered only an agreement for a future lease, and will not operate as a present demise (*m*).

It is a rule of law that, whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession and profits of the land, and the other come into them for such a determinate time, for a certain hire or rent, such words, whether they run in the form of an assignment, or of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose (*n*). A lease may be made either for life, or for years, or at will; and a contract for letting and hiring of land will, if it cannot operate as an assignment, be supported as a lease, although it was intended to pass all the lessor's interest (*o*). Whenever the house or land of one man has been occupied by another, the *primâ facie* presumption is that the use and occupation are to be paid for; and the landlord is entitled to maintain an action to recover a reasonable hire and reward for the use of the land, unless the tenant can show that he entered into possession of the property under circumstances fairly leading to an opposite conclusion. A landlord, on the other hand, who has permitted a tenant to occupy property, and has received rent from the latter for such use and occupation, will be bound by his own acts, and cannot afterwards treat such tenant as a trespasser and turn him out of possession without a proper notice to quit. But, if the transaction amounts only to a *commodatum*, or gratuitous loan of the property for use, the possession and occupation do not raise a presumption of a contract of letting and hiring between the parties. The occupation of a servant or agent is the occupation of the master or principal; and the former may at any time be removed at the will and pleasure of the latter (*p*).

Proof of terms of holding.—If a tenancy is actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. Where land was about to be let, and printed papers of the terms of holding were distributed among parties, who assented verbally to the printed terms, and subsequently became tenants, it was held that a

(*m*) *Morgan* v. *Bissell*, 3 Taunt. 72; *Doe* v. *Powell*, 8 Sc. N.R. 687; *Gore* v. *Lloyd*, 12 M. & W. 463; 13 L.J. Ex. 366; *Doe* v. *Clarke*, 7 Q.B. 211; 14 L.J. Q.B. 233; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164.

(*n*) Bac.Abr. Leases (K); Shep. Touch. ch. 14, 272; Bro.Abr. (Lease), pl. 60; *Cottee* v. *Richardson*, 7 Exch. 143; 21 L.J. Ex. 52.

(*o*) *Pollock* v. *Stacy*, 9 Q.B. 1033; 16 L.J. Q.B. 132.

(*p*) *Bertie* v. *Beaumont*, 16 East, 33; *Hunt* v. *Colson*, 3 M. & Sc. 790; *Rex* v. *Cheshunt*, 1 B. & Ald. 473; *Mayhew* v. *Suttle*, 4 E. & B. 317; 24 L.J. Q.B. 54; *White* v. *Bailey*, 30 L.J. C.P. 253; 10 C.B. N.S. 227.

witness might look at the printed paper to refresh his memory when he was asked to prove the terms of the holding from recollection (*q*).

Lease by estoppel.—We have already seen (*ante*, p. 72) that no man is permitted to prove anything in contradiction of his own deed. Where, therefore, a man grants a lease under seal, he is not permitted to avoid his own grant by proving that he had no interest in the demised premises, unless he is a trustee for the public, deriving his authority from an Act of Parliament(*r*). As between him and his lessee, the lease operates by way of estoppel. "If one makes a lease for years, by indenture, of lands wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he, having by indenture expressly demised those lands, is, by his own act, estopped and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them, and, consequently, the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease" (*s*). And, when the estoppel becomes good in point of interest, the heir of the lessor, and all persons claiming under the lessor by assignment or otherwise, are bound by the estoppel (*t*). Upon the execution of the lease there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor (*u*), which passes by descent to his heir, and by purchase to an assignee(*x*) or devisee (*y*). So long, therefore, as a lessee enjoys everything which his lease purports to grant, he has no concern with the title of the lessor or the heir or assignee of the lessor (*z*). If, however, it appears, by the recitals of the lease, that the lessor had no interest in the land, or that he had only an equitable interest, at the time of the demise, there will be no estoppel (*a*). The lessee is also in like manner estopped from

(*q*) *Bolton* (*Lord*) v. *Tomlin*, 5 Ad. & E. 856; 6 L.J. K.B. 45.

(*r*) *Fairtitle* v. *Gilbert*, 2 T.R. 169.

(*s*) Bac.Abr. Lease (O).

(*t*) *Trevivan* v. *Lawrence*, 1 Salk. 276; 2 Sm. L.C. (ed. 11), 742; *Goodtitle* v. *Morse*, 3 T.R. 365, 371; 2 Wms.Saund. 418, a; *Doe* v. *Thompson*, 9 Q.B. 1037.

(*u*) *Sturgeon* v. *Wingfield*, 15 M. & W. 224; 15 L.J. Ex. 212.

(*x*) *Cuthbertson* v. *Irving*, 6 H. & N. 135; 29 L.J. Ex. 485.

(*y*) *Driver* v. *Lawrence*, 2 W.Bl. 1259; *Doe* v. *Birchmore*, 9 Ad. & E. 662; 8 L.J. Q.B. 108.

(*z*) *Cuthbertson* v. *Irving*, *supra*.

(*a*) *Pargeter* v. *Harris*, 7 Q.B. 708; 15 L.J. Q.B. 113; *Greenaway* v. *Hart*, 14 C.B. 340; 23 L.J. C.P. 115; but see *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 28 L.J. Ch. 547; *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. Q.B. 81; *Punnett*, *Ex*

denying the lessor's title to grant the lease, and setting up such want of title as an answer to an action for the rent by the lessor or his assignee (*b*); for the law will not suffer the tenant to abuse a possession gained by the confidence of the landlord, and turn it to the injury of the latter (*c*). But he may show that the lessor's title has expired (*d*); or that he has been paying rent under a supposed legal obligation which did not in fact exist to a lessor who was not the real owner (*e*). If he is evicted and deprived of the use and enjoyment of the demised premises by some person claiming by title paramount, the eviction is pleadable in bar to a demand of the rent; but it must be an actual, and not a mere constructive, eviction (*f*). An attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver (*g*) which the court applies for the purpose of collecting the rents till a decree can be pronounced, taking care that the tenant shall be protected both while the receiver continues to act and when he is withdrawn (*h*).

Demises by agents.—If the steward of a person not named says to an occupier, "I let you into possession in the name of the landlord," he may afterwards show by parol evidence who that landlord is; and it is not open to the tenant to dispute the title of the unnamed landlord (*i*). Where an agreement was entered into by an agent in his own name for the letting of a house, and the rent was made payable to the agent in his own name, but at the commencement of the agreement he described himself as agent for the proprietors, it was held that he might show who were the proprietors at the time the agreement was signed, and that the tenant was estopped from disputing their title (*k*). A land-agent, or collector of rents, has, as such, no implied authority to grant leases (*l*). But a power to a land-agent to "manage and superintend estates" authorizes him, on behalf of his principal, to enter into an agreement for the usual

parte, 16 Ch.D. 226; 50 L.J.Ch. 212; and as to the present state of the authorities on this point, see the notes to *Spencer's Case*, 1 Sm. L.C. at pp. 97, 98 (ed. 11).

(*b*) *Cuthbertson* v. *Irving*, *supra*.

(*c*) *Dolby* v. *Iles*, 11 Ad. & E. 335; 9 L.J. Q.B. 51; *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50; *Levy* v. *Lewis*, 30 L.J. C.P. 141; 9 C.B. N.S. 872.

(*d*) *Claridge* v. *M'Kenzie*, 4 Sc. N.R. 796, 811; 11 L.J. C.P. 72; *Fenner* v. *Duplock*, 2 Bing. 10; 2 L.J. (O.S.) C.P. 102; *Doe* v. *Skirrow*, 7 Ad. & E. 157; *Downs* v. *Cooper*, 2 Q.B. 256; 11 L.J. Q.B. 2.

(*e*) *Batten Pooll* v. *Kennedy*, (1907) 1 Ch. 256; 76 L.J. Ch. 162.

(*f*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248.

(*g*) *Hughes* v. *Hughes*, 1 Ves. 161; *Dancer* v. *Hastings*, 4 Bing. 2; 5 L.J. (O.S.) C.P. 3.

(*h*) *Evans* v. *Mathias*, 7 E. & B. 590; 26 L.J. Q.B. 309.

(*i*) Tindal, C.J., *Fleming* v. *Gooding*, 10 Bing. at p. 550; 3 L.J. C.P. 214.

(*k*) *Per* Mellor, J., *Prescott* v. *Ingram*, June 23rd, 1864; *Fleming* v. *Gooding*, *supra*. See further *Tanner* v. *Christian*, 4 E. & B. 591; 24 L.J. Q.B. 91; *Chapman* v. *Smith*, (1907) 2 Ch. 97; 76 L.J. Ch. 394.

(*l*) *Collen* v. *Gardner*, 21 Beav. 540

and customary leases, according to the nature and locality of the property (*m*).

Ascertainment and identification of subject-matter of demise.—It may always be shown by parol evidence what was, and what was not, parcel of the demise (*n*). The date of the demise is *primâ facie* the time to which the description is to be referred (*o*), and the intention of the parties is, if possible, to be ascertained (*p*). If a general description be used in a lease, all the things usually comprehended under such general description will pass to the lessee, unless the surrounding circumstances plainly show that such could not have been the intention. By parol evidence of extrinsic circumstances, a general term may be restricted so as to pass much less than is ordinarily comprised under the common legal acceptance of the term, and, on the other hand, a limited description may be enlarged, so as to comprehend much more than it generally comprises (*q*). Under the word "cottage" or "house," on the other hand, land may pass, if it can be shown that the land has for a length of time been used and occupied with the cottage or house at one entire rent, and has been commonly reputed to be part and parcel thereof. "Being found to be all one, it passeth well by the lease." Divers things that, by continual enjoyment with the principal thing demised, have by common reputation been deemed to belong to it, may well pass as part and parcel of the principal thing demised, if extrinsic circumstances show that such must have been the intention of the parties (*r*). Wherever there is a sufficient description to ascertain the thing demised, a part of the description which is inaccurate may be rejected (*s*).

Things appurtenant.—When a man grants a thing to be used for hire, he grants it with all such appurtenances as properly belong to it, and with all such rights of way as are necessary to enable the hirer to have that use of the thing demised for which the hire is agreed to be paid (*t*). But a grant of realty, to be used by the grantee for a term for rent or hire, transfers to the latter a right only, as we shall presently see, to use the subject-

(*m*) *Peers* v. *Sneyd*, 17 Beav. 151.

(*n*) *Skipworth* v. *Green*, 8 Mod. 311.

(*o*) *Crisp* v. *Price*, 5 Taunt. 548; *Kerslake* v. *White*, 2 Stark. 508.

(*p*) *Doe* v. *Burt*, 1 T.R. 701, 703.

(*q*) *Doe* v. *Burt*, *supra*; *Bryan* v. *Wetherhead*, Cro.Car. 17; *Kerslake* v. *White*, *supra*; *Martyr* v. *Lawrence*, 10 Jur. N.S. 859; 2 De G. J. & S. 261; *Doe* v. *Galloway*, 5 B. & Ad. 43; 2 L.J. K.B. 182.

(*r*) *Gennings* v. *Lake*, Cro.Car. 168; *Ongley* v. *Chambers*, 1 Bing. 483, 496; 2 L.J. (O.S.) C.P. 49.

(*s*) *Doe* v. *Galloway*, 5 B. & Ad. 43 2 L.J. K.B. 182; *Cowen* v. *Truefitt* (1898) 2 Ch. 551; 67 L.J. Ch. 695; affirmed on other grounds, (1899) 2 Ch. 309; 68 L.J. Ch. 563.

(*t*) *Morris* v. *Edgington*, 3 Taunt. 24; *Kooystra* v. *Lucas*, 5 B. & Ald. 830; *Harding* v. *Wilson*, 2 B. & C. 96; 1 L.J. (O.S.) K.B. 238; *Maitland* v. *Mackinnon*, 1 H. & C. 607; 32 L.J. Ex. 49. See also 44 & 45 Vict. c. 41, s. 6 (1), (2).

matter of the demise in the way in which it has been previously used. Many things, therefore, which pass by a grant in fee, so as to give the grantee an absolute dominion over them, do not pass by a lease so as to give the lessee a right to use them as part of the proceeds of the subject-matter of the demise. The lessee, for example, has a right only to the casual profits of trees; he has no right to cut them down and sever them from the freehold and inheritance (*u*). He has a right to the profits of mines and quarries opened at the time of the demise (*x*), but has no right to open fresh mines and quarries where none before existed.

Commencement and duration of leases.—Leases for lives, as well as leases for terms of years, may now be made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. If the lease is limited to commence "from the date," or "from the day of the date," the words are either inclusive or exclusive, according to the context of the written instrument, and the apparent intention of the contracting parties (*y*). A lease "from the day of the date," and "from henceforth," is the same thing; if, therefore, a lease be dated the 1st of December, and be granted to commence "from henceforth," and be sealed and delivered on the 12th of December, the lease commences in contemplation of law from the 1st of December (*z*). If in the case of a present demise no time is mentioned for the commencement of the lease (*a*), or if the date is an impossible date (*b*), the term will be deemed to begin from the day of the delivery of the deed, or of the making of the demise, if extrinsic circumstances do not rebut such a presumption (*c*). But it is otherwise in the case of an executory agreement for a lease (*d*). The commencement of the term is necessarily controlled by extrinsic circumstances, as well as by the express terms of the deed (*e*). Where a lease was dated the 25th of March, 1783, and the term was granted to commence "from the 25th of March now last past," and it was proved that the deed was not executed until some time after the day on which it was dated, it was held that the

(*u*) See further *post*, p. 691; *Addison on Torts* (ed. 8), pp. 359 *et seq.*, as to what constitutes waste.

(*x*) Co. Litt. 53, b, 54, b; *Astry* v. *Ballard*, 2 Mod. 193; *Elias* v. *Snowdon Slate Co.*, 4 App.Cas. 454; 48 L.J. Ch. 811.

(*y*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714; and see *ante*, p. 58.

(*z*) *Llewelyn* v. *Williams*, Cro.Jac.258.

(*a*) Co. Litt. 46, b.

(*b*) Bac.Abr. Leases (L) 1.

(*c*) *Styles* v. *Wardle*, 4 B. & C. 908; 4 L.J. (O.S.) K.B. 81; *Higham* v. *Cookes*, 4 Leon. 144.

(*d*) *Marshall* v. *Berridge*, 19 Ch.D. 233; 51 L.J. Ch. 329, overruling *Jaques* v. *Millar*, 6 Ch.D. 153; 47 L.J. Ch. 544; *Rock Portland Cement Co.* v. *Wilson*, 52 L.J. Ch. 214.

(*e*) *Lander's Contract, In re*, (1892) 3 Ch. 41; 61 L.J. Ch. 707.

term commenced on the 25th of March, 1783, and not on the 25th of March, 1782 (*f*). If the land is demised "for a year, and so on from year to year," or "for a year, and afterwards from year to year," this is a lease for two years certain at least (*g*). But, if the demise is from year to year, so long as both parties please, it is a lease only for a year certain, and is determinable at the end of the first as well as of any subsequent year (*h*). If the demise is for "one year certain," and six months' notice afterwards, the lease is only a lease for a year (*i*). If the land is expressed to be demised for years generally, the lease is said to be good for two years at the least (*k*). A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties shall give the other six calendar months' notice of his intention to determine the tenancy, and it was held that this was a lease for one year at least (*l*). An agreement to let premises "for a period of twelve months with the option of a lease of the same after the aforesaid time" at a specified rent per annum operates, upon the exercise of the option, as a tenancy for at least a further period of one year (*m*), and perhaps as a tenancy for the life of the lessee (*n*).

If a lease is granted for seven, fourteen, or twenty-one years, and the lessee enters and takes possession of the demised premises, the legal construction of the lease is that the lessee is entitled at his option to take that term which is most beneficial to himself. The lessee therefore has the option, at the expiration of the first seven years, of continuing the lease on for another seven years; and, after that term has expired, for the full period of twenty-one years if he chooses so to do, the courts leaning in favour of that construction which is the most favourable to the lessee (*o*). Where the lessor agreed not to raise the rent nor turn the tenant out of possession so long as the rent was duly paid quarterly, it was held that this operated as an agreement for a tenancy from year to year. If in a lease under seal the lessor covenants not to raise the rent, nor turn out the

(*f*) *Steele* v. *Mart*, 6 D. & R. 392; 4 B. & C. 272.

(*g*) Bac.Abr. Leases (L), 838; *Legg* v. *Strudwick*, 2 Salk. 414; *Denn* v. *Cartwright*, 4 East, 29; *Doe* v. *Green*, 9 Ad. & E. 658; 8 L.J. Q.B. 100.

(*h*) *Doe* v. *Smaridge*, 7 Q.B. 957; 14 L.J. Q.B. 327.

(*i*) *Thompson* v. *Maberly*, 2 Campb. 573; *Jones* v. *Dixon*, 1 H. & C. 48; 31 L.J. Ex. 505.

(*k*) Bro.Abr. Lease, 13; 6 Co. 35, 36.

(*l*) *Reg.* v. *Chawton Inhabitants*, 1 Q.B. 247; 10 L.J. M.C. 55.

(*m*) *Austin* v. *Newham*, (1906) 2 K.B. 167; 75 L.J. K.B. 563; *Bath's* (*Bishop of*) *Case*, 6 Co. 34, b.

(*n*) *Semble*, *per* Kennedy, J., in *Austin* v. *Newham*, *supra*, based upon the authority of *Kusel* v. *Watson*, 11 Ch.D. 129; 48 L.J. Ch. 413.

(*o*) *Dann* v. *Spurrier*, 3 Bos. & P. 399, 404; *Doe* v. *Dixon*, 9 East, 15; *Goodright* v. *Richardson*, 3 T.R. 462.

tenant, so long as the rent is duly paid, this is a lease for life. If the undertaking is contained in a lease not under seal, it operates only as a simple contract or agreement, for a breach of which the tenant may recover damages from the lessor; but it does not prevent the latter from ejecting the tenant after the ordinary notice to quit (*p*). If the full extent and duration of the term are uncertain, but there is a certainty for some specific portion of time, the lease will be good for such term or portion of time, and void as to the residue (*q*). If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at all; but, if the lessee has actually entered and taken possession, the duration of the term of hiring will be regulated by the nature of the subject-matter of the demise, the times limited for the payment of the rent, and the custom of the country where the property is situate.

Leases from year to year.—In the case of a general demise of farms or lands, no term being mentioned, the presumption is by custom in favour of a yearly hiring (*r*) in the absence of an express limitation of the term. If a corn-field or an orchard is demised at a customary and ordinary rent, the hiring will be deemed to be for a year, and so on from year to year, in order that the tenant may reap the harvest and gather the fruits when they come to perfection, as the rent is reasonably presumed to be paid for the enjoyment thereof, and not for the barren occupation of the land itself. "If the produce of the demised lands require two years to come to perfection, as if it be licorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year" (*s*). Where lands were demised to J. H., his heirs, executors, and assigns for ever, at a yearly rent, with a proviso for re-entry in case of non-payment of rent, it was held that the deed created only a tenancy from year to year (*t*). If an intended lessee enters into possession of realty under an agreement for a lease, he is tenant at will or tenant by sufferance until the lease is made; but, if he remains in possession and pays rent, he becomes tenant from year to year until the lease is duly executed according to the agreement (*u*). In such a case the tenant holds on

(*p*) *Doe* v. *Browne*, 8 East, 165; see *Wood* v. *Beard*, 2 Ex.D. 30; 46 L.J. Ex. 100.

(*q*) *Gwynne* v. *Mainstone*, 3 C. & P. 320.

(*r*) 13 Hen. 8, 15, b; *Doe* v. *Watt*, 7 T.R. 83, 85.

(*s*) Adams on Eject. 99 (ed. 4), citing *Roe* v. *Lees*, 2 W.Bl. 1171.

(*t*) *Doe* v. *Gardiner*, 12 C.B. 319; 21 L.J. C.P. 222.

(*u*) *Mann* v. *Lovejoy*, R. & M. 355; *Doe* v. *Pullen*, 3 Sc. 271, 276; 5 L.J. C.P.

such of the terms of the agreement as are applicable to a yearly tenancy; and, if he enters under an agreement for a seven years' lease by which he is to do certain repairs in the last year of the term, and holds during the whole of the seven years, he must do the repairs (*x*). If a tenant holds over after the expiration of the term, and the landlord receives from him rent which has accrued due subsequently to the expiration of the lease, he becomes a tenant from year to year (*y*).

If a man takes possession of premises under an invalid lease from a tenant for life, and the remainderman accepts rent, or does any act recognising the party in possession as his tenant, the latter forthwith becomes a lessee from year to year (*z*); but the mere acceptance of two shillings and sixpence in a chief rent is not sufficient evidence of a tenancy from year to year (*a*). So, if a man enters into possession as an intended purchaser, and agrees "to pay and allow" to the vendor "at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase in equal half-yearly payments," he becomes tenant to the intended vendor "at a fixed rent of 100*l.* per annum, payable half-yearly" (*b*). A tenancy from year to year is ordinarily implied from the payment and acceptance of rent (*c*); but this *primâ facie* presumption may be rebutted by showing that the money was paid or received by mistake. Since the Judicature Act the rules of equity prevail; and if there is an agreement for a lease, the tenant holds under the terms of it before any payment of rent (*d*). The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, has long been exploded (*e*). A tenancy from year to year recommences every year (*f*). A demise by a tenant from year to year to another, also to hold from year to year, is, in con-

229; *Doe* v. *Smith*, 1 M. & R. 137; *Knight* v. *Bennett*, 11 Moore, 223; 4 L.J. (O.S.) C.P. 95; *Doe* v. *Amey*, 12 Ad. & E. 476; 4 P. & D. 177; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L.J. Ex. 38.

(*x*) *Martin* v. *Smith*, L.R. 9 Ex. 50; 43 L.J. Ex. 42.

(*y*) *Bishop* v. *Howard*, 2 B. & C. 100; 1 L.J. (O.S.) K.B. 243; and see *Morgan* v. *Harrison*, (1907) 2 Ch. 135; 76 L.J. Ch. 548.

(*z*) *Doe* v. *Morse*, 1 B. & Ad. 365.

(*a*) *Smith* v. *Widlake*, 3 C.P.D. 10; 47 L.J. C.P. 282.

(*b*) *Saunders* v. *Musgrave*, 6 B. & C. 524; 5 L.J. (O.S.) K.B. 192.

(*c*) As to a yearly tenancy created by estoppel, see *Jump* v. *Payne*, 68 L.J. Q.B. 607.

(*d*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9; 52 L.J. Ch. 2; *Lowther* v. *Heaver*, 41 Ch.D. 248; 58 L.J. Ch. 485; *Allhusen* v. *Brooking*, 26 Ch.D. 559; 53 L.J. Ch. 522; *Zimbler* v. *Abrahams*, (1903) 1 K.B. 577; 72 L.J. K.B. 103.

(*e*) *Doe* v. *Browne*, 8 East, 167.

(*f*) *Tomkins* v. *Lawrance*, 8 C. & P. 731; *Berry* v. *Lindley*, 3 M. & Gr. 498; 11 L.J. C.P. 27; *Gandy* v. *Jubber*, 33 L.J. Q.B. 151; 5 B. & S. 78; *Doe* v. *Dobell*, 1 Q.B. 806; 10 L.J. Q.B. 242; but this has been doubted, see *Bartlett* v. *Baker*, 34 L.J. Ex. 8, 11; 3 H. & C. 153.

templation of law, a demise from year to year during the continuance of the original demise to the intermediate landlord (*g*).

Half-yearly, quarterly, monthly, and weekly hirings.—If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice (*h*). Such a contract differs only from the usual letting from year to year in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. But, if it is expressly agreed that the tenant is always to be subject to quit at six months' notice given him at any time, this constitutes a half-yearly tenancy, and the lessee will be presumed to hold from six months to six months from the time that he entered as tenant. If he is to hold until one of the parties shall give unto the other three months' notice to quit at the expiration of such notice, the tenancy will be a quarterly tenancy (*i*). In the case of a demise of an unfurnished mansion at an annual rent, payable half-yearly or quarterly, the hiring is a hiring from year to year. In the case of cottages or unfurnished apartments in a house demised at a monthly or weekly rent, the presumption is in favour of a monthly or a weekly tenancy. Where a wharf, warehouse, and buildings were let on the terms that a quarter's rent should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, it was held that this was a quarterly and not a yearly hiring (*k*). There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods (*l*).

Tenancy at will.—If the lessor reserves to himself a right of re-entry at his own will and pleasure, or the lease contains an express stipulation to the effect that the tenancy may be put an end to at the will of either party (*m*), the holding is a tenancy at will (*n*). The reservation of a yearly or quarterly rent is not inconsistent with a tenancy at will (*o*). A mere permission to occupy creates a tenancy at will (*p*). If a tenant for

(*g*) *Pike* v. *Eyre*, 9 B. & C. 908 ; 8 L.J. (O.S.) K.B. 69.

(*h*) See *Lewis* v. *Baker* (No. 2), (1906) 2 K.B. 599 ; 75 L.J. K.B. 848.

(*i*) *Doe* v. *Grafton*, 18 Q.B. 496 ; 21 L.J. Q.B. 276 ; *Kemp* v. *Derrett*, 3 Campb. 510.

(*k*) *Wilkinson* v. *Hall*, 4 Sc. 301 ; 6 L.J. C.P. 82 ; *Towne* v. *Campbell*, 3 C.B. 921 ; 16 L.J. C.P. 128.

(*l*) *Cornish* v. *Stubbs*, L.R. 5 C.P. 334 ; 39 L.J. C.P. 202.

(*m*) Co. Litt. 55, a.

(*n*) *Richardson* v. *Langridge*, 4 Taunt. 128 ; *Cudlip* v. *Rundal*, 4 Mod. 12 ; 3 Salk. 156 ; *Bayley* v. *Fitzmaurice*, 8 E. & B. 664 ; 27 L.J. Q.B. 143 ; *Doe* v. *Wood*, 14 M. & W. 682, 684 ; 15 L.J. Ex. 41.

(*o*) Litt. s. 72 ; *Doe* v. *Davies*, 7 Exch. 89, 91 ; 21 L.J. Ex. 60 ; *Doe* v. *Cox*, 11 Q.B. 122 ; 17 L.J. Q.B. 3.

(*p*) *Doe* v. *Wood*, 14 M. & W. 682 ; 15 L.J. Ex. 41.

years holds over with the landlord's consent after the expiration of his lease (*q*), or continues in possession pending a treaty for a further lease (*r*), or for an assignment of a lease (*s*), or is admitted into possession pending a treaty for a purchase which falls through subsequently (*t*), he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit; but if, during the continuance of such a tenancy at will, the landlord has accepted rent from the tenant for the use of the property, the law infers that a yearly tenancy was meant to be created between them (*u*). A *cestui que trust*, if in actual possession, is a tenant will to his trustee (*x*); so is a person who holds rent free by permission of the owner, as, for instance, a dissenting minister put into possession of a chapel and dwelling-house by trustees of a congregation, whose tenancy can be determined *instanter* by a demand of possession (*y*). A tenant at will is entitled to retain possession of the land he holds until the lessor has made a demand of possession on the land (*z*), or has intimated, either by express words or by his conduct and actions, his determination to put an end to the tenancy. The holding may be determined by a letter, stating that, unless the tenant pays the lessor what he owes him, he will, without delay, take measures for recovering possession of the property (*a*), or by a demand of possession on the part of the landlord (*b*), or by an agent on his behalf (*c*), or by his entry on the land (*d*) without the tenant's consent and making livery of seisin to another (*e*), or exercising acts of ownership (*f*); also by his alienation of the reversion (*g*); by the tenant's quitting the premises; by the death of either of the parties (*h*); by the bankruptcy of the lessor with the knowledge of the tenant (*i*);

(*q*) *Doe* v. *Stennett*, 2 Esp. 717.

(*r*) Com. Dig. tit. Estates (H. 1); *Doe* v. *Stennett*, *supra*; *Doe* v. *Cartwright*, 3 B. & Ald. 326.

(*s*) *Doe* v. *Pullen*, 2 Bing. N.C. 749; 5 L.J. C.P. 229.

(*t*) *Doe* v. *Chamberlaine*, 5 M. & W. 14; 9 L.J. Ex. 38; *Right* v. *Beard*, 13 East, 210; *Howard* v. *Shaw*, 8 M. & W. 118.

(*u*) *Clayton* v. *Blakey*, 8 T.R. 3; 2 Sm. L.C. 127 (ed. 11); *Dougal* v. *McCarthy*, (1896) 1 Q.B. 736; 62 L.J. Q.B. 462.

(*x*) *Garrard* v. *Tuck*, 8 C.B. 231; 18 L.J. C.P. 338; *Melling* v. *Leak*, 16 C.B. 652; 24 L.J. C.P. 187.

(*y*) *Doe* v. *Jones*, 10 B. & C. 718; 8 L.J. (O.S.) K.B. 310; *Doe* v. *M'Kaeg*, 10 B. & C. 721.

(*z*) Co. Litt. 55, b; *Right* v. *Beard*, 13 East, 210.

(*a*) *Doe* v. *Price*, 2 M. & Sc. 464; 9 Bing. 356.

(*b*) *Locke* v. *Matthews*, 13 C.B. N.S. 753; 32 L.J. C.P. 98.

(*c*) *Doe* v. *Price*, *supra*.

(*d*) Co. Litt. 55, b.

(*e*) *Ball* v. *Cullimore*, 2 Cr. M. & R. 120; 4 L.J. Ex. 137.

(*f*) *Turner* v. *Doe*, 9 M. & W. 643; 11 M. & W. 453.

(*g*) *Doe* v. *Thomas*, 6 Exch. 854; 20 L.J. Ex. 367.

(*h*) *James* v. *Dean*, 11 Ves. 383, 391; *Doe* v. *Rock*, 4 M. & Gr. 30; 11 L.J. C.P. 194; *Scobie* v. *Collins*, (1895) 1 Q.B. 375; 64 L.J. Q.B. 10.

(*i*) *Doe* v. *Thomas*, *supra*.

by commission of voluntary waste by the tenant (*j*); and, in short, by the doing of any act which amounts to a determination of the will on either side. But an act done off the land by the landlord must, in order to bind the tenant, be brought to his notice (*k*). An entry by the landlord for the purpose of repairing the premises and without objection by the tenant does not determine the tenancy (*l*). But a tenant at will cannot determine his tenancy by assignment of his interest to a third party, without notice to his landlord (*m*). If the will is determined, and the landlord's consent to the occupation is withdrawn, so as to create an adverse possession, and the landlord afterwards does any act fairly leading to the presumption that he has renewed his consent to the holding, a fresh tenancy at will is created between the parties (*n*). A tenancy at will is determined by a mortgage of the premises by the landlord, such mortgage being brought to the knowledge of the tenant (*o*).

Tenancy by sufferance.—When the landlord has demanded possession, or has done any act which is tantamount to a determination of the will, or when the tenant holds over at the expiration of a lease against the will of the lord, or after the expiration of a notice to quit, the tenant is said to be a tenant at sufferance in contradistinction to a tenant at will (*p*). The expression, however, is not calculated to give a correct idea of the nature of the holding, and does not seem to have been very happily chosen. Although termed tenant by sufferance, he is understood to hold wrongfully and against the will, and contrary to the permission, of the landlord. He has, consequently, no estate or interest at all in the land; and an action of ejectment may at any time be brought against him without notice or demand of possession; and, if the lord can get possession peaceably, he is entitled to take and retain possession, and so oust the wrongdoer (*q*). The difference, therefore, between a tenancy at will and what is called a tenancy by sufferance is that, in the one case, the tenant holds by right, and has an estate or term in the land, precarious though it be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission

(*j*) Co. Litt. 57, a.

(*k*) *Doe* v. *Thomas*, *supra*; *Doe* v. *Davies*, 7 Exch. 89; 21 L.J. Ex. 60.

(*l*) *Lynes* v. *Snaith*, (1899) 1 Q.B. 486; 68 L.J. Q.B. 275.

(*m*) *Pinhorn* v. *Souster*, 8 Exch. 763; 22 L.J. Ex. 266; Co. Litt. 57, a; *Shaw* v. *Barber*, Cro.Eliz. 830.

(*n*) *Doe* v. *Turner*, 7 M. & W. 232; 10 L.J. Ex. 213; *Turner* v. *Doe*, 9 M. & W. 643; 11 L.J. Ex. 453; *Doe* v. *Thomas*, *supra*.

(*o*) *Jarman* v. *Hale*, (1899) 1 Q.B. 994; 58 L.J. Q.B. 681.

(*p*) Co. Litt. 57, b.

(*q*) *Fox* v. *Oakley*, Peake's Ad.Ca. 214. As to small tenements, see 1 & 2 Vict. c. 74.

of the lord, and has no estate at all in the occupied premises. When a tenancy at sufferance has existed for twenty (now twelve) years, the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property (*r*).

Leases under powers.—If a lease granted in the intended exercise of a power of leasing is invalid by reason of the non-observance of the terms of the power, such lease, if made *bonâ fide*, and if the lessee has entered thereunder, is deemed a contract to grant the lease, and all persons who would have been bound by the lease, if lawfully granted under the power, will be bound by such contract. Acceptance of rent under such invalid lease is a confirmation of the lease as against the person so accepting rent. Leases, also, invalid at the time of the grant thereof, may become valid, if the grantor subsequently acquires the requisite power of leasing (*s*). In a lease under a power, a covenant to renew the lease at its expiration is a good covenant, even though the lease was for the full term authorised by the power; but when the term expires and the new lease is to be made, it must be shown that the rent and covenants stipulated for are the best rent and the most proper covenants at that time (*t*).

Rights and liabilities of lessor and lessee.—Every lessor binds himself to give possession and not to give the party to whom he demises a mere right to take possession from a wrong-doer by an action (*u*); and every lessee binds himself to accept possession and pay rent (*v*). If a party has agreed to take a house from a particular day, provided certain things are before then done by the landlord, and the things are not done, he may decline to go on with the contract, and may refuse to take possession (*w*). A lessee who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot, as we have seen (*ante*, pp. 22, 42), be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent, nor for use and occupation. In the case of leases under seal, the law implies from the words "yielding and paying," or any equivalent words

(*r*) *Doe* v. *Gower*, 17 Q.B. 589; 21 L.J. Q.B. 57; 37 & 38 Vict. c. 57, s. 1.

(*s*) 12 & 13 Vict. c. 26; 13 Vict. c. 17. See *Gas Light & Coke Co.* v. *Towse*, *infra*.

(*t*) *Gas Light & Coke Co.* v. *Towse*, 35 Ch.D. 519; 56 L.J. Ch. 889.

(*u*) *Coe* v. *Clay*, 3 Moo. & P. 57; 7 L.J. (O.S.) C.P. 162; *Jinks* v. *Edwards*, 11 Exch. 775; *Neale* v. *Mackenzie*, 1 M. & W. 747; 6 L.J. Ex. 263; Bract. lib. 2. c. 28. fol. 62. As to agreements for a lease, see *Drury* v. *Macnamara*, 5 E. & B. 616; 25 L.J. Q.B. 5.

(*v*) *Stanley* v. *Hayes*, 3 Q.B. 105; 11 L.J. Q.B. 176; *Kelly* v. *Rogers*, (1892) 1 Q.B. 910; 61 L.J. Q.B. 604.

(*w*) *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235, *ante*, p. 43.

amounting to a reservation of rent, a covenant on the part of the lessee to pay the rent so reserved, and, in the case of parol leases, a promise to the like effect (*x*). But the liability of a lessee upon all express and implied covenants and agreements for the payment of rent is dependent upon his being put into possession, or being tendered and offered the opportunity of taking possession (*y*). The quiet enjoyment also by the lessee, as against the lessor and all that come in under him by title, and against others claiming by title paramount, during the time in respect of which the rent is claimed to have accrued due, is a condition precedent to the tenant's liability for the payment of such rent. But the tenant is not released from liability by reason of a mere constructive eviction (*z*), or a disturbance from a mere wrongdoer.

Covenants for quiet enjoyment.—From the use by a grantor of certain words having a known legal operation the law infers a covenant on the part of such grantor to protect the estate; as, if a man by deed demises land for years, the word "demise" imports or makes a covenant in law for quiet enjoyment (*a*). If by the terms of a lease the lessor "warrants" the demised premises to the lessee, this amounts to an express covenant for quiet enjoyment during the whole term (*b*). It is in every case a question of fact whether there has been a breach of the covenant for quiet enjoyment; but where the ordinary and lawful use of the demised land is substantially interfered with by the acts of the lessor or those claiming under him, the covenant is broken, even although neither the title to the land nor the possession of the land is otherwise affected (*c*). The interruption must have been caused either by the direct act of the lessor or those claiming under him, or by some act the consequences of which might have been foreseen when the covenant was entered into (*d*); but the lessor is not responsible for wrongful or negligent acts which he has not authorised (*e*). It would seem that an implied covenant for quiet enjoyment does not extend to disturbance by those who hold by title para-

(*x*) Bac.Abr. Leases, 633; Covenant, B. 342; 1 Roll.Abr. 519.

(*y*) *Holgate* v. *Kay*, 1 Car. & K. 341.

(*z*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248, *ante*, p. 655.

(*a*) *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L.J. Q.B. 257.

(*b*) *Williams* v. *Burrell*, 1 C.B. 429; 14 L.J. C.P. 98, *ante*, p. 50.

(*c*) *Sanderson* v. *Berwick (Mayor)*, 13 Q.B.D. 547; 53 L.J. Q.B. 559. See *Jenkins* v. *Jackson*, 40 Ch.D. 71; 58 L.J. Ch. 124; *Robinson* v. *Kelvert*, 41 Ch.D. 88; 58 L.J. Ch. 392; *Manchester, S. & L. Ry.* v. *Anderson*, (1898) 2 Ch. 394; 67 L.J. Ch. 568; *Tebb* v. *Cave*, (1900) 1 Ch. 642; 69 L.J. Ch. 282, but it is doubtful whether this case was rightly decided on the ground of breach of covenant for quiet enjoyment, see *Davis* v. *Town Properties Investment Corporation*, (1903) 1 Ch. 797; 72 L.J. Ch. 389.

(*d*) *Harrison* v. *Muncaster (Lord)*, (1891) 2 Q.B. 680; 61 L.J. Q.B. 102.

(*e*) *Williams* v. *Gabriel*, (1906) 1 K.B. 155; 75 L.J. K.B. 149.

mount to that of the lessor (*f*). Covenants for quiet enjoyment are broken, if the lessor builds on his own adjoining land so as to darken the lessee's windows, or does anything thereon which creates a nuisance. The erection of a gate across a lane through which the tenant has a way to the demised premises is a breach of a covenant for quiet enjoyment (*g*); and so is the placing of any structure upon any part of the demised premises (*h*). But a decree in Chancery that the land conveyed by the grantor is subject to a general right of common is not a breach of the grantee's covenant for quiet enjoyment where there has been no entry on the land (*i*). Where the lessors served the lessee's sub-tenants with notice not to pay rent to the lessee, and threatened legal proceedings, it was held to be a breach of the covenant for quiet enjoyment (*k*). The covenant is prospective, and is only a covenant that from the time of granting the lease the premises shall not be obstructed by any act done thereafter (*l*), or by the probable or necessary consequence of any act done before the granting of the lease (*m*). The usual express covenant by the lessor that the lessee shall quietly enjoy, &c., without interruption or disturbance by the lessor or any person claiming under him, is not broken by an entry on the tenant by the land-tax collector to distrain for arrears of land-tax due from the lessor, the disturbance not being by a person claiming by title from the lessor (*n*). And, where a covenant for quiet enjoyment is accompanied by a covenant by the lessee not to use the land for certain purposes, the first covenant does not guarantee to the tenant that he may lawfully use the land for any purpose not included in the restrictions in the lease (*o*). So, also, an express covenant that an underlessee should deliver up all landlord's fixtures at the end of the term does not raise an implied covenant that he may remove trade fixtures (*p*). Whenever a person demises the surface of land, reserving a right to win and work minerals, he cannot exercise the right so as to let

(*f*) See *Markham* v. *Paget*, (1908) 1 Ch. 697; 77 L.J. Ch. 451.

(*g*) *Andrews* v. *Paradise*, 8 Mod. 319; *Morris* v. *Edgington*, 3 Taunt. 24.

(*h*) *Kidder* v. *West*, 3 Lev. 167.

(*i*) *Howard* v. *Maitland*, 11 Q.B.D. 695; 53 L.J. Q.B. 42.

(*k*) *Edge* v. *Boileau*, 16 Q.B.D. 117; 55 L.J. Q.B. 90.

(*l*) *Anderson* v. *Oppenheimer*, 5 Q.B.D. 602; 49 L.J. Q.B. 708.

(*m*) *Shaw* v. *Stenton*, 2 H. & N. 858; 27 L.J. Ex. 253.

(*n*) *Stanley* v. *Hayes*, 3 Q.B. 105; 11 Q.B. 176; *Kelly* v. *Rogers*, (1892) 1 Q.B. 910; 61 L.J. Q.B. 604; *Cohen* v. *Tannar*, (1900) 2 Q.B. 609; 69 L.J. Q.B. 904. As to an implied covenant for title on the part of the lessor, or that he has power to grant an interest co-extensive with that which he assumes to grant, see *Line* v. *Stephenson*, 7 Sc. 69; 2 L.J. C.P. 263; *Bandy* v. *Cartwright*, 8 Exch. 913; 22 L.J. Ex. 285; *Stranks* v. *St. John*, L.R. 2 C.P. 376; 36 L.J. C.P. 118; *Budd-Scott* v. *Daniel*, (1902) 2 K.B. 351; 71 L.J. K.B. 706.

(*o*) *Dennett* v. *Atherton*, L.R. 7 Q.B. 316; 4 L.J. Q.B. 165.

(*p*) *Porter* v. *Drew*, 5 C.P.D. 143; 49 L.J. C.P. 482.

down or injure the surface; for that would be derogating from his own grant, and would also be a breach of a covenant for quiet enjoyment (*q*). It has been held that if a lessor's estate expires during the term, and the lessee is thereupon evicted by title paramount, no action can be maintained against the lessor for the breach of any implied covenant for title or for quiet enjoyment, any such implied covenant terminating with the expiration of the lessor's estate (*r*); but whether or not any contract is to be implied from the use of the word "let" in an agreement to let, there certainly cannot be implied from it a contract against persons not claiming under the lessor (*s*). It has also been decided that where there is an agreement to let which is to operate immediately a covenant at law either for quiet enjoyment or for title cannot be implied from the covenant to let or from the use of the word "let" in such an agreement (*t*).

Covenants for payment of rent.—A covenant for the payment of rent at a specified time, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain; and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money (*u*), if he be *intra quatuor maria* (*x*). If the tenancy is a yearly tenancy, and no time is specified for the payment of the rent, the rent will be due once a year (*y*). If the rent is to be paid free of all outgoings, it must be paid free of land-tax and tithe commutation rent-charge (*z*). If money is advanced to the lessor by the tenant on account of rent not then due, such payment is a good answer to an action for rent by the lessor or his executors (*a*). Where the lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession, and obtained from the lessee, who had no notice of the mortgage, a year's rent in advance, it was held that the payment of the rent before it became due was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him (*b*). A tenant

(*q*) *Proud* v. *Bates*, 34 L.J. Ch. 406. As to what is included under the term "minerals," see *Bell* v. *Wilson*, L.R. 1 Ch. 303; 34 L.J. Ch. 572.

(*r*) *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787.

(*s*) *Per* Collins, M.R., *Jones* v. *Lavington*, 72 L.J. K.B. 98, at p. 102; (1903) 1 K.B. 253.

(*t*) *Jones* v. *Lavington*, *supra*.

(*u*) *Haldane* v. *Johnson*, 8 Exch. 689, 696; 22 L.J. Ex. 264.

(*x*) *Haldane* v. *Johnson*, *supra*, at p. 695, citing Shep. Touchst. p. 378.

(*y*) *Collett* v. *Curling*, 10 Q.B. 785; 16 L.J. Q.B. 390.

(*z*) *Parish* v. *Sleeman*, 1 De G. F. & J. 326; 29 L.J. Ch. 96; *Sweet* v. *Seager*, 2 C.B. N.S. 119.

(*a*) *Nash* v. *Gray*, 2 F. & F. 391.

(*b*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89.

having made such a payment voluntarily cannot recover it back from the lessor in an action for money had and received (*c*). Where under a lease for a fixed term, the lessees, a limited company, and the defendants as sureties covenanted for due payment of the rent "during the said term," and the lease with the lessor's consent was assigned to another company, the defendants remaining sureties, it was held upon the dissolution subsequently of the second company that the term had come to an end so that the sureties were no longer liable for the rent (*d*).

Covenants not to "let, set, or demise," restrain an assignment (*e*), and run with the land (*f*). Covenants not to "set, let, or assign over" (*g*), or not to "assign or otherwise part with," the demised premises (*h*), restrain an under-lease. It has been held that a covenant not to "grant any underlease, or let, assign, or otherwise part with, the demised premises or any part thereof," is not broken by taking in a lodger who has the exclusive possession of the room he occupies (*i*). Where a lessee took a person into partnership, and agreed that he should have the exclusive use of a back chamber and some other parts of the demised premises, and the joint use of the rest, it was held that the covenant had been broken, and that the right to re-enter had accrued (*k*). And, in the case of a lease to two partners, an assignment by one partner of his undivided moiety of the lease to the other partner is a breach of a covenant not to assign (*l*). The covenant is broken even where the lessee for the time being assigns to the original lessee (*m*). A covenant not to assign "the said premises" is not broken by the assignment of a portion only of the premises (*n*). A limited company has been held to come within the words "a respectable and responsible person" in a covenant against assigning without the lessor's consent (*o*). A covenant by a lessee that he will not let or underlet for more than a year does not prevent him from granting leases to commence at a future day (*p*). A devise of the term to a stranger is an

(*c*) *Higgs* v. *Scott*, 7 C.B. 63.

(*d*) *Hastings Corporation* v. *Letton*, (1908) 1 K.B. 378; 77 L.J. K.B. 149.

(*e*) *Greenaway* v. *Adams*, 12 Ves. 395.

(*f*) *Per* Ld. Russell of Killowen, see *Horsey Estate* v. *Steiger*, 68 L.J. Q.B. 743, at p. 746; (1899) 2 Q.B. 79, and authorities there cited.

(*g*) *Roe* v. *Harrison*, 2 T.R. 425.

(*h*) *Doe* v. *Worsley*, 1 Campb. 20.

(*i*) *Doe* v. *Laming*, 4 Campb. 73; but see *Greenslade* v. *Tapscott*, 1 Cr. M. & R. 55; 3 L.J. Ex. 328.

(*k*) *Roe* v. *Sales*, 1 M. & S. 297.

(*l*) See *Bristol Corporation* v. *Westcott*, 12 Ch.D. 461; *Varley* v. *Coppard*, L.R. 7 C.P. 505.

(*m*) *M'Eacharn* v. *Colton*, (1902) A.C. 104; 71 L.J. P.C. 20.

(*n*) *Grove* v. *Portal*, (1902) 1 Ch. 727; 71 L.J. Ch. 299.

(*o*) *Wilmott* v. *London Road Car Co.*, (1910) 2 Ch. 525; 80 L.J. Ch. 1.

(*p*) *Croft* v. *Lumley*, 6 H.L.Cas. 672, 737; 27 L.J. Q.B. 321, 330.

assignment within the meaning of the proviso or covenant, but not a devise to the lessee's own executor (*q*), nor an assignment by act and operation of law (*r*), or by the act of God, nor an assignment by the sheriff under an execution, unless the execution has been obtained by collusion with the creditor in fraud of the covenant (*s*). If the lessee does assign or underlet, notwithstanding his covenant, the assignment or underlease is good, and the lessee is only liable to an action on his covenant (*t*), unless there is a proviso in the original lease for re-entry in case of a breach of the covenant (*u*). Where the lessee covenants not to assign without the consent of the lessor, "such consent not to be arbitrarily withheld," these words do not amount to a covenant by the lessor to give his consent; but an arbitrary refusal would leave the lessee at liberty to assign without consent (*x*). Where the covenant provided that the licence to assign was "not to be unreasonably withheld," and the lessor refused to give a licence to assign to the lessee's wife except on condition that the lessee himself covenanted to pay the rent and perform the covenants of the lease, it was held that the condition was unreasonable (*y*). Where the lessee covenanted to reside on the premises—a public-house—and personally conduct the business and also not to assign without the lessor's consent "not to be unreasonably withheld," it was held that the lessor could reasonably withhold his consent to a proposal to assign the lease to a limited company as the latter could not fulfil the covenant to reside on the premises and personally conduct the business (*z*). Where the lessor's consent is to be first obtained, and not to be unreasonably withheld from any assignment or underlease, an assignment or underlease without such consent is a breach of the covenant (*a*). Where a lessee under such a covenant contracted to assign subject to his landlord's approval, and he would not give leave, it was held that the lessee was not bound to take legal proceedings to compel his landlord to consent, but might

(*q*) Bac.Abr. Lease, T.

(*r*) *Goring* v. *Warner*, 7 Vin.Abr. 85, pl. 9; *Doe* v. *Smith*, 5 Taunt. 795.

(*s*) *Doe* v. *Carter*, 8 T.R. 57, 300.

(*t*) *Paul* v. *Nurse*, 8 B. & C. 486; 7 L.J. (O.S.) K.B. 12.

(*u*) *Roe* v. *Harrison*, 2 T.R. 425; see also *Metropolitan Water Board* v. *Solomon*, (1908) 2 Ch. 214; 77 L.J. Ch. 517, and *post*, p. 712.

(*x*) *Treloar* v. *Bigge*, L.R. 9 Ex. 151; 43 L.J. Ex. 95; *Lehmann* v. *McArthur*, L.R. 3 Ch. 496; 37 L.J. Ch. 625; *Sear* v. *House Property Society*, 16 Ch.D. 387; 50 L.J. Ch. 77; *Young* v. *Ashley Gardens Properties*, (1903) 2 Ch. 112; 71 L.J. Ch. 520; *Sparke's Lease, In re*, (1905) 1 Ch. 456; 74 L.J. Ch. 318.

(*y*) *Evans* v. *Levy*, (1910) 1 Ch. 452; 79 L.J. Ch. 383.

(*z*) *Jenkins* v. *Price*, (1908) 1 Ch. 10; 77 L.J. Ch. 41.

(*a*) *Eastern Telegraph Co.* v. *Dent*, (1899) 1 Q.B. 835; 68 L.J. Q.B. 564. See *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743, as to a mere agreement to assign not being a breach of a covenant not to assign.

consider his contract with the third party at an end (*b*). By sect. 3 of the Conveyancing Act, 1892 (*c*), no fine or sum of money in the nature of a fine (*d*) may be exacted for a licence to assign unless it is expressly provided for in the lease; but the effect of that section is not to render the payment of money by the lessee to the lessor for giving his consent to an assignment illegal, but only to read into the lease the provisions of the section as a qualification of the covenant against assignment without consent (*e*). Where a lessor refuses his consent to an assignment except upon terms inconsistent with the provisions of sect. 3, the lessee may disregard the covenant and assign as if such consent had been given (*f*). A covenant not to assign is not a usual covenant (*g*). The fact that a debtor has been adjudicated bankrupt on his own petition does not constitute a breach of a covenant not to assign (*h*).

Non-execution of lease by lessee.—A person who has neither sealed and delivered an indenture of lease, nor entered and taken possession under it, cannot be made responsible upon the covenants contained in the indenture; but, if he enters and takes possession by force of the lease, he is deemed in law to have covenanted to hold upon the terms of the indenture and to observe the conditions of the lease, and the lessor, therefore, may distrain or bring an action for the arrears of rent (*i*). If land is leased to two for a term of years, and one puts his seal, and the other agrees to this lease, and enters and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but, if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is a party to the lease, he is not a party to the condition (*k*). Where three windmills were demised by letters-patent under seal, which letters-patent contained a clause to the effect that the lessee and his assignees should repair and maintain the windmills during the term, and yield them up in good condition

(*b*) *Lehmann* v. *McArthur*, *ante*, p. 669.

(*c*) 55 & 56 Vict. c. 13, s. 3. See *Cosh's Contract*, *In re*, (1897) 1 Ch. 9; 66 L.J. Ch. 28.

(*d*) As to what a "fine" includes, see 44 & 45 Vict. c. 41, s. 2 (9); *Waite* v. *Jennings*, (1906) 2 K.B. 11; 75 L.J. K.B. 542.

(*e*) *Andrew* v. *Bridgman*, (1908) 1 K.B. 596; 77 L.J. K.B. 272.

(*f*) *Andrew* v. *Bridgman*, *supra*, following the principle on which *Treloar* v. *Bigge*, L.R. 9 Ex. 151; 43 L.J. Ex. 95, was decided.

(*g*) *Hampshire* v. *Wickens*, 7 Ch.D. 555; 47 L.J. Ch. 243; *Bishop* v. *Taylor*, 60 L.J. Q.B. 556; *Wilson* v. *Redhead*, 28 W.R. 795.

(*h*) *Riggs*, *In re*, (1901) 2 K.B. 16; 70 L.J. K.B. 541.

(*i*) *Brett* v. *Cumberland*, 2 Roll. 63; Litt. sec. 58, 374; *Lyme Regis* (*Mayor*) v. *Henley*, 1 Bing. N.C. 237; *Gregg* v. *Coates*, 23 Beav. 33.

(*k*) Bro.Abr. Dette, pl. 80; Fitz.Abr. Dette, pl. 117; Co. Litt. 231, b; 2 Roll. Rep. 63.

at the expiration thereof, and the lessee entered under the grant and took possession of the windmills, it was held that there resulted from the acceptance of the estate an express covenant to repair, which was annexed to the term granted, and ran with the land, and bound both the lessee and his assignees by reason of the privity of estate (*l*). Where a lessee entered into possession of a house under an agreement to repair, and paid rent, and the lessor sold the estate and assigned all his interest to the plaintiff, and the lessee continued to occupy and paid rent to the plaintiff, it was held that the lessee must be presumed, in the absence of evidence to the contrary, to have agreed to continue to hold of the plaintiff on the same terms as he held of the original lessor, and that he was therefore responsible to the plaintiff for a breach of his agreement to repair (*m*).

Non-execution of lease by lessor.—It is said that, if an indenture of lease be sealed only on the part of the lessee, and not on the part of the lessor, *nihil operat*, neither in respect of the interest nor in respect of the covenants; for the covenants depend upon the lease, and if there is no lease there is no covenant; for, if the lease had been made and afterwards surrendered, all the covenants had been void (*n*). Where an indenture of demise for the term of eleven years, containing covenants to pay rent and repair, was executed by the lessee alone, and the latter entered and took possession and paid rent for several years, and the lessor assigned his reversion without ever having executed the lease, it was held that the assignee of the reversion could not sue upon any of the covenants of the lease, as the lease for eleven years to which they were annexed had never been created; that the only reversion which could carry with it the right to sue upon the covenant was a reversion expectant upon the determination of the term for eleven years, which reversion had never been in existence by reason of the non-execution of the lease by the lessor (*o*). But, as between the original parties, where a privity of contract exists between them, the lessee may, under certain circumstances, be held liable upon the covenants contained in the indenture, though the lease has not been executed by the lessor and the term created. It has been said that every lease must be construed in connection with surrounding circumstances, and that a lessee may, by entering upon, and taking possession of, tenements under an indenture sealed by him, and by dispensing with the

(*l*) *Brett* v. *Cumberland*, *ante*, p. 670.
(*m*) *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 268.
(*n*) *Soprani* v. *Skurro*, Yelv. 18.
(*o*) *Cardwell* v. *Lucas*, 2 M. & W. 111; 5 L.J. Ex 52.

execution of the indenture by the lessor, render himself liable to be sued upon his covenants, as independent covenants, on the ground that a party may waive a condition in his favour and dispense with its performance; and that, if a lessee executes his part of an indenture of lease, and enters and takes possession of the demised premises, and has the use of them, and gathers all the produce and profits of the soil for the whole term intended to be granted without ever having required the lessor to execute the indenture, he ought in justice to be deemed to have waived his right to treat the execution of the lease by the lessor as a condition precedent to his liability upon his covenants; and the Court of Queen's Bench has held that a lessee who has executed an indenture of demise containing a covenant to repair, and has entered and enjoyed for the whole term intended to be granted, is liable on his covenant, though the lease has never been executed by the lessor, and that the covenant becomes, under such circumstances, an independent covenant within the rule laid down in Comyn's Digest (*p*), "that, if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part" (*q*). In a later case the Court of Exchequer held that the entry and taking of possession by the lessee before the execution of the lease by the lessor did not render the covenants to pay rent and repair independent covenants (*r*); but this would hardly be the case now if the lease were one in respect of which specific performance could be decreed (*s*).

Concealment of latent defects.—In contracts for the letting and hiring of realty, the lessor is not bound to disclose to the lessee latent defects interfering with the use and enjoyment of the property let to hire (*t*). A lessor of a house, for example, who knows that the house is in a ruinous and dangerous state and unfit for occupation, is not bound to disclose the fact to his lessee at the time that he grants the lease (*u*).

Having executed the lease, and put the lessee into possession of the demised premises, the lessor has done all that is necessary for him to do to entitle himself to the rent; he does not,

(*p*) Com. Dig. Fait (C.), 2.

(*q*) *Cooch* v. *Goodman*, 2 Q.B. 599; Littledale, J., *Richardson* v. *Gifford*, 1 Ad. & E. 55; 3 L.J. K.B. 122; *Hughes* v. *Clark*, 10 C.B. 905; *How* v. *Greek*, 3 H. & C. 391; 34 L.J. Ex. 4.

(*r*) *Pitman* v. *Woodbury*, 3 Exch. 4; 12; *Swatman* v. *Ambler*, 8 Exch. 72; 22 L.J. Ex. 81.

(*s*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9; 52 L.J. Ch. 2; and see *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 608; 70 L.J. Ch. 814.

(*t*) *Hart* v. *Windsor*, 12 M. & W. 68; 13 L.J. Ex. 129; *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297.

(*u*) *Keates* v. *Cadogan* (*Earl*), 10 C.B. 591; 29 L.J. C.P. 76. As to the implied condition that premises let to persons of the working classes are fit for human habitation at the commencement of the holding, see 53 & 54 Vict. c. 70, s. 12, *post*, p. 673.

in the case of demises of realty, warrant that the premises are, at the time of the demise, or that they shall continue to be during the term, in any particular condition, or fit for any particular purpose; and the lessee, therefore, is bound to pay his rent, although the subject-matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use of it. If, indeed, the lessor has been guilty of any fraudulent concealment of defects, or has resorted to any misrepresentation calculated to mislead the lessee in some important particular, the contract will be void, and the lessee will be discharged from the rent; but, in the absence of all fraud and deceit, he is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use of the demised premises which was anticipated. Thus, there is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises (*x*); and it has also been held, where the eddish or eatage of a meadow was let for a certain time at a specific rent, that there was no implied warranty by the lessor that the eatage was to be what might be denominated wholesome grass, reasonably fit for the food of cattle, and that the defendant was liable for the rent, although the eddish at the time of the demise was wholly unfit for the purpose for which it was taken, and the defendant had not had any beneficial use of it (*y*).

Demises of houses unfit for habitation.—Where the defendant in an action by the lessor for the non-payment of the rent of a house, which had been demised to him for a term of years, had declined to pay the rent upon the ground that it was unfit for habitation, and that he could not dwell therein, or have any beneficial use or occupation thereof, by reason of its being greatly infested with bugs, it was held that the law, in the case of demises of unfurnished houses, implies no warranty on the part of the lessor that the house is at the time of the demise, or at the commencement of the term, in a fit condition for habitation (*z*), or that it will continue to be in a fit condition during the term (*a*). By sect. 75 of the Housing of the Working Classes Act, 1890 (*b*), in any contract now made for "letting

(*x*) *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 835.

(*y*) *Sutton* v. *Temple*, 12 M. & W. 52; 13 L.J. Ex. 17; 27 Hen. 6 (Trin. Term), fol. 10, pl. 6; Hil. Term, 14 Hen. 4, fol. 27, pl. 35; Bro.Abr. Dette, pl. 18, fol. 220.

(*z*) *Hart* v. *Windsor*, 12 M. & W. 68; 13 L.J. Ex. 129; *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809; as to bugs in furnished lodgings, see *Smith* v. *Marrable*, 11 M. & W. 5; 12 L.J. Ex. 223, *post*, p. 761.

(*a*) *Arden* v. *Pullen*, 10 M. & W. 321; 11 L.J. Ex. 359.

(*b*) 53 & 54 Vict. c. 70, s. 75. Extended by Housing, Town Planning, &c. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15.

for habitation by persons of the working classes" (*c*) a house or part of a house a condition is to be implied that the house is at the commencement of the holding in all respects reasonably fit for human habitation; and by sect. 12 of the Act of 1903 (*d*), the above section of the principal Act is, as respects any contract now made, to take effect notwithstanding any agreement to the contrary, and any such agreement is void. The provisions of sect. 75 of the principal Act enable a tenant of premises within the Act to sue his landlord for damages for injuries caused by their being in a defective state of repair at the commencement of the tenancy (*e*).

Payment of rent.—Although, therefore, houses become ruinous and fall down, and fences and crops be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues (*f*). If the landlord is bound by custom, or has entered into an express covenant to repair a house demised by him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing of the house by the lessor is not a condition precedent to the liability of the lessee upon his covenant (*g*).

Payment of rent—Exception of damage by fire.—If the lessee has covenanted to pay rent, "damage by fire excepted," and part of the demised premises is destroyed by fire, the entire rent is not thereby suspended, but the tenant is entitled to an abatement proportionate to the part destroyed (*h*). And, if the lessee covenants to pay rent, and also to repair, with an express exception of casualties by fire and tempest, the exception is confined to the covenant to repair, and does not qualify or affect the liability upon the covenant to pay rent, unless it has been extended thereto by express words (*i*).

Payment of rent—Extinction and suspension of rent by eviction.—If the tenant loses the benefit of the enjoyment of

(*c*) This expression means the letting for habitation of a house or part of a house at a rent not exceeding in England the sum named as the limit for the composition of rates by 32 & 33 Vict. c. 41, s. 3, and in Scotland or Ireland four pounds.

(*d*) 3 Edw. 7, c. 39, s. 12.

(*e*) *Walker* v. *Hobbs*, 23 Q.B.D. 458; 59 L.J. Q.B. 93, decided on 48 & 49 Vict. c. 72, s. 12 (rep.).

(*f*) *Carter* v. *Cummins*, cited 1 Ch.Ca. 84; *Pindar* v. *Ainsley*, cited 1 T.R. 312; *Bayne* v. *Walker*, 3 Dow, 233; *Leeds* v. *Cheetham*, 1 Sim. 146; 5 L.J. (O.S.) Ch. 105; *Arden* v. *Pullen*, 10 M. & W. 321; 11 L.J. Ex. 359; *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 493, 494; 14 L.J. Ex. 95; *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L.J. Q.B. 168; *Surplice* v. *Farnsworth*, 7 M. & Gr. 576; 13 L.J. C.P. 215.

(*g*) T. Term, 27 Hen. 6, fol. 10, pl. 6; Bro.Abr. Dette, pl. 18; *Surplice* v. *Farnsworth*, *supra*.

(*h*) *Bennett* v. *Ireland*, E. B. & E. 326; 28 L.J. Q.B. 48.

(*i*) *Monk* v. *Cooper*, 2 Str. 763; *Belfour* v. *Weston*, 1 T.R. 310.

any portion of the demised premises by the act of the landlord, the entire rent is thereby suspended (*k*); but the act must be something of a grave and permanent character, dispossessing the tenant, and not a mere temporary trespass (*l*); and there must be an actual dispossession of the tenant, and not a mere constructive eviction (*m*). The tenant is not released from liability by reason of an eviction by a mere wrong-doer and trespasser who has no title. Thus, where an action of debt was brought for three years' arrears of rent reserved upon a lease of a farm, and the defendant pleaded that Prince Rupert, an alien and enemy of the king, invaded the realm, and with divers armed men did enter upon the demised premises, and expel him therefrom, and keep him out, so that he could not enjoy the land during the term, "it was resolved that the matter of the plea was insufficient." And this distinction was taken that, where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Another reason was added that, as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses (*n*) and not lay the whole burthen of them upon his lessor (*o*). So, where the parliament, during the civil wars, took possession of a house which had been demised to a lessee for a term of years, and turned it into an hospital for maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years, notwithstanding which the lessor brought an action of debt for the rent, no question appears to have been made but that the lessee was bound at common law to make good the rent; and the lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrong-doer, because it was an act of force in the parliament, which had been pardoned by the Act of Oblivion; but it does not appear that he got relief even in equity (*p*).

(*k*) Co. Litt. 148, b; *Upton* v. *Townend*, 17 C.B. 30; 25 L.J. C.P. 44.

(*l*) *Upton* v. *Townend*, 17 C.B. 30, 64; 25 L.J. C.P. 44; *Carpenter* v. *Parker*, 3 C.B. N.S. 206; 27 L.J. C.P. 78.

(*m*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248, *ante*, p. 655; *Wheeler* v. *Stevenson*, 6 H. & N. 155, 158; 30 L.J. Ex. 46.

(*n*) See *Charlesworth* v. *Watson*, (1906) A.C. 14; 75 L.J. K.B. 137, a case where the working of a mine became unprofitable to the lessee.

(*o*) *Paradine* v. *Jane*, Aleyn, 26; Sty. 47; *Maryon* v. *Carter*, 4 C. & P. 295; *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L.J. Ex. 41; *Brown* v. *Royal Insurance Soc.*, 28 L.J. Q.B. 275; 1 El. & El. 853.

(*p*) *Harrison* v. *North* (*Lord*), 1 Ch. Ca. 83; as to proof of expulsion, see

Payment of rent—Eviction by railway companies under statutory powers.—If the tenant is lawfully evicted by a railway company under the powers of its Act, the tenant is discharged from the accruing rent, but not from rent that was due and in arrear at the time of the eviction. Where a yearly tenant received notice from a railway company to give up possession of certain land within six months from the notice, and the notice expired in the middle of a half-year, and the tenant gave up possession to the company without obtaining or requiring compensation in respect of his unexpired term and interest in the premises, it was held that he was liable to his landlord for the whole of the half-year's rent (*q*). When a certain portion only of lands or tenements held by tenants or lessees has been taken by a railway company under the powers of its Act, the rent is to be apportioned; and the rent to be paid by the tenant for the residue of the lands not taken by the company must be settled by agreement of the parties, or by two justices, or by a jury (*r*).

Payment of rent—Assignment of reversion.—If the lessor, after granting the lease, conveys all his estate and interest in the demised premises, he has no longer any right to the accruing rent (*s*); nor has the assignee any right to rent accrued due before the assignment (*t*). The rent passes with the reversion to the lessor's grantee without any attornment on the part of the tenant; but the tenant is not to be prejudiced by payment of rent to the lessor (*u*), or by breach of any condition for non-payment of rent, before notice of the grant has been given to him by the grantee (*x*). Prepayment is a good discharge for all rent which has become due before notice of the transfer (*y*), but not for rent which becomes due after notice (*z*).

Payment of ground-rent by tenant—Deduction thereof from tenant's rent.—The immediate landlord is by the common law bound to protect his tenant from all paramount claims; and, when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his

Poole (*Mayor*) v. *Whitt*, 15 M. & W. 571; 16 L.J. Ex. 229; as to evidence of eviction, see *Morrison* v. *Chadwick*, 7 C.B. 266; 18 L.J. C.P. 189; *Henderson* v. *Mears*, 28 L.J. Q.B. 305; *Wheeler* v. *Stevenson*, 6 H. & N. 158; 30 L.J. Ex. 46; *Pellatt* v. *Boosey*, 31 L.J. C.P. 281.

(*q*) *Wainwright* v. *Ramsden*, 5 M. & W. 602; 9 L.J. Ex. 120; *post*, pp. 720 *et seq.*

(*r*) 8 & 9 Vict. c. 18, s. 119; Bac.Abr. Rent, M.; *Ware, In re*, 9 Exch. 395; 23 L.J. Ex. 145.

(*s*) *Harmer* v. *Bean*, 3 Car. & K. 307.

(*t*) *Flight* v. *Bentley*, 7 Sim. 149; *Sharp* v. *Key*, 8 M. & W. 379.

(*u*) 4 Anne, c. 16, s. 9.

(*x*) 4 Anne, c. 16, s. 10. See *Allcock* v. *Moorhouse*, 9 Q.B.D. 366. As to effect of payment to an equitable mortgagee, see *Finch* v. *Tranter*, (1905) 1 K.B. 427; 74 L.J. K.B. 345.

(*y*) *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89.

(*z*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *ante*, p. 667.

rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is impliedly authorised to make the payment on the landlord's behalf; and the courts have held such payments to be payments in satisfaction of rent due, or accruing due, to the immediate landlord (*a*). But the tenant should deduct these payments from the next rent that becomes due, or from the rent of the current year; for, if he allows several payments of rent to pass without giving his immediate landlord notice of the payment, and claiming the deduction, he will lose his right to deduct the money he has paid from the rent (*b*). Payments of money on account of the landlord, not charged upon the demised premises and leviable upon the chattels of the occupier, cannot be given in evidence in satisfaction and discharge of the rent, unless they were expressly directed or sanctioned by the landlord (*c*).

Deduction of income-tax, land-tax, sewers rate, and other outgoings from rent.—As regards land-tax (*d*), property-tax (*e*), sewers rates, &c., charged on land demised to a tenant, the tenant ought to deduct the tax or rate out of the next rent that becomes due. If he fails to do this, he cannot deduct it from subsequent rent, nor can he recover it by action from the landlord (*f*). The Tithe Act, 1836 (*g*), has been held not to impose any liability on the landlord to pay the tithe rent-charge (*h*), but now by the Tithe Act, 1891 (*i*), the tithe rent-charge issuing out of land is payable by the owner of the lands (*k*), and in certain cases, where it has been paid by the tenant, may be deducted by him from any sums at any time becoming due from him to the landlord under whom he holds (*l*). If the landlord is entitled to be relieved from the assessment, it is his duty to take the necessary steps for the purpose; and,

(*a*) *Graham* v. *Allsopp*, 3 Exch. 186, 198; 18 L.J. Ex. 85; *Taylor* v. *Zamira*, 6 Taunt. 524; *Jones* v. *Morris*, 3 Exch. 742; 18 L.J. Ex. 477. As to deduction of proportionate part of land-tax from ground-rent, see *Mansfield* v. *Relf*, *post*, p. 678.

(*b*) *Andrew* v. *Hancock*, 3 Moore, 278; 1 B. & B. 37; *Spragg* v. *Hammond*, 4 Moore, 431; *Dawes* v. *Thomas*, (1892) 1 Q.B. 414; 61 L.J. Q.B. 482.

(*c*) *Davies* v. *Stacey*, 12 Ad. & E. 506; 9 L.J. Q.B. 393.

(*d*) As to land-tax, see 38 Geo. 3, c. 5, ss. 4, 17, 18, 35; and as to redemption of the tax, see 42 Geo. 3, c. 116, ss. 123, 126; 16 & 17 Vict. c. 117, s. 1.

(*e*) 5 & 6 Vict. c. 35, ss. 60, 103; 16 & 17 Vict. c. 34, s. 40; 27 & 28 Vict. c. 18, s. 15.

(*f*) *Andrew* v. *Hancock*, 3 Moore, 278; 1 B. & B. 37; *Denby* v. *Moore*, 1 B. & Ald. 123, 129; *Cumming* v. *Bedborough*, 15 M. & W. 438; *Dawes* v. *Thomas*, (1892) 1 Q.B. 414; 61 L.J. Q.B. 482.

(*g*) 6 & 7 Will. 4, c. 71, s. 80; 54 & 55 Vict. c. 8, s. 4.

(*h*) *Griffinhoofe* v. *Daubuz*, 4 E. & B. 235; 24 L.J. Q.B. 20.

(*i*) 54 & 55 Vict. c. 8, s. 1.

(*k*) See *ante*, p. 90, as to contract for tenant to pay charge being void, and see 54 & 55 Vict. c. 8, ss. 1 (3), 2, as to modes of recovering tithe rent-charge.

(*l*) 54 & 55 Vict. c. 8, s. 4.

if, before he has done this, the assessment is made on the occupier, and the tax paid, it may be deducted from the rent, although at the time the deduction is made the landlord has obtained his exemption from the tax (*m*). The landlord is in general liable to pay taxes in proportion to the rent reserved, and not to the improved value (*n*). Where land and premises thereon were granted for a term at a ground-rent of 1*l.* 7*s.* per annum clear of all deductions except *inter alia* land-tax, the lessor covenanting to pay "the land-tax chargeable upon the premises," and the premises, the annual value of which had not increased since the granting of the lease, being assessed at the annual value of 32*l.*, and the land-tax charged thereon at 32*l.* per annum, amounting to 5*s.* 4*d.*, it was held that the lessee was only entitled when paying the ground rent to deduct that part of the land-tax which was proportionate to the ground-rent (*o*). Where a lessor covenanted to pay all present and future rates and taxes, and the lessee with his consent sub-let at profit rentals whereby the assessment of the premises demised at a rack-rent was increased, it was held that the lessor was liable for the whole of the increased rates (*p*). Where the lessor was also the owner of the tithe rent-charge upon the land, it was held that a covenant to pay "all taxes and assessments whatsoever for or in respect of the demised premises, save and except the level-tax, property-tax, and land-tax," did not include the tithe rent-charge, and that the lessee was not bound to pay it (*q*). An agreement by the landlord to repay the tenant all sums which he shall pay for the landlord's property-tax if the tenant will pay his rent in full without any deduction of landlord's property-tax, is good notwithstanding the provisions of the statute (*r*). But an agreement by the tenant to pay "by way of further rent so much as the landlord shall pay for tithe rent-charge on the said premsies" is void under sect. 1 of the Tithe Act, 1891 (*s*).

(*m*) *Swatman* v. *Ambler*, 24 L.J. Ex. 185.

(*n*) *Smith* v. *Humble*, 15 C.B. 321.

(*o*) *Mansfield* v. *Relf*, (1908) 1 K.B. 71; 77 L.J. K.B. 145; following *Watson* v. *Home*, 7 B. & C. 285; 6 L.J. (O.S.) K.B. 73, and *Smith* v. *Humble*, *supra*.

(*p*) *Salaman* v. *Holford*, (1909) 2 Ch. 602; 79 L.J. Ch. 41. As to whether an underlessee is an assign of the lessee, see *South of England Dairies* v. *Baker*, (1906) 2 Ch. 631; 76 L.J. Ch. 78.

(*q*) *Jeffrey* v. *Neale*, L.R. 6 C.P. 240; 40 L.J. C.P. 191. See also Tithe Act, 1891 (54 & 55 Vict. c. 8).

(*r*) 5 & 6 Vict. c. 35, ss. 60, 103; *Lamb* v. *Brewster*, 4 Q.B.D. 220, 607; 48 L.J. Q.B. 421; as to agreements to pay rates, including a rate under 37 & 38 Vict. c. 54, s. 3 (rating of mines), see *Chaloner* v. *Bolckhow*, 3 App.Cas. 933; 47 L.J. C.P. 562. As to water rate, see *Spanish Telegraph Co.* v. *Shepherd*, 13 Q.B.D. 202; 53 L.J. Q.B. 420; *Badcock* v. *Hunt*, 22 Q.B.D. 145; 58 L.J. Q.B. 104; *Floyd*, *In re*, (1897) 1 Ch. 633; 66 L.J. Ch. 350; *Bourn* v. *Salmon*, (1907) 1 Ch. 616; 76 L.J. Ch. 374; 10 & 11 Vict. c. 17, s. 72; 50 & 51 Vict. c. 21, s. 4.

(*s*) 54 & 55 Vict. c. 8, s. 1; *Ludlow* (*Baron*) v. *Pike*, (1904) 1 K.B. 531; 73 L.J. K.B. 274. See also as to property-tax, *Colbron* v. *Travers*, 12 C.B. N.S. 181; 31 L.J. C.P. 257.

Where the lessee covenanted to pay the rent without any deduction, &c., and further "to pay all manner of taxes, &c., charges and impositions whatever, &c., imposed by the authority of parliament or otherwise howsoever," and the lessor was compelled under an Act to abate a nuisance from bad drainage, it has been held that he was not entitled to call upon the lessee to pay (*t*). A tenant who covenants to pay, bear, and discharge all assessments, charges, or impositions whatever, parliamentary, parochial, or otherwise, which at any time during the continuance of the demise may be charged, assessed or imposed on the lessor, for or in respect of the premises, is liable to recoup his landlord any expenses incurred by him in complying with an order made under the Public Health (London) Act, 1891, to abate a nuisance on the demised premises, inasmuch as such expenses are a charge on the lessor in respect of the premises (*u*). The word "impositions" in a somewhat similar covenant has been held to embrace an obligation imposed on a landlord in respect of a structural defect which he was called upon to remedy under the Act of 1891 (*x*), but in cases of this kind he can only recover the expenses if incurred under the order and compulsion of a public authority (*y*). The expenses of paving a street incurred by a landlord under sect. 150 of the Public Health Act, 1875, have been held not recoverable by him from a tenant under a lease by which the tenant covenanted to pay "all rates, taxes, the assessments whatsoever which then are or during the said term shall be imposed or assessed upon the premises, or the landlord or tenant in respect thereof, by authority of parliament or otherwise" (*z*); but it has more recently been held that such expenses are recoverable by a landlord under a covenant by his tenant to pay "all rates, taxes, and outgoings now payable or hereafter to become payable" in respect of the demised pre-

(*t*) *Rawlins* v. *Briggs*, 3 C.P.D. 368; 47 L.J. C.P. 487; *Tidswell* v. *Whitworth*, L.R. 2 C.P. 326; 36 L.J. C.P. 103; but see *Foulger* v. *Arding*, (1902) 1 K.B. 700; 71 L.J. K.B. 499. As to "all outgoings," see *Aldridge* v. *Ferne*, 17 Q.B.D. 212; 55 L.J. Q.B. 587.

(*u*) *Smith* v. *Robinson*, (1893) 2 Q.B. 53; 62 L.J. Q.B. 509.

(*x*) *Foulger* v. *Arding*, (1902) 1 K.B. 700; 71 L.J. K.B. 499; *Thompson* v. *Lapworth*, L.R. 3 C.P. 149; 37 L.J. C.P. 74.

(*y*) *Hartley* v. *Hudson*, 4 C.P.D. 367; 48 L.J. C.P. 751; *Budd* v. *Marshall*, 5 C.P.D. 481; 50 L.J. C.P. 24; *Allum* v. *Dickinson*, 9 Q.B.D. 632; 52 L.J. Q.B. 190; *Foulger* v. *Arding*, *supra*; *Harris* v. *Hickman*, (1904) 1 K.B. 13; 73 L.J. K.B. 31; *Wix* v. *Rutson*, (1899) 1 Q.B. 474; 68 L.J. Q.B. 298; *Warriner*, *In re*, (1903) 2 Ch. 367; 72 L.J. Ch. 701; *Stockdale* v. *Ascherberg*, (1904) 1 K.B. 447; 73 L.J. K.B. 206. As to lessee's liability under "outgoings" to pay expenses of structural alterations made under the Factory Act, 1901 (1 Edw. 7, c. 22), see *Monk* v. *Arnold*, (1902) 1 K.B. 761; 71 L.J. K.B. 441; *Goldstein* v. *Hollingsworth*, (1904) 2 K.B. 578; 73 L.J. K.B. 826; *Morris* v. *Beal*, (1904) 2 K.B. 585; 73 L.J. K.B. 830; *Horner* v. *Franklin*, (1905) 1 K.B. 479; 74 L.J. K.B. 291; *Stuckey* v. *Hooke*, (1906) 2 K.B. 20; 75 L.J. K.B. 504.

(*z*) *Baylis* v. *Jiggens*, (1898) 2 Q.B. 315; 67 L.J. Q.B. 793; *Wilkinson* v *Collyer*, 13 Q.B.D. 1; 53 L.J. Q.B. 278,

mises (*a*). A covenant by the lessee to pay all "present and future" rates and "outgoings" charged on the demised premises, or the owner, does not cover charges incurred before but only payable after the lease has been granted (*b*). A lessee who covenanted with the lessor to pay "taxes, rates, duties, assessments and impositions . . . which now are or shall be . . . assessed or imposed on in respect of the . . . premises or of the rent hereby reserved" has been held liable, as between himself and the landlord, under the word "duties," to pay the cost incurred by the latter in abating a nuisance arising from drains in compliance with a notice served upon him under the Public Health (London) Act, 1891 (*c*). Where the tenant covenanted to pay charges imposed upon frontagers of premises and paid to a local authority under the Metropolis Management Act, 1862 (*d*), certain paving expenses it was held that such payment was not a payment of rent *pro tanto* which prevented the landlord from distraining for the amount when deducted by the tenant from the rent (*e*).

Right to distrain for rent.—The law relating to distress will be found under its respective heads treated at length elsewhere (*f*), but the right to distrain for rent is here stated generally. The lessor's right to enter in person or by deputy upon the demised premises and distrain the goods and chattels of the tenant for rent or services in arrear has existed in this country from so early a period, "that we have no memorial of its original with us" (*g*). This power is impliedly accorded to the lessor on every demise of realty where there is an express reservation of, or an agreement by the tenant to pay, a fixed ascertained rent or service (*h*). If there has been merely a permissive occupation of the property, without any previous payment of rent referable to some certain term of hiring, or to some definite portion of a year, the lessor has no right of entry upon the land nor power to distrain, but must proceed by way of action upon the implied promise of the tenant to pay a fair and reasonable compensation for the permissive use and enjoyment of property (*i*).

(*a*) *Greaves* v. *Whitmarsh, Watson & Co.*, (1906) 2 K.B. 340; 75 L.J. K.B. 633.

(*b*) *Surtees* v. *Woodhouse*, (1903) 1 K.B. 396; 72 L.J. K.B. 302; *Stock* v. *Meakin*, (1900) 1 Ch. 683; 69 L.J. Ch. 401.

(*c*) *Brett* v. *Rogers*, (1897) 1 Q.B. 525; 66 L.J. Q.B. 287; *Farlow* v. *Stevenson*, (1900) 1 Ch. 128; 69 L.J. Ch. 106; see observations of Collins, M.R., on these cases in *Foulger* v. *Arding*, (1902) 1 K.B. 700; 71 L.J. K.B. 499.

(*d*) 25 & 26 Vict. c. 102, s. 96.

(*e*) *Skinner* v. *Hunt*, (1904) 2 K.B. 452; 73 L.J. K.B. 680.

(*f*) *Post*, p. 772; and see *Addison on Torts* (ed. 8), pp. 318—345.

(*g*) Gilbert on Distress, p. 2 (ed. 4); 2 Bro.Abr. Distress, fol. 252; Bradby, 2.

(*h*) Litt. sect. 214.

(*i*) *Dunk* v. *Hunter*, 5 B. & Ald. 322, 325.

Extinguishment of right to distrain by assignment of reversion.—If the lessor, after the making of the demise, conveys the property to a purchaser, he has no power to distrain for the rent that became due prior to the execution of the conveyance, as he is no longer possessed of the reversion expectant upon the determination of the lease (*k*). Neither can the purchaser distrain for such rent; for it was a fruit fallen from the reversion at the time of the conveyance of the demised premises to him (*l*). But if the conveyance was preceded by the ordinary agreement between vendor and purchaser vesting the equitable estate in the latter prior to the rent becoming due, the purchaser would be entitled to recover the rent by action (*m*).

Apportionment of rent and conditions.—The Apportionment Act, 1834(*n*), respecting the apportionment of rent did not apply to leases created by parol (*o*). But by the Apportionment Act, 1870 (*p*), rents are to be considered to accrue from day to day, and are to be apportionable in respect of time accordingly (*q*). By the Conveyancing Act, 1881, it is provided that, notwithstanding severance of the reversionary estate in any land or the cesser of the term granted by a lease as to part only of the land, every condition contained in the lease shall be apportioned (*r*). Where land demised under a lease is severed by reason of the assignment of a portion of it, the rent should be apportioned on the basis not of the area of each portion of the land, but of the value computed as at the date of the severance (*s*).

Compensation for use and occupation of land.—Where land or premises are occupied by the permission express or implied of the person between whom and the person occupying the relation of landlord and tenant exists, the former is entitled to sue the latter in an action for the use and occupation (*t*). But

(*k*) Bro.Abr. Dette, pl. 39; *Parmenter* v. *Webber*, 8 Taunt. 593; *Preece* v. *Corrie*, 5 Bing. 24; 6 L.J. (O.S.) C.P. 205.

(*l*) *Midgley* v. *Lovelace*, Carth. 289; 12 Mod. 46.

(*m*) *Anon.*, Skin. 367; *Midgley* v. *Lovelace*, Carth. 290; as to the mode in which a distress must be levied and other incidents, see *Addison on Torts* (ed. 8), pp. 318 *et seq.*

(*n*) 4 & 5 Will. 4, c. 22.

(*o*) *Cattley* v. *Arnold*, 1 Jo. & H. 651; 28 L.J. Ch. 352; *Plummer* v. *Whiteley*, 29 L.J. Ch. 247; Johns. 585.

(*p*) 33 & 34 Vict. c. 35, s. 2. As to apportionment of first-fruits and tenths, see *Rochester* (*Bishop*) v. *Le Fanu*, (1906) 2 Ch. 513; 75 L.J. Ch. 743.

(*q*) *Hastings* (*Lord*), *Ex parte*, 62 L.J. Q.B. 628; *Barnett* v. *Eastman*, 67 L.J. Q.B. 517; *Ellis* v. *Rowbotham*, 69 L.J. Q.B. 379.

(*r*) 44 & 45 Vict. c. 41, s. 12; the section only applies to leases made after Dec. 31, 1881. In a case of a lease granted before the above Act, where there was a personal covenant by the defendant to pay rent, and he assigned the term, and his assignee surrendered a portion of the premises to the plaintiff, it was held that the plaintiff could recover rent for the portion not surrendered, and possibly, for the whole: *Baynton* v. *Morgan*, 22 Q.B.D. 74; 58 L.J. Q.B. 139.

(*s*) *Salts* v. *Battersby*, (1910) 2 K.B. 155; 79 L.J. K.B. 937.

(*t*) *Turner* v. *Cameron's Steam Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71; *Carmier* v. *Mercer*, cited *Birch* v.

as formerly the plaintiff was nonsuited if a demise was proved, it was provided by sect. 14 of the Distress for Rent Act, 1737 (*u*), that the landlord, where the agreement is not by deed, is entitled to recover a reasonable satisfaction for the land or premises held or occupied by the defendant in an action for the use and occupation of what was so held or enjoyed; and that if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear the plaintiff is not to be nonsuited but may make use thereof as evidence of the quantum of the damages to be recovered.

Constructive occupation.—An actual personal occupation is not necessary to entitle the landlord to compensation, when the lessee has entered and taken possession, and the term has become vested in him (*y*). But there must be proof of an actual entry on the land (*z*) and taking of possession, or it must be shown that there has been an occupation by some other parties standing in such a relation to the defendant that their occupation is his and that he is personally liable for it (*a*). An entry by one of two joint lessees is an entry by both, so as to render both liable (*b*). The action is maintainable, where no certain rent has been reserved, and where there is, consequently, no right to distrain (*c*). The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day so long as the occupation lasts (*d*). Very slight circumstances, such as entry on the lands (*e*), the putting up a notice for the purpose of letting (*f*), sending a woman to clean windows or rooms, or workmen to put up paper or do repairs (*g*), will suffice to establish the fact of entry and of actual occupation.

An occupation by an under-tenant of the lessee is the lessee's own occupation, as much as if he were himself personally present upon the land (*h*). But, if one of two joint lessees

Wright, 1 T.R. 387; *Newport* (*Mayor*) v. *Saunders*, 3 B. & Ad. 411; 1 L.J. K.B. 147; *Churchward* v. *Ford*, 2 H. & N. 446; 26 L.J. Ex. 354.

(*u*) 11 Geo. 2, c. 19, s. 14; *Churchward* v. *Ford*, *supra*; *Hellier* v. *Silleox*, 19 L.J. Q.B. 295; *Levy* v. *Lewis*, 9 C.B. N.S. 872; 30 L.J. C.P. 141; *Hardon* v. *Hesketh*, 4 H. & N. 175; 28 L.J. Ex. 137.

(*y*) *Baker* v. *Holtpzaffell*, 4 Taunt. 45; *Izon* v. *Gorton*, 7 Sc. 537; 8 L.J. C.P. 272; *Pollock* v. *Stacy*, 9 Q.B. 1033; 16 L.J. Q.B. 132.

(*z*) *Edge* v. *Stafford*, 1 Cr. & J. 391; 9 L.J. (O.S.) Ex. 101; *Lowe* v. *Ross*, 5 Exch. 553; 19 L.J. Ex. 318; *How* v. *Kennett*, 3 Ad. & E. 659; 4 L.J. K.B. 220; *Towne* v. *D'Heinrich*, 13 C.B. 892; 22 L.J. C.P. 219.

(*a*) *Bull* v. *Sibbs*, 8 T.R. 327.

(*b*) *Glen* v. *Dungey*, 4 Exch. 61; 18 L.J. Ex. 359.

(*c*) *Waring* v. *King*, 8 M. & W. 571; 11 L.J. Ex. 49; *Hamerton* v. *Stead*, 3 B. & C. 478; 3 L.J. (O.S.) K.B. 33.

(*d*) *Packer* v. *Gibbins*, 1 Q.B. 421; 10 L.J. Q.B. 224; *Gibson* v. *Kirk*, 1 Q.B. 850, 856; 14 L.J. Q.B. 297.

(*e*) *Woolley* v. *Watling*, 7 C. & P. 610.

(*f*) *Sullivan* v. *Jones*, 3 C. & P. 579.

(*g*) *Smith* v. *Twoart*, 2 M. & Gr. 841.

(*h*) *Bull* v. *Sibbs*, *supra*; *Conolly* v. *Baxter*, 2 Stark. 525; *Smith* v. *Eldridge*, 15 C.B. 234.

holds over after the expiration of his lease, without the assent of his co-lessee, the latter is not responsible in respect of the occupation of such co-lessee (*i*). The occupation of the wife before marriage is not the occupation of the husband (*k*). The actual possession and use by one of two executors of property holden on lease by their testator is not in law a possession and use by both, and does not render both chargeable as joint occupiers in their own right (*l*). If the testator held the premises, and if the executors, since his decease, have not actually occupied but have held only, they would not be personally liable for rent accrued, but the assets in their hands would be liable (*m*). If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee and refuses, he is liable to an action at the suit of the latter (*n*). The defendant may show that the plaintiff's interest in the premises has expired, or has been transferred to some third party; but he is estopped from denying the lessor's title to grant the property to be enjoyed, and cannot show that the lessor has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action (*o*). A tenant who has occupied land under a corporation and paid rent to the corporate body, is liable for use and occupation, although the corporation cannot in general contract except by virtue of its common seal (*p*); and a corporation which has actually occupied and used lands, &c., may be made liable during the period of occupation, but not afterwards, unless there is a demise under seal (*q*).

If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies, and receives the profits of, the land, he is liable for a reasonable compensation to be paid to the owner for the use and enjoyment of the property (*r*). But, if he takes possession of property as a purchaser, under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain, consequently,

(*i*) *Christy* v. *Tancred*, 9 M. & W. 438; 11 L.J. Ex. 109; *Draper* v. *Crofts*, 15 M. & W. 166; 15 L.J. Ex. 92; *Ibbs* v. *Richardson*, 9 Ad. & E. 849; 8 L.J. Q.B. 126.

(*k*) *Richardson* v. *Hall*, 3 Moore, 307; 1 B. & B. 50.

(*l*) *Nation* v. *Tozer*, 1 Cr. M. & R. 175; 3 L.J. Ex. 234.

(*m*) *Per* Maule, J., *Atkins* v. *Humphrey*, 2 C.B. 654, 659; 15 L.J. C.P. 120.

(*n*) *Lumley* v. *Hodgson*, 16 East, 99; *Birch* v. *Wright*, 1 T.R. 378; *Rennie* v. *Robinson*, 1 Bing. 147; 1 L.J. (O.S.) C.P. 30.

(*o*) *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50.

(*p*) *Stafford* (*Mayor*) v. *Till*, 12 Moore, 260; 5 L.J. (O.S.) C.P. 77; *Thetford* (*Mayor*) v. *Tyler*, 8 Q.B. 95; 15 L.J. C.P. 33.

(*q*) *Finlay* v. *Bristol and Exeter Ry.*, 7 Exch. 409, 417; 21 L.J. Ex. 117; *Lowe* v. *L. & N. W. Ry.*, 18 Q.B. 632; 21 L.J. Q.B. 361; see *ante*, p. 375.

(*r*) *Thetford* (*Mayor*) v. *Tyler*; *supra*.

goes off, the purchaser is not, in general, bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property (*s*). If, however, after a contract of purchase and sale has gone off or been abandoned, the intended purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation for the subsequent use and occupation (*t*). So, if the vendor of a house continues to reside in it after he has sold it, he is not liable in respect of such subsequent residence, in the absence of proof of an express or implied agreement that the occupation was to be paid for (*u*). If a lessor has agreed to put a house into repair, and the tenant enters and occupies, and the lessor neglects to fulfil his agreement, he is nevertheless entitled to recover such a sum as the use and occupation by the tenant may be reasonably worth (*x*). If the tenant or occupier has entered as a trespasser and wrongdoer, and has remained in possession and used and occupied the land to the exclusion of the owner, it appears to be somewhat doubtful whether the latter may waive the tort, and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property (*y*). But acceptance of rent by the owner from a trespasser, would be a waiver of the tort and a creation of a tenancy, with its accompanying rights and duties. If the landlord assigns his interest, and the tenant has notice of the assignment, and continues to occupy with the consent of the assignee, he may be sued by the latter (*z*), but not otherwise (*a*). A lessee is not liable for use and occupation after he has been adjudicated a bankrupt, whether the trustee accepts his interest in the premises or disclaims it (*b*).

Use and occupation by one of several joint tenants or tenants in common.—By 4 Anne, c. 16, s. 27, joint tenants and tenants in common, and their executors, and administrators, may maintain an action of account, against the others as bailiff, for re-

(*s*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Winterbottom* v. *Ingham*, 7 Q.B. 611; 14 L.J. Q.B. 298.

(*t*) *Howard* v. *Shaw*, 8 M. & W. 118, 122; 10 L.J. Ex. 334.

(*u*) *Tew* v. *Jones*, 13 M. & W. 12; 14 L.J. Ex. 94; see *Metropolitan Ry.* v. *Defries*, 2 Q.B.D. 189, 387.

(*x*) *Smith* v. *Eldridge*, 15 C.B. 236.

(*y*) See *per* Parke, B., *Turner* v. *Cameron's Steam Coal Co.*, 5 Exch. 932, 937; 20 L.J. Ex. 71; and observations of Bowen, L.J., *Phillips* v. *Homfray*, 24 Ch.D. 439, 461; 52 L.J. Ch. 833, 840.

(*z*) *Standen* v. *Chrismas*, 10 Q.B. 135; 16 L.J. Q.B. 265; see 4 Anne, c. 16, s. 9, as to attornment.

(*a*) *Cook* v. *Moylan*, 1 Exch. 67; 16 L.J. Ex. 253; *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.

(*b*) 46 & 47 Vict. c. 52, s. 55. See *Stacey* v. *Hill*, (1901) 1 K.B. 660; 70 L.J. K.B. 435.

ceiving more than their just share or proportion (*c*). This statute applies to cases where two or more persons are tenants in common of land leased to a third party at a rent payable to each, or where there is a rent-charge, or any money payment, or payment in kind due to them from another person, and one receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy, and not to cases where one has enjoyed more of the benefit of the land, and made more by personal occupation of it, than another. There are many cases in which a tenant in common may occupy and enjoy the common land solely, and have all the advantage to be derived from it, and yet not be liable to pay anything to his co-tenant in common (*d*); but where a tenant in common continues in occupation as tenant at sufferance after the expiration of a lease to him by his co-tenant, he will be liable in an action for use and occupation at the suit of the latter (*e*).

Covenants and agreements to repair.—There is no implied covenant or promise, either on the part of the lessor or the lessee of a house, to repair or uphold it during the term (*f*). There is no obligation on the part of a lessor to repair in the absence of an express contract in that behalf; and therefore, if a house demised falls, and destroys the furniture of the lessee, the landlord will not be responsible in damages (*g*). Where the lessor covenants to *keep* in repair, there is no breach until after notice of want of repair (*h*). Thus a covenant by a lessor to keep in repair the external wall or any part of a building is a covenant to repair on notice and not otherwise (*i*). But want of notice is no answer to an action for breach of a covenant to *put* into repair (*k*). Where the lessor covenants to keep in repair he must execute repairs having regard to the class of buildings to which the lease refers, and not merely to the condition of the particular building (*l*). Every covenant by a lessee that he will well and sufficiently repair and maintain the demised premises during the term, and deliver them up at the expiration thereof in good repair and condition, will be construed in connection with the age of the buildings, the state

(*c*) *Jacobs* v. *Seward*, L.R. 5 H.L. 464; 41 L.J. C.P. 221.

(*d*) *Henderson* v. *Eason*, 17 Q.B. 701; 21 L.J. Q.B. 82.

(*e*) *Leigh* v. *Dickeson*, 15 Q.B.D. 60; 54 L.J. Q.B. 18.

(*f*) Dyer, 36, b.

(*g*) *Gott* v. *Gandy*, 2 E. & B. 845; 23 L.J. Q.B. 1.

(*h*) *Makin* v. *Watkinson*, L.R. 6 Ex. 25; 40 L.J. Ex. 33; *L. & S. W. Ry.* v. *Flower*, 1 C.P.D. 77; 45 L.J. C.P. 54; *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809.

(*i*) *Torrens* v. *Walker*, (1906) 2 Ch. 645; 75 L.J. Ch. 166.

(*k*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*l*) *Saner* v. *Bilton*, 7 Ch.D. 815; 47 L.J. Ch. 267; such a covenant implies a licence from the tenant to enter for a reasonable time to do the repairs: *Saner* v. *Bilton*, *supra*.

and condition of them at the time of the demise and the length of the lease (*m*). If the house is an old house, the lessee is bound to keep it up only as an old house, and cannot be compelled to replace old materials with new (*n*). If the lessee has covenanted to keep the demised premises in good repair during the term, and at the time of the demise they were old and in bad repair, he must put them in good repair as old premises, and not keep them in bad repair because they happened to be in that state when he took them. The age and class of the premises, however, with their general condition as to repair, must be looked at in order to measure the extent of the repairs to be done (*o*). If the lessee has covenanted to keep buildings in repair, "the same being first put into repair by the lessor," the liability of the lessee does not arise until after all the buildings have been put into repair by the lessor (*p*), who is bound to repair in the first instance (*q*). When the lessee has entered into an express covenant or agreement to repair, uphold, and keep in repair a house, or any other structure or building demised to him, he is bound to re-build or re-construct it, if it is burned by an accidental fire, or blown down by tempest, or destroyed by floods or by an inevitable accident; for, when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenants to repair a house, or a bridge, and the house is burned down by lightning or an accidental fire, or thrown down by enemies, or the bridge is washed away, the lessee must rebuild (*r*). A covenant to repair remains in force although part of the premises has been acquired and demolished by a local authority under their statutory powers (*s*). The ordinary covenant to repair the "*demised*" tenements and dwelling-houses does not extend (so as to create a forfeiture under a proviso for re-entry in case of non-performance of covenant) to an

(*m*) *Proudfoot* v. *Hart*, 25 Q.B.D. 42; 59 L.J. Q.B. 389; *London Corp.* v. *G. W. Ry.*, (1910) 2 Ch. 314; 79 L.J. Ch. 622.

(*n*) *Harris* v. *Jones*, 1 Moo. & R. 173; *Gutteridge* v. *Munyard*, 1 Moo. & R. 334; 7 C. & P. 129.

(*o*) Parke, B., *Payne* v. *Haine*, 16 M. & W. 545; 16 L.J. Ex. 130; *Proudfoot* v. *Hart*, *supra*; *Lister* v. *Lane*, (1893) 2 Q.B. 212; 62 L.J. Q.B. 583.

(*p*) *Neale* v. *Ratcliff*, 15 Q.B. 916; 20 L.J. Q.B. 130; *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*q*) *Cannock* or *Connoch* v. *Jones*, 3 Exch. 233; 18 L.J. Ex. 204.

(*r*) 40 Edw. 3, fol. 6, pl. 11; *Paradine* v. *Jane*, Aleyn, 26; 2 Saund. 421, a (2); Dyer, 33, a, pl. 10; *Brecknock Co.* v. *Pritchard*, 6 T.R. 750; *Bullock* v. *Dommitt*, *ib.* 650; *Chesterfield* v. *Bolton*, 2 Comyn, 627; *Clark* v. *Glasgow Assur. Co.*, 1 Macq. 668. See *ante*, p. 149.

(*s*) *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. 134; 77 L.J. Ch. 813; *Manchester, Sheffield & Linc. Ry.* v. *Anderson*, (1898) 2 Ch. 394; 67 L.J. Ch. 568.

entirely new structure erected during the term, not in existence and not forming part of any buildings on the premises at the time of the execution of the lease (*t*), unless it appears that the land was demised for building purposes, and that the erection of buildings by the lessee during the term was contemplated by the parties, and that the covenant was meant to extend to buildings thereafter to be erected (*u*).

Where a lease containing a covenant on the part of the lessee to repair is executed on a certain day but the *habendum* of the lease states that the premises are held from a previous day, the tenant who has entered between the two days is not liable on the covenant to repair for breach as committed during the interval, the *habendum* only marking the duration of the tenant's interest, and operating merely retrospectively as a grant (*x*). If the lease is under seal, and the tenant has bound himself by covenant to repair, and the landlord assigns his interest, the assignee is entitled (*ante*, p. 227) to sue upon the covenant (*y*). A covenant to *put* into repair is not a continuing covenant (*z*); but covenants to *keep* in repair are covenants which run with the land, and are continuing covenants to the end of the term (*a*), provided that they touch or concern the thing demised, and are not merely personal and collateral covenants (*b*). And the recovery of damages for a breach of them is no bar to an action for a subsequent breach, but only matter in mitigation of damages (*c*). Such covenants extend to all additions and enlargements of structures existing at the time of the demise, but not to detached independent buildings erected after the making of the lease (*d*). If the landlord has evicted the tenant from part of the demised premises, the tenancy is not thereby determined, and the tenant is not discharged from the performance of a covenant to repair (*e*). The landlord is entitled to recover damages (*f*) for breach of a covenant to yield up in repair at the end of the term, although he immediately proceeds to demolish the buildings (*g*).

(*t*) *Cornish* v. *Cleife*, 3 H. & C. 446; 34 L.J. Ex. 19.

(*u*) *Douse* v. *Cale*, 2 Vent. 136; *Douse* v. *Earl*, 3 Lev. 264; *Lant* v. *Norris*, 1 Burr. 287.

(*x*) *Shaw* v. *Kay*, 1 Exch. 412; 17 L.J. Ex. 17; *Wyburd* v. *Tuck*, 1 Bos. & P. 464.

(*y*) *Bickford* v. *Parson*, 17 L.J. C.P. 192; 5 C.B. 918.

(*z*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*a*) *Martyn* v. *Clue*, 22 L.J. Q.B. 147; 18 Q.B. 661.

(*b*) See *Dewar* v. *Goodman*, 78 L.J. K.B. 209; (1909) A.C. 72.

(*c*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*d*) *Cornish* v. *Cleife*, 34 L.J. Ex. 19; 3 H. & C. 446.

(*e*) *Morrison* v. *Chadwick*, 7 C.B. 266; 18 L.J. C.P. 189; see *ante*, p. 675.

(*f*) As to the measure of damages for breach of covenant to leave in repair, see *Joyner* v. *Weeks*, (1891) 2 Q.B. 31; 60 L.J. Q.B. 510, 515; *Henderson* v. *Thorn*, (1893) 2 Q.B. 164; 62 L.J. Q.B. 586.

(*g*) *Rawlings* v. *Morgan*, 18 C.B. N.S. 776; 34 L.J. C.P. 185.

Where articles of agreement under seal were entered into between an intended lessor and lessee for the grant of a lease for twenty-one years, as soon as a licence from the lord of the manor (the land being copyhold land) could be obtained, and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years, it was held that he was responsible upon his covenant to repair, although the intended lease had never been made, nor any licence obtained from the lord (*h*). If the lessee has not entered and held under the indenture of demise executed by him, and upon the terms of the covenant he has thought fit to enter into, but under a distinct parol demise, then he is not liable upon the covenants of the lease (*i*). Where a lease made under a leasing power was void from non-compliance with the requirements of the power, but the lessee entered and took possession, and paid rent, and then assigned his interest, and the assignee entered and paid rent under the void lease, and continued in possession until the end of the term intended to have been granted, it was held that he must be taken to have promised to hold upon the terms of the lease, and that he was liable for not repairing according to the covenant therein contained (*k*). If a party assents verbally to certain printed terms of hiring, and enters and takes possession, he will be bound by the printed terms, although they are not signed either by him or by the lessor (*l*). Where a tenant gave a written undertaking to hire a house for three years, and to pay rent and repair during the term, but there was no lease or agreement on the part of the lessor, and the tenant entered and took possession and held the premises for more than three years, it was held that he was responsible for neglecting to repair (*m*).

The owner of two houses, 38 and 40, demised 38 by lease containing a covenant by the lessee to repair walls and party-walls. Afterwards he demised 40 similarly. No. 40 was built so as to extend over a gateway between it and 38, and it rested on the wall which was a party-wall between 38 and the gateway, but this wall did not belong to 40. In an action by the lessee of 40 against the owner, it was held that there was no

(*h*) *Pistor* v. *Cater*, 9 M. & W. 315 ; 12 L.J. Ex. 129.

(*i*) See *Pitman* v. *Woodbury*, 3 Exch. at p. 12.

(*k*) *Beale* v. *Sanders*, 3 Bing. N.C. 850 ; 6 L.J. C.P. 283 ; *Lee* v. *Smith*, 23 L.J. Ex. 199.

(*l*) *Bolton* (*Lord*) v. *Tomlin*, 5 Ad. & E. 856 ; 6 L.J. K.B. 45.

(*m*) *Richardson* v. *Gifford*, 1 Ad. & E. 52 ; 3 L.J. K.B. 122.

implied covenant on his part to repair this party-wall (*n*). It was said that if an action were brought by the owner against the lessee of 40 it might be an answer to say that the owner had neglected some precedent obligation, because 40 could not be repaired without first repairing this party-wall; but the suggestion is not very clear (*o*).

By 4 Anne, c. 16, s. 10, as we have seen (*ante*, p. 676), the assignee of the reversion cannot sue for the rent without having given notice of the assignment; but there is no provision to that effect with respect to his right to sue or eject for a forfeiture for non-repair, for the tenant may not know to whom to pay the rent without notice, but he must know that he ought to repair (*p*). A covenant running with the reversion, such as a covenant to repair, entered into by a lessor with his lessee, remains binding on the lessor notwithstanding that he has assigned the reversion (*q*).

Tenant's liability for damage to demised premises.—In the absence of an express covenant or agreement to repair, there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, according as the lease is by deed or by simple contract, to use the property demised in a tenant-like manner, and restore it, at the expiration of the term, in the same state and condition as it was in when demised, subject only to ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required. The extent of the liability of the tenant for the preservation of the property depends upon the duration and value of his own term and interest therein. A tenant for life or years, for example, is bound to watch over the interests of the reversioner, and is responsible for permissive as well as commissive waste, whilst a tenant at will, or from year to year, is responsible only for commissive waste (*r*).

Permissive waste by lessees for terms of years.—A tenant for a term of years is responsible for permissive as well as commissive waste (*s*); but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay,

(*n*) *Colebeck* v. *Girdlers' Co.*, 1 Q.B.D. 234; 45 L.J. Q.B. 225.

(*o*) *Colebeck* v. *Girdlers' Co.*, *supra*.

(*p*) *Scaltock* v. *Harston*, 1 C.P.D. 106; 45 L.J. C.P. 125.

(*q*) *Stuart* v. *Joy*, (1904) 1 K.B. 362; 73 L.J. K.B. 97, approving dictum in *Eccles* v. *Mills*, (1898) A.C. at p. 371; 67 L.J. P.C. at pp. 31, 32.

(*r*) See *Addison on Torts* (ed. 8), pp. 358—370, where the law relating to both permissive and commissive waste is treated at length; *Harnett* v. *Maitland*, 16 M. & W. 257; 16 L.J. Ex. 134; *Herne* v. *Bembow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100; *Torriano* v. *Young*, 6 C. & P. 12.

(*s*) *Yellowly* v. *Gower*, 11 Exch. 274, 294; 24 L.J. Ex. 294, 299.

the landlord is the person to provide a new one, if he think fit (*t*). A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavours to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof, but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet (*u*). The extent of the liability of a lessee, not holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general condition of the buildings at the time he took possession of them, the nature of the repairs required for their preservation, and the duration of his own term and interest in the property (*x*); for a tenant at will, or tenant from year to year, cannot be expected to do as much for the preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste; and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them (*y*). So, where a building is destroyed by what is under all the circumstances an apparently reasonable user of the building, the tenant is not liable for "waste" (*z*).

Commissive waste by lessees for terms of years.—The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations (*a*). Therefore an action

(*t*) Bayley, J., *Wise* v. *Metcalfe*, 10 B. & C. 314; 8 L.J. (O.S.) K.B. 126.

(*u*) See *Shrewsbury's (Lady) Case*, 5 Co. 13, b; *M'Kenzie* v. *M'Leod*, 4 M. & Sc. 253; 3 L.J. C.P. 79; *Salop (Countess)* v. *Crompton*, Cro.Eliz. 777.

(*x*) *Ferguson* v. ——, 2 Esp. 590; *Anworth* v. *Johnson*, 5 C. & P. 239.

(*y*) 2 Roll.Abr. Waste (C).

(*z*) *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809; following *Saner* v. *Bilton*, 7 Ch.D. 815; 47 L.J. Ch. 267.

(*a*) *Smith* v. *Carter*, 18 Beav. 78; *West Ham Central Charity Board* v. *East London Waterworks*, (1900) 1 Ch. 624; 69 L.J. Ch. 257.

is maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance (*b*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value (*c*), for stopping up the windows (*d*), or for removing a partition-wall in a house and enlarging a chamber (*e*). Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner (*f*). But, if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition (*g*).

The lessee cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill, or malt-mill, or a water-mill into a wind-mill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant (*h*). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches, and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease. He must not remove virgin soil (*i*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the

(*b*) *Queen's College* (*Provost, &c.*) v. *Hallett*, 14 East, 489.

(*c*) *Cole* v. *Green*, 1 Lev. 309.

(*d*) *Thomlinson* v. *Brown*, Sayer, 215.

(*e*) 2 Roll.Abr. 815, pl. 9.

(*f*) *Young* v. *Spencer*, 10 B. & C. 145; 8 L.J. (O.S.) K.B. 106.

(*g*) *Queen's College* (*Provost, &c.*) v. *Hallett*, *supra*; *Cole* v. *Forth*, *infra*.

(*h*) Bac.Abr. Waste; *Cole* v. *Forth*, 1 Mod. 94; Co. Litt. 53, a, 53, b.

(*i*) *Higgon* v. *Mortimer*, 6 C. & P. 616.

demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he found when he was intrusted with the possession and use of the property (*k*).

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, whether annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (*post*, p. 696); and there is no difference in law if it be fastened by great nails, or little nails, or by screws or irons put through the posts or walls (*l*); for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the person entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil (*m*).

Waste by tenant from year to year.—A tenant from year to year is not responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding for a term not then determined, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C.J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage

(*k*) *D'Arcy* (*Lord*) v. *Askwith*, Hob. 234; *Phillips* v. *Smith*, 14 M. & W. 589; 15 L.J. Ex. 201; Bac.Abr. Waste; Litt. s. 71.

(*l*) *Herlakenden's Case*, 4 Co. 63, b; *Wilde* v. *Waters*, 16 C.B. 637; 24 L.J. C.P. 193.

(*m*) *Lancaster* v. *Eve*, 5 C.B.N.S. 717; 28 L.J. C.P. 235.

it" (*n*). But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from the rain. A tenant at will, or a tenant from year to year, is not bound, unless by special contract, to expend money in repairs and improvements. The lessee of land who erects a building thereon does not commit waste by so doing, unless it can be shown that such building is an injury to the inheritance (*o*). And so where the tenant of a farm near London erected glass houses upon it and turned it in part into a market garden, it was held that there was no waste, and the opinion was expressed that the Agricultural Holdings Act, 1883, had abolished some of the old common law doctrine of waste, and that buildings erected by a lessee on a demised land which rendered it more profitable would be improvements and could not be regarded as waste (*p*).

Timber trees.—Wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter on the land and cut the trees at all reasonable times (*q*).

Duty of tenant to preserve landlord's landmarks and boundaries.—Where a tenant for life, or for years, or at will, has land of his own adjoining to that which he holds as tenant, it is his duty to keep the boundaries between the two properties distinct, so that, at the expiration of the tenancy, the reversioner may be able without difficulty to resume the possession of what belongs to him; and, if the tenant neglects this duty, and suffers the boundaries to be confused, so that the reversioner cannot tell to what land he is entitled, the courts will give relief by compelling the tenant to restore the proper boundaries, if it can be done, or, if not, to give an equivalent. This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or purchasers without notice (*r*).

Fences.—There is no implied agreement on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut on land demised to a tenant so as to prevent the tenant's cattle from straying on to them (*s*).

(*n*) *Gibson* v. *Wells*, 1 Bos. & P. N.R. 290; *Herne* v. *Bembow*, 4 Taunt. 764; *Martin* v. *Gilham*, 7 Ad. & E. 540; 7 L.J. Q.B. 11.

(*o*) *Jones* v. *Chappell*, L.R. 20 Eq. 539; 44 L.J. Ch. 658.

(*p*) *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L.J. Ch. 449. See *ante*, p. 690.

(*q*) *Hewitt* v. *Isham*, 7 Exch. 77; 21 L.J. Ex. 35. As to waste in timber trees, see *Addison on Torts* (ed. 8), pp. 358, 361.

(*r*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L.J. Ch. 888.

(*s*) *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 835.

Restrictive covenants as to the user of premises entered into between lessor and lessee run with the land (*ante*, p. 305). When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by any assignment of that land without proof of special bargain (*t*). A general covenant by the lessee that he will not do, or suffer to be done, upon the demised premises anything which may become an annoyance to the tenants of the adjoining houses may prevent him from opening a shop or coal-office, or carrying on any trade or business in a dwelling-house (*u*).

A lessee covenanted not to do anything to annoy or diminish the value of the property adjoining, or build without the approval of the lessor, &c. The owner afterwards leased the adjoining property to another who made a similar covenant. The first lessee began to build with the approval of the lessor. It was held that the second lessee could not call upon the owner to restrain the first from building (*x*). The purchaser of each lot of a building estate entered into a covenant with the vendor and the purchasers of the other lots that he would not build beyond a specified line; a mortgagee of one of the lots, with notice of the covenant, but without restriction of his mortgagor, foreclosed and sold his lot to the defendant, with notice of the covenant; it was held that there was no implied restriction as between the mortgagor and mortgagee, and that the mortgagor was not entitled to enforce the restriction against the defendant (*y*). Where a building has been erected without complaint, the court will not grant a mandatory injunction to pull it down (*z*). Where a lessor covenanted that he would not let any other house in the same street "for the purpose of an eating house," and then let a house to a person who set up an eating house, although covenanting not to do so, it was held that the lessor was not liable to the first lessee (*a*). The erection of a clock outside trade premises by way of advertisement has been held not to be a breach of a covenant by the lessee not to make any "alteration to the premises" without the lessor's consent (*b*). A covenant by the lessee of a public-house

(*t*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L.J. Ch. 652.

(*u*) *Wilkinson* v. *Rogers*, 10 Jur. N.S. 5; 2 De G. J. & S. 62.

(*x*) *Master* v. *Hansard*, 4 Ch.D. 718; 46 L.J. Ch. 505; *Renals* v. *Cowlishaw*, 11 Ch.D. 866; 48 L.J. Ch. 830. See, however, *Nicoll* v. *Fenning*, 19 Ch.D. 258; 51 L.J. Ch. 166; *Spicer* v. *Martin*, 14 App.Cas. 12; 58 L.J. Ch. 309; *Mackenzie* v. *Childers*, 43 Ch.D. 265; 59 L.J. Ch. 188.

(*y*) *King* v. *Dickeson*, 40 Ch.D. 596; 58 L.J. Ch. 464.

(*z*) *Gaskin* v. *Balls*, 13 Ch.D. 324.

(*a*) *Kemp* v. *Bird*, 5 Ch.D. 974; 46 L.J. Ch. 828; *Fitz* v. *Iles*, (1893) 1 Ch. 77; 62 L.J. Ch. 258; *Ashby* v. *Wilson*, (1900) 1 Ch. 66; 69 L.J. Ch. 47; *Holloway Brothers* v. *Hill*, (1902) 2 Ch. 612; 71 L.J. Ch. 818; *Brigg* v. *Thornton*, (1904) 1 Ch. 386; 73 L.J. Ch. 301.

(*b*) *Bickmore* v. *Dimmer*, (1903) 1 Ch. 158; 72 L.J. Ch. 96.

to "keep and conduct" it during the term in a regular and proper manner is broken by the conviction of the underlessee for permitting drunkenness upon the premises whereby the renewal of the licence was refused by the justices (*c*).

Where the lessee covenanted not to carry on any "business, &c., whatsoever, or anything of the nature thereof, or to suffer anything which may grow to the annoyance, &c. of the neighbourhood," he was prohibited from using the premises as a throat hospital, where small payments were made by the patients (*d*); and where the lessee covenanted not to use the house "for any other purpose than a private residence," it was held that he broke it by taking in as boarders pupils attending a school in the neighbourhood (*e*). Where there was a covenant to pay an extra rent in case any noxious trade was carried on, it was held that this was not a licence to carry on the trade paying the rent, but was a covenant rendering void the lease at the option of the lessor (*f*).

Fixtures.—The question as to what articles are fixtures has been the subject of much discussion. Fixtures are chattels which have been annexed to land; but whether a chattel has been so annexed to land as to become a fixture, depends on the circumstances of each case, and mainly on two circumstances as indicating intention, viz., the degree and the object of the annexation (*g*), and a chattel affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel (*h*). It would seem that where articles are strictly and properly part of the architectural design, and put there as such (*i*), and for the purpose of improving the inheritance(*k*), they are fixtures. Tapestry, for instance, when physically

(*c*) *Palethorpe* v. *Home Brewery, Ltd.*, (1906) 2 K.B. 5; 75 L.J. K.B. 555; distinguishing *Bryant* v. *Hancock & Co.*, (1899) A.C. 442; 68 L.J. Q.B. 889. See, further, *Mumford* v. *Walker*, 71 L.J. K.B. 19; *Wilson* v. *Twamley*, (1904) 2 K.B. 99; 73 L.J. K.B. 703.

(*d*) *Bramwell* v. *Lacy*, 10 Ch.D. 691; 48 L.J. Ch. 339; see also *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250; *Rolls* v. *Miller*, 27 Ch.D. 71; 53 L.J. Ch. 682; *Tod Heatly* v. *Benham*, 40 Ch.D. 80; 58 L.J. Ch. 83; *Wood* v. *Cooper*, (1894) 3 Ch. 671; 63 L.J. Ch. 845; *Wauton* v. *Coppard*, (1899) 1 Ch. 92; 68 L.J. Ch. 8.

(*e*) *Hobson* v. *Tulloch*, (1898) 1 Ch. 424; 67 L.J. Ch. 205.

(*f*) *Westcn* v. *Met. Asylum District*, 9 Q.B.D. 404; 51 L.J. Q.B. 399; *Harmann* v. *Powell*, 60 L.J. Q.B. 628.

(*g*) As to intention of attachment, see *Leigh* v. *Taylor*, *infra*; *Hulse*, *In re*, (1905) 1 Ch. 406; 74 L.J. Ch. 246.

(*h*) See *Addison on Torts*, 611 (ed. 8). As to the classes of persons between whom questions arise respecting the right to what are ordinarily called fixtures, see *per* Ld. Ellenborough, *Fisher* v. *Dixon*, 12 Cl. & Fin. 312; *Walmsley* v. *Milne*, 7 C.B. N.S. 115; 29 L.J. C.P. 97.

(*i*) *D'Eyncourt* v. *Gregory*, L.R. 3 Eq. 382; 36 L.J. Ch. 107; see also *Leigh* v. *Taylor*, (1902) A.C. 157; 71 L.J. Ch. 272; *Whaley*, *In re*, *Whaley* v. *Roehrich*, (1908) 1 Ch. 615; 77 L.J. Ch. 367.

(*k*) *Monti* v. *Barnes*, (1901) 1 K.B. 205; 70 L.J. K.B. 225.

annexed to the walls has been held to be a fixture (*l*), but not a collection of stuffed birds attached to removable trays in cases affixed to the walls (*m*).

Landlord's fixtures.—The term "landlord's fixtures" means such things as the landlord chooses to annex to the freehold and demise with it, and which, of course, the tenant has no right to remove, and must restore at the end of the term: such as grates, marble chimney-pieces, locks, keys, bars and bolts (*n*), steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, &c. (*o*).

Tenant's fixtures.—The rule formerly was, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it. One has been in favour of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like (*p*). Of all these, it is to be observed that they are exceptions only (*q*). Other exceptions have been grafted upon the rule in favour of the enjoyment of the occupation, and in favour of trade, and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade (*r*). If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation, fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term. Whether a particular fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise (*s*). Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold (*t*); also barns and beast-houses, waggon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending waggons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor (*u*); also railway-sleepers (*x*); also

(*l*) *Norton* v. *Dashwood*, (1896) 2 Ch. 497; 65 L.J. Ch. 737; see also *Leigh* v. *Taylor*, *ante*, p. 695.

(*m*) *Hill* v. *Bullock*, (1897) 2 Ch. 482; 66 L.J. Ch. 705.

(*n*) See Shep. Touch. 90; *Bishop* v. *Elliott*, 11 Exch. 113; 24 L.J. Ex. 229.

(*o*) *Walmsley* v. *Milne*, 7 C.B. N.S. 115; 29 L.J. C.P. 97

(*p*) See *post*, p. 699, and the cases collected in Amos & Ferard on Fixtures pp. 105 *et seq.* (ed. 3).

(*q*) *Buckland* v. *Butterfield*, 4 Moore, 440, 447; 2 Brod. & B. 54.

(*r*) See the cases collected in Amos & Ferard on Fixtures, pp. 97 *et seq.* (ed. 3).

(*s*) *Bishop* v. *Elliott*, *supra*; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130.

(*t*) *Leach* v. *Thomas*, 7 C. & P. 327.

(*u*) *Elwes* v. *Maw*, 3 East, 38; 2 Smith's L.C. 189 (ed. 11); *Wood* v. *Hewett*, 8 Q.B. 913; 15 L.J. Q.B. 247.

(*x*) *Turner* v. *Cameron*, L.R. 5 Q.B. 306; 39 L.J. Q.B. 125.

conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up he is guilty of waste (*y*). But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease (*z*). A door which may be lifted from its hinges, or a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold (*a*); nor a mooring-pile, driven into land for the accommodation of the navigation of a canal or river (*b*); nor looms of a worsted mill fixed by nails (*c*). But locks, keys, and bars belong to the landlord (*d*); and so does a shutter and sliding bolt, put up for the security of the premises. In determining whether a chattel has become a fixture or not, the intention of the person affixing it to the soil is only material so far as it is apparent from external facts (*e*).

Agricultural tenant's fixtures removable by statute.—Buildings and constructions of a permanent character, erected upon the demised premises by the tenant and attached to the freehold, are irremovable by him at common law, unless they have been erected for trading purposes. Where a tenant received from his landlord timber for the express purpose of erecting a shed, and used the timber in the construction of it, it was held that he had no right afterwards to remove it, although he had added a few materials of his own, and confounded them, in the erection, with those furnished by the landlord (*f*). By sect. 3 of the Landlord and Tenant Act, 1851 (*g*), if any tenant shall with

(*y*) *Buckland* v. *Butterfield*, 4 Moore, 440; 2 Brod. & B. 54; *Jenkins* v. *Gething*, 2 Jo. & H. 520; *Sleddon* v. *Cruikshank*, 16 M. & W. 71; 16 L.J. Ex. 61.

(*z*) *Grymes* v. *Boweren*, 6 Bing. 437; 8 L.J. (O.S.) C.P. 140; *Rex* v. *Otley*, 1 B. & Ad. 161; 9 L.J. (O.S.) M.C. 11; *Wansbrough* v. *Maton*, 4 Ad. & E. 884; 5 L.J. K.B. 150; *Davis* v. *Jones*, 2 B. & Ald. 165; *Rex* v. *Londonthorpe*, 6 T.R. 377; *Wiltshear* v. *Cottrell*, 22 L.J. Q.B. 177; 1 E. & B. 674.

(*a*) *Wood* v. *Hewett*, 8 Q.B. 913; 15 L.J. Q.B. 247; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114. As to machinery embedded in concrete floor passing to mortgagee, see *Reynolds* v. *Ashby*, (1904) A.C. 466; 73 L.J. K.B. 946.

(*b*) *Lancaster* v. *Eve*, 5 C.B. N.S. 717; 28 L.J. C.P. 235.

(*c*) *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; *Astbury*, *Ex parte*, L.R. 4 Ch. 630; 38 L.J. Bankr. 9; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37.

(*d*) See *ante*, p. 696.

(*e*) *Hobson* v. *Gorringe*, *supra*; see also *ante*, p. 695.

(*f*) *Smith* v. *Render*, 27 L.J. Ex. 83.

(*g*) 14 & 15 Vict. c. 25, s. 3.

the consent in writing of the landlord, at his own cost and expense, erect any buildings, engine, or machinery, for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned.

By sect. 21, sub-sect. 1, of the Agricultural Holdings Act, 1908(*h*), "(1) any engine, machinery, fencing, or other fixture affixed to a holding by a tenant, and any building erected thereon for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy: Provided that—(i) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding: (ii) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding: (iii) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal: (iv) The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of his intention to remove it: (v) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay to the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by arbitration." The provisions of the section apply to a fixture or building acquired since December 31, 1900, by a tenant in like manner as they apply to a fixture or building affixed or erected by a tenant, but do not apply to any fixture or building affixed or erected before January 1, 1884 (*i*). The provisions of the Act relating to tenants' property in fixtures and buildings are extended to every fixture or building affixed

(*h*) 8 Edw. 7, c. 28, s. 21 (1).
(*i*) 8 Edw. 7, c. 28, s. 21 (2). See the corresponding provision in the repealed Act of 1900 (63 & 64 Vict. c. 50), s. 4.

or erected by the tenant to or upon the holding, or acquired by him since December 31, 1900, for the purposes of his trade or business as a market gardener (*k*). By the Small Holdings and Allotments Act, 1908(*l*), a tenant of any small holding or allotment may remove any toolhouse, shed, greenhouse, fowl-house or pigsty built or acquired by him for which he has no claim for compensation.

Ornamental fixtures.—The ornamental fixtures now held removable by the tenant during the term, or within a reasonable time after its expiration (*m*), are chimney-glasses and pier-glasses (*n*), ornamental chimney-pieces (*o*), and stoves (*p*), tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels (*q*), and ornamental cornices capable of being detached without injury to the building (*r*).

Domestic and trade fixtures.—Amongst the various fixtures held to be removable by the tenant are, in the case of fixtures for domestic use, gas-pipes and gas fittings, and water-pipes attached to buildings by metal bands and nails, grates, ranges and ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, &c. (*s*), and, in the case of trade fixtures, soap-boilers' furnaces, fat-vats, coppers, dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans (*t*); also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam-engine, or machinery, or trade utensils, from the effect of the weather, it may be removable, together with the trade fixture to which it belonged, on the ground that "omne accessorium sequitur suum principale." But a building is not removable merely because it has been erected for manufacturing or trading purposes, or

(*k*) 8 Edw. 7, c. 28, s. 42 (1) (ii). See sect. 3 (1) of the repealed Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 27), and *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L.J. Ch. 621.

(*l*) 8 Edw. 7, c. 36, s. 47 (4).

(*m*) *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223.

(*n*) *Bech* v. *Rebow*, 1 P.Wms. 94.

(*o*) *Bishop* v. *Elliott*, 11 Exch. 113; 24 L.J. Ex. 229; *Leach* v. *Thomas*, 7 C. & P. 327.

(*p*) *Rex* v. *St. Dunstan, Kent (Inhabitants)*, 4 B. & C. 686; *Reg.* v. *Lee*, L.R. 1 Q.B. 241, 254; 35 L.J. M.C. 105.

(*q*) *Leigh* v. *Taylor*, (1902) A.C. 157; 71 L.J. Ch. 272.

(*r*) *Avery* v. *Cheslyn*, 3 Ad. & E. 75.

(*s*) *Bishop* v. *Elliott*, 11 Exch. 113; 24 L.J. Ex. 229, *ante*, p. 696.

(*t*) 42 Edw. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24; *Poole's Case*, 1 Salk. 368; *Lawton* v. *Lawton*, 3 Atk. 13; *Lawton* v. *Salmon*, 1 H.Bl. 260, n.; *Penton* v. *Robart*, 2 East, 88. As to glass houses, see *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L.J. Ch. 621, and 8 Edw. 7, c. 28, s. 42 (1) (ii), *supra*.

for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory (*u*).

Fixtures removable by local custom and usage.—Things annexed to the freehold are sometimes held removable in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber (*x*). If the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom (*y*). Where miners, under recognized customs embodied in an Act of Parliament, had lawfully erected machinery and buildings, accessory thereto, exclusively for mining purposes, but such buildings were attached to the soil so as to be part of it, and so that they could not be removed without some disturbance, which however did not amount to a destruction, of the soil, it was held that the miners were entitled to remove them while their interest in the mine continued, and were not liable to the surface owners for so doing (*z*). Local custom as to the removal of fixtures cannot, however, prevail where there is an express stipulation in a lease dealing with their removal (*a*).

Abandonment of right to remove ornamental and trade fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, "all erections and buildings that may be erected," or "all improvements (*b*) that may be made," upon the demised premises, he cannot afterwards remove trade erections or buildings, or trade or ornamental or domestic fixtures (*c*). A covenant by a tenant to yield up trade fixtures at the end of the term will not prevent the removal of

(*u*) *Whitehead* v. *Bennett*, 27 L.J. Ch. 474.

(*x*) 11 Vin. Abr. 154; EXECUTORS, U. pl. 74; *Culling* v. *Tuffnell*, Bull. N.P. 34.

(*y*) See notes to *Elwes* v. *Maw*, 2 Smith's L.C. 189 (ed. 11).

(*z*) *Wake* v. *Hall*, 8 App.Cas. 195; 52 L.J. Q.B. 494.

(*a*) *Martyr* v. *Bradley*, 9 Bing. 24; 1 L.J. (O.S.) C.P. 147.

(*b*) See *London and South African Exploration Co.* v. *De Beers Consolidated Mines*, (1895) A.C. p. 455; 64 L.J. P.C. 125, *per* Ld. Macnaghten, as to meaning of "improvements."

(*c*) *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *East London Waterworks*, 2 B. & C. 608; 2 L.J. (O.S.) K.B. 100; *Martyr* v. *Bradley*, 2 M. & Sc. 25; 1 L.J. C.P. 147; *West* v. *Blakeway*, 3 Sc. N.R. 218; 10 L.J. C.P. 173; *Bishop* v. *Elliott*, *ante*, pp. 696, 699; see also *Dumergue* v. *Rumsey*, 32 L.J. Ex. 88; 2 H. & C. 777; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130.

trade machinery fixed by bolts to the floors of the demised premises not as an integral part of, but only for the more convenient user of, the premises (*d*); and if such a covenant leaves the matter doubtful, the ordinary right of a tenant to remove trade fixtures will not be interfered with (*e*). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterwards put up by the tenant (*f*).

Inability of tenant to remove fixtures after expiration of term.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy (*g*); he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord (*h*), re-enter for the purpose of severing and removing fixtures. "After the term they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the permission of the landlord, and actually removes them during the continuance of his lawful possession, after the expiration of the term; if he holds over wrongfully, he loses his right to remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner (*i*). It has been held that a tenant's fixtures not removed during the continuance of the tenancy become on its expiration part of the freehold even though they are on the premises by the parol consent of the lessor (*k*). If the lease becomes forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will be entitled to retain those removed within a reasonable time, as they are not forfeited to the landlord

(*d*) *Lambourn* v. *McLellan*, (1903) 2 Ch. 268; 72 L.J. Ch. 617.

(*e*) *Per* Vaughan Williams, L.J., in *Lambourn* v. *McLellan*, *supra*.

(*f*) *Hitchman* v. *Walton*, 4 M. & W. 414; 8 L.J. Ex. 31; *Metrop. Co. Ins. Soc.* v. *Brown*, 28 L.J. Ch. 581; 26 Beav. 454.

(*g*) *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L.J. (O.S.) K.B. 26.

(*h*) *Brook*, *Ex parte*, 10 Ch.D. 100, 110; 48 L.J. Bankr. 22.

(*i*) *Leader* v. *Homewood*, 5 C.B. N.S. 546; 27 L.J. C.P. 316; *Roffey* v. *Henderson*, 17 Q.B. 574; 21 L.J. Q.B. 49; *Heap* v. *Barton*, 12 C.B. 274; 21 L.J. C.P. 153.

(*k*) *Thomas* v. *Jennings*, 66 L.J. Q.B. 5; *Roffey* v. *Henderson*, *supra*.

by the forfeiture of the lease (*l*). But if the landlord re-enters for the forfeiture the tenant's right to remove the fixtures is gone (*m*). Under the Agricultural Holdings Act, 1908 (*n*), a tenant who has complied with the provisions of that Act is entitled to remove fixtures affixed by him to his holding within a reasonable time after the determination of his tenancy. Where a trustee in bankruptcy applies for leave to disclaim a lease the Court may make such orders with respect to fixtures as it thinks just (*o*); and the trustee upon disclaiming has a reasonable time within which to remove them where the landlord refuses to take them over at a valuation (*p*).

Right of purchasers, or mortgagees, to enter and remove fixtures.—The right of the assignee of the lessee can of course, in general, extend no further than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender; "for, as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance" (*q*); therefore, where a tenant surrenders his term and quits possession, a mortgagee or purchaser of the tenant's fixtures has a right to enter and remove them within a reasonable time after the surrender (*r*); and where a company forfeits a lease by passing a resolution for a voluntary winding-up, in which resolution the debenture holders do not concur, the latter have a similar right (*s*). Trade fixtures affixed to mortgaged premises by the mortgagor in a quasi-permanent manner, before or even after the mortgage (*t*), pass to the mortgagee (*u*). An equitable mortgagee has the same rights in this respect as a legal mortgagee (*x*). As a general

(*l*) *Stansfeld* v. *Portsmouth* (*Mayor*), 4 C.B. N.S. 120; 27 L.J. C.P. 124; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130; but see *Storer* v. *Hunter*, 3 B. & C. 368; 3 L.J. (O.S.) K.B. 81. As to the issue of a writ in ejectment determining a tenancy, see *Barff* v. *Probyn*, 64 L.J. Q.B. 557.

(*m*) *Pugh* v. *Arton*, L.R. 8 Eq. 626; 38 L.J. Ch. 619. This decision has been questioned by Joyce, J., in *Glasdir Copper Mines, Ltd., In re*, (1904) 1 Ch. 819; 73 L.J. Ch. 461.

(*n*) 8 Edw. 7, c. 28, s. 21 (1). See also *ante*, p. 698.

(*o*) 46 & 47 Vict. c. 52, s. 55 (3).

(*p*) *Moser*, *In re*, 13 Q.B.D. 738.

(*q*) Co. Litt. 388, b.

(*r*) *Lond. and Westminster Loan Co.* v. *Drake*, 6 C.B. N.S. 798; 28 L.J. C.P. 297.

(*s*) *Glasdir Copper Mines, Ltd., In re*, (1904) 1 Ch. 819; 73 L.J. Ch. 461.

(*t*) *Meux* v. *Jacobs*, L.R. 7 H.L. 481; 44 L.J. Ch. 481.

(*u*) *Cullwick* v. *Swindell*, L.R. 3 Eq. 249; 36 L.J. Ch. 173; *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223; see *Boyd* v. *Shorrock*, L.R. 5 Eq. 72; 37 L.J. Ch. 144; *Astbury*, *Ex parte*, L.R. 4 Ch. 630; 38 L.J. Bankr. 9; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146. As to machinery embedded in concrete floor passing to mortgagee, see *Reynolds* v. *Ashby*, (1904) A.C. 466; 77 L.J. K.B. 946.

(*x*) *Tebb* v. *Hodge*, L.R. 5 C.P. 73; 39 L.J. C.P. 56.

rule no authority ought to be implied from a mortgagee to a mortgagor in possession to remove trade fixtures affixed to the mortgaged premises (*y*).

Abandonment of right to remove fixtures.—A covenant in a lease to yield up the demised premises, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease; but a covenant to yield up fixtures that may belong to the demised premises extends to fixtures that are afterwards put up by the tenant (*z*). It has been recently held that a covenant to deliver up premises "with all fixtures belonging thereto" is not, in the absence of explanatory words, confined to landlord's fixtures, but extends to all fixtures on the premises of whatsoever nature (*a*). Whenever the tenant has a right of removal, he must exercise such right prior to the determination of his tenancy; he cannot, after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures (*b*). If the tenant holds over wrongfully, he loses his right to sever and remove fixtures (*c*); but, if a lease becomes forfeited, the tenant may, before the landlord re-enters, or before the forfeiture is established by the judgment of a court of law, but not afterwards (*d*), remove his fixtures, and cannot, it seems, be made responsible for so doing (*e*). If the landlord gives the lessee permission to leave the fixtures on the premises, and make the best terms he can for them with the incoming tenant, and the latter enters and takes possession of the fixtures, but refuses to pay for them, the lessee cannot enter to remove them, nor can he recover the value of them (*f*). When it is provided by the terms of a lease that the lessee, at the expiration or other sooner determination of the term, is to have certain fixtures, and the lease becomes forfeited, the lessee has a reasonable time from the date of the forfeiture for the removal of his fixtures (*g*). If a covenant in a lease to leave fixtures

(*y*) *Ellis* v. *Glover*, (1908) 1 K.B. 388; 77 L.J. K.B. 251.

(*z*) *Hitchman* v. *Walton*, 4 M. & W. 414; 8 L.J. Ex. 31; *Metrop. Co. Insur. Co.* v. *Brown*, 28 L.J. Ch. 581; 26 Beav. 454; *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *East London Waterworks*, 2 B. & C. 608; 2 L.J. (O.S.) K.B. 100; *Martyr* v. *Bradley*, 9 Bing. 24; 1 L.J. C.P. 147; *West* v. *Blakeway*, 2 M. & Gr. 729; 10 L.J. C.P. 173; see also *Dumergue* v. *Rumsey*, 33 L.J. Ex. 88; 2 H. & C. 777; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 30.

(*a*) *Leschallas* v. *Woolf*, (1908) 1 Ch. 641; 77 L.J. Ch. 345.

(*b*) *Lee* v. *Risdon*, 7 Taunt. 191; *Quincy, Ex parte*, 1 Atk. 477; *Dudley* v. *Warde*, Amb. 113; *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L.J. (O.S.) K.B. 26.

(*c*) *Leader* v. *Homewood*, 27 L.J. C.P. 316; 5 C.B. N.S. 546.

(*d*) *Heap* v. *Barton*, 12 C.B. 274; 21 L.J. C.P. 153; *Pugh* v. *Arton*, L.R. 8 Eq. 626; 38 L.J. Ch. 619.

(*e*) *Stansfeld* v. *Portsmouth (Mayor)*, 4 C.B. N.S. 120; 27 L.J. C.P. 124; *Storer* v. *Hunter*, 3 B. & C. 368; 3 L.J. (O.S.) K.B. 81.

(*f*) *Roffey* v. *Henderson*, 17 Q.B. 574; 21 L.J. Q.B. 49; *Thomas* v. *Jenkins*, 66 L.J. Q.B. 5.

(*g*) *Stansfeld* v. *Portsmouth (Mayor)*, 4 C.B. N.S. 131; 27 L.J. C.P. 124.

at the end of the term leaves the matter doubtful, the ordinary right of a tenant to remove trade fixtures will not be interfered with (*h*).

Licence to commit waste.—If a general or partial permission be given to the lessee by the lease to commit waste (*i*), he is so far tenant without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* for every half acre so dug, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth (*k*).

Right of reversioners to enter upon lands in possession of lessees to inspect waste.—The law gives to a lessor, or him who hath the reversion, liberty to enter upon the lands of the lessee for years, to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages (*l*).

Injuries to lands and tenements from fire.—The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant at will or from year to year is not, as we have seen, responsible to the reversioner (*m*). Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house property is exposed from fire and the negligence of servants intrusted with fire and candles (*n*); and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party

(*h*) *Per* Vaughan Williams, L.J., *Lambourn* v. *McLellan*, (1903) 2 Ch. 268; 72 L.J. Ch. 617.

(*i*) By 52 Hen. 3, c. 23, a tenant is to do no waste without special licence.

(*k*) *Attersoll* v. *Stevens*, 1 Taunt. 183.

(*l*) *Hunt* v. *Dowman*, Cro.Jac. 478.

(*m*) *Ante*, p. 692. *Shrewsbury* (*Countess*) v. *Crompton*, Cro.Eliz. 777; Tindal, C.J., in *M'Kenzie* v. *M'Leod*, 4 M. & Sc. 253; 3 L.J. C.P. 79; *Horsefall* v. *Mather*, Holt, N.P.C. 9.

(*n*) See as to penalties on servants negligently causing fire, *Addison on Torts*, 707 (ed. 8).

guilty of the misconduct, whether it be the tenant or a stranger to the demise, will be answerable for commissive waste.

Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. Where the entry of gas into a house was under the control of the occupants of the house, the gas company supplying the gas was held not to be bound by the Act under which it was incorporated, on receiving notice that no more gas would be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street (*o*). In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main" (*p*).

Damages for waste.—In an action for waste (*q*), it is no objection to the landlord's claim to substantial damages, or to the judgment of the court, that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. If a tenant convert a furze-brake, in which game have bred, into arable or pasture land, by which its real value is improved, but its value to the landlord is depreciated, the landlord is entitled to have damages assessed thereon (*r*), and to judgment, however small may be the damages recovered (*s*).

When the action is brought for a breach of duty by the defendant, in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house, but only the loss which the plaintiff has sustained by the actual deterioration of his property. If the new house, when rebuilt, will be

(*o*) *Holden* v. *Liverpool Gas Co.*, 3 C.B. 14; 15 L.J. C.P. 304.

(*p*) *Blenkiron* v. *Gt. Central Gas Consumers' Co.*, 2 F. & F. 438.

(*q*) As to who may sue see R.S.C. Order XVI. r. 37. As to what constitutes waste, see *ante*, p. 689, and *Addison on Torts*, pp. 358 *et seq.* (ed. 8).

(*r*) Heath, J., *Harrow School* v. *Alderton*, 2 Bos. & P. 86, 88.

(*s*) *Pindar* v. *Wadsworth*, 2 East, 154

much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding (*t*). Where, however, there is a covenant not to commit waste, the measure of damages for a breach is not necessarily the sum required to reinstate the property, but is the diminution in the value of the reversion, less a discount for immediate payment (*u*).

Damages recoverable from tenant obstructing reversioner entering upon premises to inspect waste.—We have already seen (*ante*, p. 704) that the law gives to a lessor, or him who hath the reversion, liberty to enter upon the lands of the lessee for years, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore, if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done (*x*).

Injunction to restrain waste (*y*).—The courts will interfere by injunction to restrain lessees and mortgagees in possession from committing voluntary waste to the injury of the landlord or mortgagor; unless the wrongful act works a forfeiture of the estate, and the landlord has an immediate right of entry and fails to exercise it (*z*), or unless the parties have by their contract assessed the compensation in the shape of an increased rent or liquidated damages to be paid for the doing of the act (*a*), and not as a cumulative remedy (*b*). In determining whether an act of waste has been committed by a lessee on the demised premises, so as to entitle the lessor to an injunction to restrain further commission, the test is whether the act complained of by the lessor is one which substantially alters the nature of the thing demised (*c*).

Where a tenant from year to year received notice to quit, and then began to cut and damage the hedge-rows, and to take manure off the land, and remove straw, &c., contrary to the course of good husbandry (*cc*), the court granted an injunction to

(*t*) *Yates* v. *Dunster*, 11 Exch. 15; 24 L.J. Ex. 226; *Lukin* v. *Godsall*, 1 Peake, Add.Cas. 15.

(*u*) *Whitham* v. *Kershaw*, 16 Q.B.D. 613.

(*x*) *Hunt* v. *Dowman*, Cro.Jac. 478.

(*y*) See, further, *Addison on Torts*, pp. 365 *et seq.* (ed. 8).

(*z*) *Lathropp* v. *Marsh*, 5 Ves. 259.

(*a*) *Woodward* v. *Giles*, 2 Vern. 119; *Carnes* v. *Nesbitt*, 7 H. & N. 778; 30 L.J. Ex. 348; *Rolfe* v. *Peterson*, 2 Bro. P.C. 436.

(*b*) *London* (*City of*) v. *Pugh*, 4 Bro. P.C. 395.

(*c*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, (1901) 1 Ch. 624; 69 L.J. Ch. 257; *Doherty* v. *Allman*, 3 App.Cas. 709.

(*cc*) See *Rush* v. *Lucas*, (1910) 1 Ch 437; 79 L.J. Ch. 172.

stop the mischief (*d*). And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh mountains through his land, set to work to gather the minerals, and sell them, the court granted a perpetual injunction to restrain him from so doing (*e*). And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where a mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance (*f*).

Effect of acquiescence in commission of waste.—It is a principle of equity, that when a person has stood by seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorised or permitted (*g*).

Right of property in trees and bushes (*h*).—According to the old authorities, the general property in trees is in the landlord, and that in bushes is in the tenant, although if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action for waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*i*).

Defeasible leases.—The lessor may reserve to himself a right to determine the lease and resume possession of the demised premises at any time on giving notice of his intention to the lessee (*k*). If a lease is made defeasible at the option of either of the parties, it may be determined by the lessor by a simple demand of possession, or the tenant may quit the demised premises and release himself from his contract by tendering possession to the landlord; but, if the lease is made determinable at the expiration of three, six, or nine years, or any particular interval of time, reasonable notice of the intention to determine the contract must be given by the party who intends to avail himself of the power of defeasance (*l*). If the lease is made determinable at the expiration of a certain time, "if the parties so think fit," both parties must concur in exercising

(*d*) *Onslow* v. ——, 16 Ves. 173. As to freedom of cropping and disposal of produce, &c., see now 8 Edw. 7, c. 28, s. 26.

(*e*) *Thomas* v. *Jones*, 1 Y. & C. 510.

(*f*) *Farrant* v. *Lovel*, 3 Atk. 722.

(*g*) *Brydges* v. *Kilburne*, cited *Jackson* v. *Cator*, 5 Ves. 688; *Harrow School* v. *Alderton*, 2 Bos. & P. 86, *ante*, p. 705; *Rex* v. *Butterton*, 6 T.R. 555; *E. I. Co.* v. *Vincent*, 2 Atk. 82; *Parrott* v. *Palmer*, 3 Myl. & K. 632, 640.

(*h*) See also *Addison on Torts*, p. 384 (ed. 8).

(*i*) *Berriman* v. *Peacock*, 9 Bing. 384; 2 L.J. C.P. 23.

(*k*) *Doe* v. *Kennard*, 12 Q.B. 244; *Liddy* v. *Kennedy*, L.R. 5 H.L. 134.

(*l*) *Goodright* v. *Richardson*, 3 T.R. 462.

the power to determine the lease (*m*). If power to determine the lease after a certain time is reserved, without saying by whom it is to be exercised, the law gives it to the lessee (*n*). If an agreement is entered into for a yearly tenancy, with a proviso for determining it in the middle of the year, "such a proviso does not prevent it from being a yearly tenancy; when the party is in, he is in of the whole estate for a year, liable to a defeasance on a particular event" (*o*). So, where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party, when he enters, is in of a term of twenty-one years, but a defeasible term, and which may determinate by matter *ex post facto* (*p*). When the lease is determinable by notice, the notice may be given at any time, if no particular period for giving it is specified (*q*); but it must be in strict conformity with the terms of the power of defeasance; and, when performance of all the covenants that have been entered into by the lessee is made a condition precedent to his right to determine the lease, these covenants must be strictly fulfilled (*r*).

Disclaimer and forfeiture.—If a tenant from year to year disclaims the title of his lessor; if he claims the land as his own, and refuses to pay rent on the ground that he is himself the owner (*s*); or if he attorns (*t*) or delivers up possession to a stranger (*u*), or professes to sell or grant the property to another; if he cuts down timber, pulls down or alters dwelling-houses, or obliterates fences, boundaries, and land-marks, or opens and digs mines and quarries against the will of the landlord, the tenancy is determinable by the latter, and he has a right of re-entry upon the property, and may forthwith recover possession of the demised premises (*x*). Acts of this description on the part of a tenant from year to year work a forfeiture, or to speak more strictly constitute evidence of disclaimer, of his term and interest, and convert the possession into an adverse

(*m*) *Fowell* v. *Franter* or *Tranter*, 34 L.J. Ex. 6; 3 H. & C. 458.

(*n*) *Dann* v. *Spurrier*, 3 Bos. & P. 399; *Powell* v. *Smith*, L.R. 14 Eq. 85; 41 L.J. Ch. 734.

(*o*) *Per* Bayley, J., *Rex* v. *Herstmonceaux*, 7 B. & C. at p. 555; 6 L.J. (O.S.) M.C. 35.

(*p*) *Id.*

(*q*) *Bridges* v. *Potts*, 17 C.B. N.S. 314; 33 L.J. C.P. 338 (a case of a yearly tenancy of mines); *Soames* v. *Nicholson*, (1902) 1 K.B. 157; 71 L.J. K.B. 24; *Lewis* v. *Baker*, (1906) 2 K.B. 599; 75 L.J. K.B. 848.

(*r*) *Friar* v. *Grey*, 15 Q.B. 899; 19 L.J. Q.B. 393; 5 Exch. 584; 19 L.J. Ex. 368; in err., 5 Exch. 597; 20 L.J. Ex. 365.

(*s*) *Doe* v. *Cooper*, 1 Sc. N.R. 41; 9 L.J. C.P. 229; *Doe* v. *Stanion*, 1 M. & W. 695; 5 L.J. Ex. 253.

(*t*) *Doe* v. *Litherland*, 4 Ad. & E. 784; 6 L.J. K.B. 267; *Doe* v. *Evans*, 9 M. & W. 48; 11 L.J. Ex. 9.

(*u*) *Doe* v. *Flynn*, 1 Cr. M. & R. 137; 3 L.J. Ex. 221.

(*x*) *Jones* v. *Mills*, 10 C.B. N.S. 788; 31 L.J. C.P. 66. See, however, as to relief against forfeiture, *post*, p. 714.

possession, so that the tenant may at once be proceeded against without any notice to quit and without any demand of possession (*y*). But, if the lessor dies, and adverse claimants to the property appear and demand the rent of the tenant, and the latter refuses to pay it until the conflicting claims have been ascertained and settled, the refusal is not such a disclaimer of the title of the real owner as will justify the latter in treating the tenant as a trespasser (*z*). "To constitute a disclaimer there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself" (*a*). A mere refusal to pay rent, or a declaration by the tenant that he will continue to hold possession, or an omission to acknowledge the landlord as such by requesting further information as to title, when the property has changed hands, does not render the tenancy an adverse tenancy and possession (*b*). All verbal disclaimers operating as a forfeiture of the tenant's interest in, and right of possession of, the demised premises, and dispensing with the necessity of a notice to quit, are restricted to tenancies from year to year; and need not be in writing (*c*). A lease for a definite term of years cannot be forfeited by mere words (*d*). And if, after a disclaimer by a tenant from year to year, the landlord puts in a distress for rent which became due subsequently to the disclaimer, such distress is a waiver of the disclaimer, and again clothes the tenant with a lawful possession (*e*). Forfeiture is also incurred by the breach of conditions annexed to the demise; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or repugnant to the grant itself, and upon the breach of those conditions may avoid the lease (*f*). But the law does not favour forfeitures of estates; and strict proof of a breach of a condition or covenant working a forfeiture of a lease is always required (*g*); and relief against forfeiture can now be obtained under the Conveyancing Act, 1881 (*h*).

Provisoes for re-entry.—It is frequently made a term or con-

(*y*) *Doe* v. *Frowd*, 1 M. & P. 480; 6 L.J. (O.S.) C.P. 114; *Doe* v. *Flynn*, 1 Cr. M. & R. 137; 3 L.J. Ex. 221; *Doe* v. *Pittman*, 2 N. & M. 673; *Vivian* v. *Moat*, 16 Ch.D. 730; 50 L.J. Ch. 331.

(*z*) *Doe* v. *Pasquali*, Peake, 259; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L.J. Ex. 368.

(*a*) *Doe* v. *Cooper*, 1 Sc. N.R. 41; 9 L.J. C.P. 229; *Hunt* v. *Allgood*, 30 L.J. C.P. 313; 10 C.B. N.S. 253.

(*b*) *Doe* v. *Cawdor*, 1 Cr. M. & R. 398; 3 L.J. Ex. 239; *Doe* v. *Stanion*, 1 M. & W. 695, 703; 5 L.J. Ex. 253; *Jones* v. *Mills*, 10 C.B. N.S. 788; 31 L.J. C.P. 66.

(*c*) *Doe* v. *Long*, 9 C. & P. 773.

(*d*) *Doe* v. *Wells*, 10 Ad. & E. 427; 8 L.J. Q.B. 265.

(*e*) *Doe* v. *Williams*, 7 C. & P. 322.

(*f*) Bac.Abr. Leases, T. 2.

(*g*) 1 Wms.Saund. 287, b; 288, i; 1 Mad. ch. 36.

(*h*) 44 & 45 Vict. c. 41, s. 14, as amended by 55 & 56 Vict. c. 13. See also *post*, p. 714.

dition of the demise that the lease shall be forfeited and the lessor have a right to re-enter and re-possess himself of the demised premises for a breach of particular covenants contained in a lease. The right to take advantage of a proviso of this description is, of course, confined to the lessor and the assignee of the reversion or part of the reversion (*i*); and the lessee cannot be permitted to set up his own breach of contract as an avoidance of the lease; for no man is permitted to take advantage of his own wrong (*j*). If it is provided that, in case of non-payment of rent, it shall be lawful for the lessor "to enter on the premises for the same until it be fully satisfied," the lessor will be entitled at common law to enter and hold possession until the arrears of rent are satisfied; but, when they are satisfied, the lessee will be entitled to re-enter and hold under the lease as before (*k*). A power to re-enter if the lessee does not "observe perform and keep" the covenants, has been held to apply to a breach of a negative covenant (*l*); and where a lease contained a proviso for re-entry if the lessee should commit any breach of the "covenants hereinbefore contained" and upon his part "to be performed" it was held that these latter words did not limit the proviso to breaches of affirmative covenants, but applied to a breach of a covenant against assigning or sub-letting without the consent of the lessor (*m*). Provisoes in leases for re-entry in case of non-payment of rent or non-performance of covenants are not to be construed with the strictness of conditions at common law; but, being matters of contract between the parties, they should be construed like all other contracts (*n*). Where the lessee was to hold in consideration of the rent "and conditions" contained in the lease, and it was "stipulated and conditioned" that the lessee should not assign or underlet, it was held that the lease was forfeited, and that the lessor had a right to re-enter, on an assignment being made by the lessee (*o*). An agreement to hire a messuage "at or under" a certain rent is an agreement to pay that rent; and, therefore, if a power of re-entry is reserved "in

(*i*) See 22 & 23 Vict. c. 35, s. 3, which only applies where rent is legally apportioned.

(*j*) *Reid* v. *Parsons*, 2 Chit. 247; *Doe* v. *Birch*, 1 M. & W. 402; 5 L.J. Ex. 185; *Jones* v. *Carter*, 15 M. & W. 718, 725.

(*k*) *Per* Ld. Denman, C.J., *Doe* v. *Bowditch*, 8 Q.B. 973; 15 L.J. Q.B. 267; Co. Litt. 203.

(*l*) *Evans* v. *Davis*, 10 Ch.D. 747; 48 L.J. Ch. 223.

(*m*) *Harman* v. *Ainslie*, (1904) 1 K.B. 698; 73 L.J. K.B. 539; and see observations of Collins, M.R., on *West* v. *Dobb*, L.R. 5 Q.B. 460; 39 L.J. Q.B. 190; and *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121, in the latter case a power of re-entry being given upon the lessee "wilfully failing or neglecting to perform" any covenant.

(*n*) Ld. Tenterden, *Doe* v. *Elsam*, M. & M. 189, 191; *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*o*) *Doe* v. *Watt*, 8 B. & C. 308; 6 L.J. (O.S.) K.B. 185.

case of breach of any of the agreements" contained in the written instrument of demise, the lessor may re-enter for non-payment of rent (*p*). Where a lessee covenanted to pay rent and not to assign, and there was a proviso for re-entry if the rent was in arrear, or all or any of the covenants "hereinafter contained" on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying the rent, &c., should quietly enjoy, it was held that the lessor could not enter for breach of the covenant not to assign, as the proviso was restrained by the word "hereinafter" to subsequent covenants, and there were none such in the lease (*q*). Where there is a proviso for re-entry in case of non-performance of covenants, and the lease contains a general covenant to repair, and also a covenant to repair within a certain time after notice, the landlord may at once enter for breach of the general covenant (*r*); but, if he gives notice under the second covenant, this is a waiver of the forfeiture incurred by breach of the general covenant, and he cannot recover possession until after the time limited by the notice has expired (*s*). A notice to repair "in accordance with the covenants" (*t*) or "forthwith" (*u*) will not, however, amount to a waiver of the forfeiture incurred by a breach of the general covenant. Where a right of re-entry for waste is reserved, the proviso is understood to mean such waste as is injurious to the reversion (*x*). Where there is a proviso for re-entry for breach of a covenant to insure and keep insured, it does not mean that the lessee shall keep any one particular policy on foot, but that he shall always keep the premises insured by some one policy or another; and the breach will be a continuing breach so long as they remain uninsured (*y*).

A power of re-entry, in case the lessee carries on any trade or business upon the demised premises, authorises the lessor to re-enter if a school is established (*z*). But, when particular trades or occupations are specified, no trade or business which does not clearly fall within the description contained in the lease will come within the proviso (*a*). A proviso for re-

(*p*) *Doe* v. *Kneller*, 4 C. & P. 3.
(*q*) *Doe* v. *Godwin*, 4 M. & S. 265.
(*r*) *Baylis* v. *Le Gros*, 4 C.B. N.S. 537, but notice is now required under 44 & 45 Vict. c. 41, s. 14.
(*s*) *Doe* v. *Meux*, 4 B. & C. 606; 4 L.J. (O.S.) K.B. 4.
(*t*) *Few* v. *Perkins*, L.R. 2 Ex. 92; 36 L.J. Ex. 54.
(*u*) *Roe* v. *Paine*, 2 Campb. 520.
(*x*) *Doe* v. *Bond*, 5 B. & C. 855; 5 L.J. (O.S.) K.B. 68.
(*y*) *Doe* v. *Peck*, 1 B. & Ad. 428; 9 L.J. (O.S.) K.B. 60.
(*z*) *Doe* v. *Keeling*, 1 M. & S. 95; *Kemp* v. *Sober*, 1 Sim. N.S. 517; 20 L.J. Ch. 602. As to restrictive covenants as to user of premises, see *ante*, pp. 694, 695.
(*a*) *Jones* v. *Thorne*, 1 B. & C. 715; 1 L.J. (O.S.) K.B. 200.

entry may be reserved in case the tenant should become bankrupt or insolvent (*b*), or the term granted should be taken in execution by the sheriff (*c*), or, where the tenant is a limited company, on liquidation voluntary or compulsory (*d*). Where a sub-lease granted to a water company contained a covenant by them not to sell or sub-let without the consent of the lessors to whom was reserved a power of re-entry on breach of any covenant on the company's part and the undertaking and property of the latter was subsequently compulsorily transferred to the plaintiffs, who were empowered by statute to sell or underlet any lands or property so transferred to them, it was held that these statutory powers did not deprive the lessors of their right of re-entry on breach of the above-mentioned covenant (*e*). If the contingency provided for happens, the lessor will be entitled to take possession, and to enjoy the emblements (*f*). If a proviso for re-entry is insensible, it is of course nugatory; for the court cannot find a meaning for that which has no meaning (*g*).

If the lessor has the custody of the lease, and has in any wise misrepresented the nature of the proviso, or of the covenants to be fulfilled, or has withholden any necessary information from the lessee, or done anything to entrap the latter into a forfeiture, the law will not permit the lessor to avail himself of such forfeiture; for that would be permitting him to take advantage of his own wrong (*h*). When a party is let into possession under an agreement for a future lease, which is to contain certain covenants and a proviso for re-entry in case of the non-performance of those covenants, the tenant holds, as we have before seen (*ante*, p. 660), subject to all such of the terms of the intended lease as are applicable to a yearly tenancy; and if, before the lease is granted, the lessee does an act which would have worked a forfeiture if the lease had been granted, the landlord will have a right to re-enter, and may forthwith recover possession (*i*).

Effect of re-entry on lessee's liability on his covenants.—The forfeiture of the lease does not extinguish the liability of the lessee in respect of breaches of covenant that had accrued at the time of the forfeiture, so that the lessor, by taking

(*b*) *Roe* v. *Galliers*, 2 T.R. 133; *Doe* v. *Ingleby*, 15 M. & W. 465. See *Smith* v. *Gronow*, (1891) 2 Q.B. 394; 60 L.J. Q.B. 776.

(*c*) *Rex* v. *Topping*, M'Clel. & Y. 544.

(*d*) *Fryer* v. *Ewart*, (1902) A.C. 187; 71 L.J. Ch. 433.

(*e*) *Metropolitan Water Board* v. *Solomon*, (1908) 2 Ch. 214; 77 L.J. Ch. 517.

(*f*) *Davis* v. *Eyton*, 7 Bing. 154; 9 L.J. (O.S.) C.P. 44.

(*g*) *Doe* v. *Carew*, 2 Q.B. 317; 11 L.J. Q.B. 5. As to clerical errors which can be rectified, see *Hunt* v. *Bishop*, 8 Exch. 67; 22 L.J. Ex. 337.

(*h*) *Doe* v. *Rowe*, Ry. & Mood. 346.

(*i*) *Doe* v. *Amey*, 12 Ad. & E. 476;

advantage of the forfeiture and re-entering, does not deprive himself of his remedies upon the covenants of the lease for any breach of those covenants up to the time of the re-entry (*k*). If the landlord does not think fit to avail himself of the forfeiture, the liability of the lessee upon the covenants of the lease remains unaffected by the forfeiture; but, if the landlord brings an action of ejectment, he cannot, in general, sue the lessee in respect of breaches of covenant that have accrued subsequently to the commencement of the action (*l*).

Waiver of forfeiture—Lessor's right of election.—The right of entry for forfeiture of a lease is governed by the general law that, where a man has a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If, therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease or not as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterwards annul the lease. If, knowing of a forfeiture, he nevertheless tells his tenant that he is still tenant, and that he shall hold him to the covenants and stipulations of his lease, the election is made, and the landlord cannot afterwards enter for the forfeiture (*m*). On the other hand, if he brings ejectment for the forfeiture, he unequivocally declares his election to determine the lease (*n*); and a subsequent distress is no waiver of the forfeiture (*o*). Acceptance of rent, or demand of rent, or the bringing of an action for rent, or distraining for rent, accruing due after a forfeiture, will be considered as strong evidence of the lessor's determination to continue the lease and waive the forfeiture, if it appears that, at the time the lessor received the rent, he had notice of the breach of the condition (*p*). A forfeiture for not repairing may be waived by the receipt of rent which became due after the right of entry accrued, but not by the receipt of rent becoming due before the expiration of a notice to repair (*q*). A forfeiture is suspended, but not waived,

Doe v. *Ekins*, Ry. & M. 29; *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*k*) *Hartshorne* v. *Watson*, 5 Sc. 506; 7 L.J. C.P. 138; *Blore* v. *Giulini*, (1903) 1 K.B. 356; 72 L.J. K.B. 114.

(*l*) *Jones* v. *Carter*, 15 M. & W. 718.

(*m*) *Ward* v. *Day*, 33 L.J. Q.B. 13, 254; 5 B. & S. 359.

(*n*) *Serjeant* v. *Nash, Field & Co.* (1903) 2 K.B. 304; 72 L.J. K.B. 630.

(*o*) *Grimwood* v. *Moss*, L.R. 7 C.P. 360; 41 L.J. C.P. 239; *Serjeant* v. *Nash, Field & Co.*, (1903) 2 K.B. 304; 72 L.J. K.B. 630.

(*p*) Bac. Abr. Leases, tit. 2; *Ward* v. *Day*, *supra*; *Denby* v. *Nicoll*, 4 C.B. N.S. 376; 27 L.J. C.P. 220; *Croft* v. *Lumley*, 27 L.J. Q.B. 321; 5 E. & B. 648; *Cotesworth* v. *Spokes*, 30 L.J. C.P. 220; 10 C.B. N.S. 103; *Pellatt* v. *Boosey*, 31 L.J. C.P. 281; *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395.

(*q*) *Doe* v. *Brindley*, 4 B. & Ad. 84; 2 L.J. K.B. 7.

by allowing a tenant further time to repair (*r*). A waiver of one forfeiture does not prevent the lessor from availing himself of subsequent forfeitures (*s*); and a receipt of rent is no waiver of a continuing breach of a covenant to repair (*t*). Where a breach of covenant has continued upwards of twenty years with full knowledge of it on the part of the lessor, and no attempt has been made to take advantage of it, neither the lessor nor his assignee can avail himself of the breach to work a forfeiture; such knowledge is evidence from which a licence ought to be presumed (*u*). The mere fact of a landlord not objecting to assignees of a lessee taking possession is not sufficient in itself to imply a recognition of the assignees where the lease contains a covenant not to assign without the landlord's assent (*x*).

Relief against forfeiture -Breach of covenants or conditions respectnig insurance or payment of rent.—With respect to leases made before or after the commencement of the Conveyancing Act, 1881, and notwithstanding any stipulation to the contrary, relief (*y*) will now be given against forfeiture (except in cases of non-payment of rent, or breach of covenant not to assign or underlet) (*z*), unless notice has been given requesting the lessee to remedy the breach and make compensation, and the lessee has failed to comply (*a*). The Court however has power, under sect. 4 of the Conveyancing Act, 1892 (*b*), to grant relief to an underlessee against a forfeiture of the superior lease for non-payment of rent (*c*), or where the forfeiture has been

(*r*) *Doe* v. *Meux*, 4 B. & C. 606; 4 L.J. (O.S.) K.B. 4; and see *Few* v. *Perkins*, L.R. 2 Ex. 92; 36 L.J. Ex. 54, *ante*, p. 711.

(*s*) *Doe* v. *Bliss*, 4 Taunt. 735; 23 & 24 Vict. c. 38, s. 6.

(*t*) *Doe* v. *Jones*, 5 Exch. 498; 19 L.J. Ex. 405.

(*u*) *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L.J. Ex. 37; *Summerson, In re*, (1900) 1 Ch. 112, n.; 69 L.J. Ch. 57, n.; *Hepworth* v. *Pickles*, (1900) 1 Ch. 108; 69 L.J. Ch. 55.

(*x*) *Elphinstone* (*Lord*) v. *Monkland Iron Co.*, 11 App.Cas. 332.

(*y*) As to the necessary parties to an application for relief, see *Humphreys* v. *Morten*, (1905) 1 Ch. 379; 74 L.J. Ch. 370.

(*z*) And in a mining lease, except as to covenants to allow access to books, &c., see 44 & 45 Vict. c. 41, s. 14 (6) (ii). Forfeiture in cases of bankruptcy or execution was excepted from relief by 44 & 45 Vict. c. 41, s. 14 (6); but now, by 55 & 56 Vict. c. 13, s. 2 (2), relief is allowed in these cases under certain restrictions. Notice is, therefore, a condition precedent to enforcing a forfeiture or bankruptcy or liquidation: *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 62 L.J. Q.B. 743; *Jacob* v. *Down*, (1900) 8 Ch. 156; 69 L.J. Ch. 493; *Fryer* v. *Ewart*, (1902) A.C. 187; 71 L.J. Ch. 433. As to forfeiture for non-payment of rent, see 23 & 24 Vict. c. 126, s. 1; *Howard* v. *Fanshawe*, (1895) 2 Ch. 581; 64 L.J. Ch. 666.

(*a*) 44 & 45 Vict. c. 41, s. 14; the lessee may apply for relief in an action by the lessor. See *Gentle* v. *Faulkner*, (1900) 2 Q.B. 267; 69 L.J. Q.B. 777. A mere tenancy under an agreement for a lease is not a lease within the meaning of this section. An agreement with a right for specific performance is a lease: 55 & 56 Vict. c. 13, s. 5. The section extends to breaches committed before the Act came into operation: *Quilter* v. *Mapleson*, 9 Q.B.D. 672; 52 L.J. Q.B. 44. See *Nind* v. *Nineteenth Century Building Society*, (1894) 2 Q.B. 226; 63 L.J. Q.B. 636, as to the meaning of "lessee" in 55 & 56 Vict. c. 13, s. 2 (1).

(*b*) 55 & 56 Vict. c. 13, s. 4.

(*c*) *Gray* v. *Bonsall*, (1904) 1 K.B. 601; 73 L.J. K.B. 515. The contrary was held before the Act of 1892 in *Burt* v. *Gray*, (1891) 2 Q.B. 98; 60 L.J. Q.B. 664.

occasioned by a breach of covenant by the lessee not to assign or underlet without consent (*d*); but relief was refused where an underlessee did not investigate his lessor's title, and so failed to discover a covenant against assigning (*e*). The lessee cannot, however, apply under sect. 14 for relief after the lessor has actually re-entered(*f*). It is not necessary in all cases that the notice of a breach of covenant given under the section should require the lessee to make compensation if the lessor does not require compensation (*g*). The notice must specify in detail the particular breach so as to give the lessee precise information of what is alleged against him and what is demanded from him and thus enable him to remedy it before action brought, but a mere general notice of a breach of a specified covenant is insufficient (*h*). But where the notice refers to several breaches of covenant, it is not entirely invalidated because it turns out that some of the breaches cannot be relied upon (*i*). No relief would formerly be granted in the case of forfeiture for the breach of any covenant other than covenants to pay rent or insure, except in the case of accident, mistake, or fraud (*k*), or where the tenant has been misled by the conduct of the landlord amounting to a waiver (*l*). The effect of the relief granted to a lessee or his assign under sect. 14 is for all purposes and between all parties to wipe out the forfeiture just as if there never had been any (*m*).

Assignment after forfeiture.—A right of entry which has accrued on a forfeiture cannot be assigned; and the assignee of the reversion, therefore, cannot take advantage of any forfeiture incurred before the assignment; but he is entitled to the benefit of the covenant, and of the condition of re-entry, in respect of any subsequent or continuing breach (*n*).

(*d*) *Imray* v. *Oakshette*, (1897) 2 Q.B. 218; 66 L.J. Q.B. 544.

(*e*) *Imray* v. *Oakshette*, *supra*, followed in *Matthews* v. *Smallwood*, (1910) 1 Ch. 777; 79 L.J. Ch. 322.

(*f*) *Rogers* v. *Rice*, (1892) 2 Ch. 170; 61 L.J. Ch. 573.

(*g*) *Lock* v. *Pearce*, (1893) 2 Ch. 271; 62 L.J. Ch. 582.

(*h*) *Fletcher* v. *Nokes*, (1897) 1 Ch. 271; 66 L.J. Ch. 177; *Serle*, *In re*, (1898) 1 Ch. 652; 67 L.J. Ch. 344; *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. 134; 77 L.J. Ch. 813. As to claim for rent after notice, see *Penton* v. *Barnett*, (1898) 1 Q.B. 276; 67 L.J. Q.B. 11.

(*i*) *Pannell* v. *City of London Brewery Co.*, (1900) 1 Ch. 496; 69 L.J. Ch. 244.

(*k*) *Gregory* v. *Wilson*, 9 Hare, 683; 22 L.J. Ch. 159; *Hughes* v. *Met. Ry.*, 2 App.Cas. 439, 448; 46 L.J. Ch. 583. As to mistake in respect of which the court will or will not grant relief, see *Barrow* v. *Isaacs*, (1891) 1 Q.B. 417; 60 L.J. Q.B. 179; *Eastern Telegraph Co.* v. *Dent*, (1899) 1 Q.B. 835; 68 L.J. Q.B. 564.

(*l*) *Hughes* v. *Met. Ry.*, 2 App.Cas. 439. As to proper case for relief under the section, see *Keith* v. *Gancia & Co.*, (1904) 1 Ch. 774; 73 L.J. Ch. 411.

(*m*) *Dendy* v. *Evans*, (1910) 1 K.B. 263; 79 L.J. K.B. 121.

(*n*) *Crane* v. *Batten*, 23 L.T. 220; Co. Litt. 215, a.

Costs.—By the Conveyancing Act, 1892 (*o*), a lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by him in employing a solicitor and surveyor, or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which he has waived by writing under his hand at the request of the lessee, or from which the lessee has been relieved (*p*) under the Conveyancing Acts.

Surrender—Deeds and agreements of surrender.—A surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, is void, unless it is made by deed (*ante*, p. 43). An estate for life or years, which cannot be created without deed, cannot be surrendered without deed (*q*); but, if the estate may be created, and has been created, without deed, it may be surrendered without deed (*r*). It is said that "a surrender immediately divests the estate out of the surrenderor and vests it in the surrenderee: for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent; yet that consent is implied; a gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest the property" (*s*). But this must be understood only of surrenders of particular estates which are manifestly beneficial to the surrenderee. If the benefit is equivocal there will be no implied assent or acceptance, and the surrender will be nugatory without the express concurrence of the surrenderee (*post*, p. 718). If the tenant holds under a parol demise for a term not exceeding three years, the term may be surrendered by an agreement in writing, signed by the surrenderor and the surrenderee, provided it is intended to have an immediate effect. There cannot be a surrender to take place *in futuro*. If anything is to be done by either or both of the parties before the estate of the termor is to be

(*o*) 55 & 56 Vict. c. 13, s. 2 (1). This Act abrogates the decision in *Skinners' Co.* v. *Knight*, (1891) 2 Q.B. 542; 60 L.J. Q.B. 629.

(*p*) This provision would seem to apply only where the lessee has applied to the court for relief, see *Nind* v. *Nineteenth Century Building Society*, (1894) 2 Q.B. 226; 63 L.J. Q.B. 636.

(*q*) Shep. Touch. 397; Defeasance; Co. Litt. 338, a; 1 Wms.Saund. 236, a; *Perkins* v. *Perkins*, Cro.Eliz. 269; *Lyon* v. *Reed*, 13 M. & W. 285, 310; 13 L.J. Ex. 377.

(*r*) *Farmer* v. *Rogers*, 2 Wils. 26.

(*s*) *Thompson* v. *Leach*, 2 Salk. 617.

extinguished, the transaction amounts only to a covenant or agreement to surrender, and there is no actual surrender by the tenant, and no right of entry on the part of the landlord by the mere force of the contract (*t*). An insufficient notice to quit, therefore, accepted by the landlord, does not of itself amount to a surrender of the term by operation of law if the surrender is to operate *in futuro* (*u*). But an agreement between a landlord and a tenant holding a demise from year to year, that the tenancy should be determined, followed by the departure of the tenant, and an entry and taking of possession on the part of the landlord, becomes an actual surrender by act and operation of law (*x*). Where a dispute arose between a yearly tenant and the landlord, and the tenant said to the landlord, "I shall quit," and the latter said, "You may do so, and I shall be glad to get rid of you," and the tenant then removed her furniture and sent the keys of the house to the landlord, and the latter accepted them and took possession, it was held that there was a surrender of the lease by operation of law (*y*). But the mere delivery and acceptance of the key, without any entry on the demised premises and taking of possession by the landlord, would be no evidence of a surrender (*z*); and an abandonment of the demised premises by the tenant, and an entry of the landlord thereon for the purpose of repairing them, or airing or drying the rooms, or letting them, and not with a view of taking possession as owner, will not of course amount to a surrender (*a*). A landlord will not be bound by a surrender accepted under a mistake of fact induced by the tenant (*b*).

Surrenders by act and operation of law by way of estoppel take place "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. . . . Thus, if lessee for years accept a new lease from his lessor, he is estopped

(*t*) *Coupland* v. *Maynard*, 12 East, 134; *Weddall* v. *Capes*, 1 M. & W. 50; 5 L.J. Ex. 111; *Foquet* v. *Moor*, 7 Exch. 870; 22 L.J. Ex. 35.

(*u*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L.J. (O.S.) K.B. 71; *Doe* v. *Milward*, 3 M. & W. 328, 332; 7 L.J. Ex. 57.

(*x*) See 2 Smith's L.C. 837, 843 (ed. 11); *Dodd* v. *Acklom*, 7 Sc. N.R. 415; 13 L.J. C.P. 11; *Furnivall* v. *Grove*, 30 L.J. C.P. 3; 8 C.B. N.S. 496; *Grimman* v. *Legge*, 8 B. & C. 324; 6 L.J. (O.S.) K.B. 321.

(*y*) *Grimman* v. *Legge*, 8 B. & C. 324; 6 L.J. (O.S.) K.B. 321; *Phenè* v. *Popplewell*, 12 C.B. N.S. 334; 31 L.J. C.P. 235; *Cadle* v. *Moody*, 30 L.J. Ex. 385; see also *Oastler* v. *Henderson*, 2 Q.B.D. 575; 46 L.J. Q.B. 607; *Panther Lead Co., In re*, (1896) 1 Ch. 978; 65 L.J. Ch. 499.

(*z*) *Cannan* v. *Hartley*, 9 C.B. 634; 19 L.J. C.P. 323.

(*a*) *Bessell* v. *Landsberg*, 7 Q.B. 638; 14 L.J. Q.B. 355; *Griffith* v. *Hodges*, 1 C. & P. 419; *Oastler* v. *Henderson*, *supra*.

(*b*) *Gray* v. *Owen*, (1910) 1 K.B. 622; 79 L.J. K.B. 389.

from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. . . . The acts *in pais* which bind parties by way of estoppel are . . . all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed" (*c*). But, if the original lease is under seal, the acceptance by the lessee of a mere parol demise from the lessor will not amount to a surrender of such original lease (*d*); and, if the new lease is wholly or partially invalid, and does not pass an interest according to the contract and the intention of the parties, it will not operate as a surrender of the former lease (*e*). A mere agreement for, or the payment and acceptance of, an increased (*f*), or diminished (*g*), rent will not have the effect of creating a new tenancy.

Substitution of new tenant in place of original tenant.—When there is an open and notorious shifting of the actual possession of corporeal property, in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, there is a surrender by operation of law of such original lease (*h*). But a mere agreement with the lessor for the sub-

(*c*) *Lyon* v. *Reed*, 13 M. & W. 285, 306, 309; 13 L.J. Ex. 377; *Fenner* v. *Blake*, (1900) 1 Q.B. 426; 69 L.J. Q.B. 257; *Knight* v. *Williams*, (1901) 1 Ch. 257; 70 L.J. Ch. 92.

(*d*) Shep. Touch. 397.

(*e*) *Doe* v. *Poole*, 11 Q.B. 713; 17 L.J. Q.B. 143; *Doe* v. *Courtenay*, 11 Q.B. 702; 17 L.J. Q.B. 151.

(*f*) *Geeckie* v. *Monk*, 1 C. & K. 307; *Doe* v. *Geekie*, 5 Q.B. 841; 13 L.J. Q.B. 239; *Donellan* v. *Read*, 3 B. & Ad. 899, 905; 1 L.J. K.B. 269.

(*g*) *Crowley* v. *Vitty*, 7 Exch. 319; 21 L.J. Ex. 135.

(*h*) *Davison* v. *Gent*, 1 H. & N. 744; 26 L.J. Ex. 122; *Nickells* or *Nicholls* v. *Atherstone*, 10 Q.B. 944; 16 L.J. Q.B.

stitution of a new tenant, not followed up by any actual change of possession, or a mere change of possession unaccompanied by an agreement of substitution, does not amount to a surrender (*i*). Where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law; but the old tenant must give up possession to the new tenant at or about the time of the grant of the new lease to which he assents, since the change of possession is a necessary part of the consent (*k*). It must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee, by the mutual agreement of all parties (*l*); for the mere change of the possession is no evidence of the grant and acceptance of a new lease, the *primâ facie* presumption being that the incoming tenant has entered and taken possession as the under-tenant or assignee of the original lessee (*m*). The mere circumstance of the landlord's having accepted rent from an assignee or under-tenant in possession of the demised premises is not in itself sufficient evidence of an acceptance of such assignee or under-tenant as his lessee in the place of the original lessee, the *primâ facie* presumption being that the rent was paid by the latter as the agent of the original lessee and on his behalf (*n*).

Surrender and acceptance of surrender by joint tenants.—Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them; and, if the benefit be doubtful, two joint-tenants have no right to elect for the third. A surrender, therefore, or acceptance of a surrender, by one of several joint-tenants, will not, in general, bind the others (*o*). If, however, one of two joint-lessors lies by and allows the other to act for him, and acquiesces in the acts of his co-owner, and intrusts the whole management of the business in which they are jointly interested to him, he will be bound by his acts (*p*).

371; *Reeve* v. *Bird*, 1 Cr. M. & R. 31; 3 L.J. Ex. 282; *Walls* v. *Atcheson*, 11 Moore, 379; *Woodcock* v. *Nuth*, 1 M. & Sc. 317; *Thomas* v. *Cook*, 2 B. & Ald. 119.

(*i*) *Taylor* v. *Chapman*, Peake's Add. Cas. 19; *Cocking* v. *Ward*, 1 C.B. 868; 15 L.J. C.P. 245; *Kelly* v. *Webster*, 12 C.B. 283; 21 L.J. C.P. 163.

(*k*) *Wallis* v. *Hands*, (1893) 2 Ch. 75; 62 L.J. Ch. 586.

(*l*) *Graham* v. *Whichelo*, 1 Cr. & M. 186; 2 L.J. Ex. 70; *M'Donnell* v. *Pope*, 9 Hare, 705; *Mathews* v. *Sawell*, 2 Moore, 262; 8 Taunt. 270.

(*m*) *Doe* v. *Williams*, 6 B. & C. 41; 9 D. & R. 30. See also *Roe* v. *Street* or *Fairbanks*, 2 Ad. & E. 329; 4 L.J. K.B. 67.

(*n*) *Copeland* v. *Watts*, 1 Stark. 96; *Doe* v. *Wood*, 14 M. & W. 682; 15 L.J. Ex. 41; *Fryer* v. *Ewart*, (1902) A.C. 187; 71 L.J. Ch. 433.

(*o*) *Right* v. *Cuthell*, 5 East, 491, 498.

(*p*) *Dodd* v. *Acklom*, 7 Sc. N.R. 415; 13 L.J. C.P. 11.

Non-extinguishment by surrender of derivative estates.—If a lessee from year to year grants an underlease of part of the premises demised to him, and then surrenders his term, the surrender will not destroy the estate and interest of the underlessee (*q*), even though the latter had notice of the surrender (*r*).

Effect of surrender on existing breaches of covenant.—The mere surrender of the lease does not relieve the lessee from his liability in respect of breaches of covenant that have accrued prior to the surrender. The lessor, therefore, after a surrender, remains a specialty creditor for all arrears of rent, which become due before the surrender, upon the lessee's covenants for the payment of rent (*s*).

Notice to quit, when necessary.—"When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprized of the determination of the term" (*t*). If, therefore, a lease is granted for a term of years, or for one year only, no notice to quit is necessary at the end of the term (*u*); but, if the tenancy is from year to year, a half-year's notice terminating with the end of the year must be given on either side in order to determine the tenancy, and this notice may be given in the first as well as in any subsequent year of the tenancy (*x*). If a man holds under an agreement for a lease, or under a lease void by reason of its not having been made by deed, for the full term intended to have been granted, an ejectment may be brought against him at the expiration of such term without any notice to quit (*y*). In the case of a tenancy at will (*z*) no notice to quit is necessary; but there must be a formal demand of possession, or notice of the determination of the will, on the part of the landlord, before any action of ejectment can be brought (*a*). The tenant at will, too, in order to discharge himself from his liability for rent, or for a reasonable compensation for the use and enjoyment of the demised premises, must

(*q*) Co. Litt. 338, b; 4 Geo. 2, c. 28, s. 6; *Pleasant* v. *Benson*, 14 East, 237; *Cousins* v. *Phillips*, 3 H. & C. 892; 35 L.J. Ex. 84; *G. W. Ry.* v. *Smith*, 3 App. Cas. 165; 47 L.J. Ch. 97; *Parker* v. *Jones*, (1910) 2 K.B. 32; 79 L.J. K.B. 921 (a case where the lessor had no notice of the underlease).

(*r*) *Cornish* v. *Stubbs*, L.R. 5 C.P. 334; 39 L.J. C.P. 202; the same principle was applied to a licensee under a revocable licence in *Mellor* v. *Watkins*, L.R. 9 Q.B. 400.

(*s*) *Att.-Gen.* v. *Cox*, 3 H.L.Cas. 240.

(*t*) *Right* v. *Darby*, 1 T.R. 159, 162; *Messenger* v. *Armstrong*, *ib.* 53.

(*u*) *Cobb* v. *Stokes*, 8 East, 358.

(*x*) *Doe* v. *Smaridge*, 7 Q.B. 957; 14 L.J. Q.B. 327; *Doe* v. *Nainby*, 16 L.J. Q.B. 303; *Doe* v. *Geekie*, 5 Q.B. 841; 13 L.J. Q.B. 239. As to what is a reasonable notice to determine a yearly hiring of sporting rights, see *Lowe* v. *Adams*, (1901) 2 Ch. 598; 70 L.J. Ch. 783.

(*y*) *Doe* v. *Stratton*, 1 M. & P. 183; 6 L.J. (O.S.) C.P. 50; *Tress* v. *Savage*, 4 E. & B. 36; 23 L.J. Q.B. 339.

(*z*) See *ante*, p. 662.

(*a*) *Right* v. *Beard*, 13 East, 210; *Denn* v. *Rawlins*, 10 East, 261; *Doe* v. *Cox*, 11 Q.B. 122; 17 L.J. Q.B. 3.

give notice to the landlord of the fact of his abandonment of the possession, and of his election to rescind the contract and put an end to the tenancy (*b*). If the occupation is the occupation of a servant or agent holding possession of the premises on account and on behalf of his master or principal (*c*), the possession of the occupier is the possession of the owner himself, and the latter may at any time remove the occupier, and resume possession of the property without any notice to quit (*d*). If the tenancy and possession are adverse, or if the occupier holds over after the expiration of a lease, or after a forfeiture, or after an agreement for a lease or a contract of sale has gone off and been abandoned (*e*), or after the tenancy has been determined by a dissolution of partnership, and continues in possession without the permission and against the will of the owner, no notice to quit is necessary; but the owner may at once proceed against the wrongdoer by action for the recovery of the demised premises, or he may enter and take possession if the tenant leaves the demised premises vacant (*f*).

If the lessor is only tenant at will, or has made a prior lease of the lands, or mortgaged them so as to give the mortgagee a right of entry and to deprive himself of the power of granting a lease for the term specified, the tenant may be turned out without any previous notice to quit from the party who has title (*g*). But, if the lessor at the time of making of the lease had full right and title to grant the demised premises to the lessee for the term, any subsequent grant, mortgage, sale, or lease, cannot affect the tenant's right of possession, or in any way dispense with the ordinary notice to quit (*h*).

Mode of giving notice.—A notice to quit may be given orally by the lessor, or by his agent (*i*), unless there has been an express agreement or stipulation for a notice in writing (*k*). By the Agricultural Holdings Act, 1908 (*l*), a notice to quit under the Act may be served on the person to whom it is to be given either personally or by leaving it at his last known place of abode in England or by sending it by post in a registered letter to him there; and in the case of a notice to a landlord "the

(*b*) See Co. Litt. 55, a; *Cole on Ejectment*, 453.

(*c*) As to occupation by servant for purpose of his employment, see *Reg.* v. *Spurrell*, L.R. 1 Q.B. 422; 35 L.J. M.C. 74.

(*d*) *Doe* v. *Derry*, 9 C. & P. 494; *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54; *White* v. *Bailey*, 30 L.J. C.P. 253; 10 C.B. N.S. 227.

(*e*) See *ante*, p. 662.

(*f*) *Doe* v. *Sayer*, 3 Campb. 8; *Doe* v. *Miles*, 1 Stark. 181; *Doe* v. *Bluck*, 8 C. & P. 464.

(*g*) *Keech* v. *Hall*, 1 Doug. 21; 1 Smith's L.C. 511 (ed. 11).

(*h*) As to when notice is necessary by statute, see 44 & 45 Vict. c. 41, s. 18; 53 & 54 Vict. c. 57, s. 2.

(*i*) *Timmins* v. *Rowlinson*, 3 Burr. 1603; *Doe* v. *Crick*, 5 Esp. 196.

(*k*) *Legg* v. *Benion*, Willes, 43.

(*l*) 8 Edw. 7, c. 28, s. 45.

person to whom it is to be given" includes any duly authorised agent of the landlord. The notice must be given by or on behalf of the person in whom the term is vested (*m*). A mere receiver of rents has no implied authority to give a notice to quit; but an agent or receiver who is intrusted with the general management of landed property, and has a general authority to let lands from year to year, has also authority to determine such tenancies by a notice to quit (*n*). And he may give the notice in his own name, as it is not necessary that his agency and the authority of his principals should appear on the face of the document (*o*). The steward of a corporation, who is intrusted with the letting of the corporate estates, may give a notice to quit (*p*) and needs no authority under seal from the corporation for the purpose (*q*). If there are several joint-lessors or joint-owners of the property, a notice to quit, given or signed by one or more of them, on behalf of all, is sufficient (*r*); and the subsequent assent of such joint-owners to a notice previously given by one or more of them, on behalf of all, is equivalent to a precedent authority (*s*). But, if it is expressly provided by the agreement of the parties that a written notice shall be given by all of them, under their respective hands, the notice must be signed by all, and a ratification given afterwards will not do (*t*). The notice may also be given by an agent on their behalf; but such notice, in order to be valid and effectual, must be given in the names of the joint-owners, the principals, and not in the name of the agent, unless the agent has a general authority to let their lands (*u*); and the agent ought to have authority to give the notice at the time it begins to operate; for, if the tenant could not safely have acted upon the notice at the time it was given, no subsequent recognition of it by the landlord will make it valid (*x*). If one or more of several joint-owners dissent from the notice, such of them as have joined in giving the notice to quit are entitled to enter into and hold possession of the demised premises, and receive the rents and profits of the land, jointly with the tenant or lessee of the others who

(*m*) *Seaward* v. *Drew*, 67 L.J. Q.B. 322.

(*n*) *Doe* v. *Mizen*, 2 M. & Rob. 56.

(*o*) *Jones* v. *Phipps*, L.R. 3 Q.B. 567; 37 L.J. Q.B. 198.

(*p*) *Roe* v. *Pierce*, 2 Campb. 96.

(*q*) *Doe* v. *Bold*, 11 Q.B. 127.

(*r*) *Doe* v. *Hulme*, 2 Man. & Ry. 433; 6 L.J. (O.S.) K.B. 344; *Doe* v. *Summersett*, 1 B. & Ad. 135; 8 L.J. (O.S.) K.B. 369; *Alford* v. *Vickery*, Car. & M. 280; *Doe* v. *Hughes*, 7 M. & W. 139; 10 L.J. Ex. 185.

(*s*) Abbott, C.J., *Goodtitle* v. *Woodward*, 3 B. & Ald. 689, 692.

(*t*) *Right* v. *Cuthell*, 5 East, 491.

(*u*) *Jones* v. *Phipps*, L.R. 3 Q.B. 567; 37 L.J. Q.B. 198.

(*x*) *Doe* v. *Walters*, 10 B. & C. 626; 8 L.J. (O.S.) K.B. 297; *Doe* v. *Goldwin*, 2 Q.B. 146; 10 L.J. Q.B. 275; *Goodtitle* v. *Woodward*, *supra*. As to ratification of an unauthorized notice to quit, see *London and Blackwall Ry.* v. *Cross*, 31 Ch.D. 354, at p. 363; 55 L.J. Ch. 313.

have refused to join in such notice (*y*). One of two or more executors or administrators stands in the same position as regards giving notice to quit as one of several joint-tenants who demise premises (*z*).

Form and effect of notice—Alternative and peremptory notices.—A notice to quit "all the property you hold of me," addressed to the tenant, is a sufficient description of the demised premises; and any general description applicable to the whole of the property will suffice (*a*). But a landlord cannot give a notice to quit which is intended to apply to a part only of premises which have been demised together at one entire rent (*b*). Under the Agricultural Holdings Act, 1908 (*c*), however, where a notice to quit is given by the landlord of a holding to a tenant from year to year with a view to the use of land for the purpose of making certain improvements, the notice, if it states that it is given with a view to such use, cannot be objected to on the ground that it relates to part only of the holding (*d*); but the tenant may, within twenty-eight days after service of such notice, serve on the landlord notice in writing that he accepts it as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit will have effect accordingly (*e*). A mere misdescription, however, of the premises (*f*), or a mistake in the Christian name of the tenant (*g*), does not invalidate the notice, provided the tenant has not been misled or prejudiced by such misdescription or mistake (*h*). If the notice applies to a year that is past, but was clearly intended to apply to the coming year, and the tenant must have known what time was meant, he is bound by the notice (*i*). If the notice is not a peremptory notice to quit, but is drawn up in the alternative, and seems to have been intended either to put an end to the lease or obtain an increased rent, the tenant may elect to remain in possession, paying an increased rent; and, such an option having been accorded to him, he cannot, if he chooses to occupy, be treated as a trespasser and wrongdoer and turned out of possession. If, however, the notice is a notice to quit or pay double the annual value under the statutes imposing penalties on tenants for holding over after a notice to quit,

(*y*) *Doe* v. *Chaplin*, 3 Taunt. 120.
(*z*) *Cole on Ejectment*, p. 43 *et seq.*
(*a*) *Doe* v. *Church*, 3 Campb. 71.
(*b*) *Doe* v. *Archer*, 14 East, 245.
(*c*) 8 Edw. 7, c. 28, s. 23.
(*d*) *Ib.*, s. 23 (a).
(*e*) See proviso to s. 23; and as to service of notices under the Act, see s. 45.
(*f*) *Doe* v. *Roe*, 4 Esp. 185; *Doe* v. *Wilkinson*, 12 Ad. & E. 743; 4 P. & D. 323.
(*g*) *Doe* v. *Spiller*, 6 Esp. 70.
(*h*) *Doe* v. *Smith*, 5 Ad. & E. 350; 5 L.J. K.B. 216. See *post*, p. 727.
(*i*) *Doe* v. *Kightley*, 7 T.R. 63.

the alternative notice so given will be construed as a peremptory notice to quit, accompanied by a warning to the tenant of the penal consequences of disobedience, and not as an offer on the part of the landlord of a new bargain and a new lease at an increased rent (*k*). A notice to determine a tenancy, although imperfectly expressed, is a good and valid notice if accepted as such at the time by the landlord (*l*). Where a tenant wrote to his landlord, from whom he had taken a house on a lease determinable at the end of seven or fourteen years, "I have just been looking at my lease, and I see that my first seven years will be determined on 25th December, 1894. . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt," it was held, that the letter constituted a good and sufficient notice to determine the lease (*m*). Where a notice to quit on a day terminating the tenancy went on to say, "And I hereby further give you notice that, should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly in advance," it was held that the notice was not rendered invalid by the addition (*n*).

Length of notice.—We have already seen that, in the case of a tenancy from year to year, six calendar months' notice to quit is required to be given prior to the expiration of the current year of hiring, in order to determine the tenancy between the parties (*o*). But, whenever the tenancy commences and ends at any of the usual feasts, the customary half-year (*i.e.*, 182 days) intervening between two half-yearly feasts constitutes a half-year's notice, although the intermediate time be not exactly six calendar months (*p*). And where the tenancy commenced on a feast day, and notice was given on the 26th of March to quit on the 29th September, it was held bad, although there were more than 183 days intervening (*q*). Although rent may be payable under the lease on the usual feast days, yet where the length of notice required by the terms of the lease is six calendar months, a notice given on the 29th September to quit on the

(*k*) *Doe* v. *Jackson*, 1 Doug. 175; *Doe* v. *Goldwin*, 2 Q.B. 143; 10 L.J. Q.B. 275.

(*l*) *General Assurance Co.* v. *Worsley*, 64 L.J. Q.B. 253.

(*m*) *Bury* v. *Thompson*, (1895) 1 Q.B. 696; 64 L.J. Q.B. 500.

(*n*) *Ahearn* v. *Bellman*, 4 Ex.D. 201; 48 L.J. Ex. 681.

(*o*) *Ante*, p. 720; but see *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L.J. Ch. 165.

(*p*) *Howard* v. *Wemsley*, 6 Esp. 53; *Rogers* v. *Kingston-upon-Hull Dock Co.*, *supra*.

(*q*) *Morgan* v. *Davies*, 3 C.P.D. 260.

25th March would be bad, as there are not six calendar months intervening. Under sect. 22 of the Agricultural Holdings Act, 1908 (*r*), where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for the determination of a tenancy of a holding from year to year, a year's notice so expiring shall by virtue of the Act be necessary and sufficient for such determination, unless the landlord and the tenant agree in writing that this section shall not apply, in which case a half-year's notice shall be sufficient; but nothing in this section extends to a case where a receiving order in bankruptcy is made against the tenant (*s*). Under the Act of 1883 it was held that, where by agreement a yearly tenancy was determinable on six months' notice, that Act did not apply (*t*).

Time of quitting specified in notice.—If the time at which the tenant is to quit is specified in the notice, the time should correspond with the termination of the term of hiring, unless the notice is given in the exercise of a power to determine the tenancy expressly reserved in the lease or agreement (*u*); for, if the term expires at one period, and the notice is to quit at another, that is, on the wrong day, such notice is bad (*x*). A tenant, under an agreement to quit at a quarter's notice, cannot be expelled at the expiration of any quarter that the lessor may choose to select, but the notice must be a quarter's notice to quit at the expiration of the current year (*y*). If the hiring is from half-year to half-year, determinable by six months' notice to quit, the tenancy may be determined by notice at the expiration of any half-year from its commencement (*z*). If it is a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month, or week; if it breaks into the middle of the quarter, month, or week, it is not a good notice to quit. If the hiring is from month to month, and the rent is made payable weekly, a notice to quit at the expiration of the current month must be given, and not a notice expiring at any one of the weeks without reference to the termination of the month. The length of the notice, however, may be varied by local custom and usage, and by the agreement of the parties (*a*). When the hiring is

(*r*) 8 Edw. 7, c. 28, s. 22.

(*s*) *Ib.*, s. 22.

(*t*) *Barlow* v. *Teal*, 15 Q.B.D. 501; 54 L.J. Q.B. 564; and see also *Wilkinson* v. *Calvert*, 3 C.P.D. 360; 47 L.J. C.P. 679, decided under 38 & 39 Vict. c. 92, s. 51 (repealed).

(*u*) *Bridges* v. *Potts*, 33 L.J. C.P. 338; 17 C.B. N.S. 314; *Soames* v. *Nicholson*, (1902) 1 K.B. 157; 71 L.J. K.B. 24.

(*x*) *Doe* v. *Lea*, 11 East, 312.

(*y*) *Doe* v. *Donovan*, 1 Taunt. 555; *Dixon* v. *Bradford Coal Supply Co.*, (1904) 1 K.B. 444; 73 L.J. K.B. 136.

(*z*) *Doe* v. *Grafton*, 18 Q.B. 496; 21 L.J. Q.B. 276; and see *Lewis* v. *Baker*, (1906) 2 K.B. 599; 75 L.J. K.B. 848.

(*a*) *King* v. *Eversfield*, (1897) 2 Q.B. 475; 66 L.J. Q.B. 809. As to notice being necessary to determine a weekly

for one single quarter, month, or week, no notice at all is requisite (*b*).

A notice "to quit at the end of the first year of your tenancy which expires half a year after the date of this notice," will be sufficient, and so also will a notice "to quit at the expiration of the current year of your tenancy," provided such notice was given half a year prior to the expiration of the current year of hiring (*c*). A notice to quit on the anniversary of the day "at," or "on," or "from," or "on and from" which the tenancy commenced is good (*d*). Sometimes the notice is given in the alternative, in order to hit one of two periods on which the term is believed to end, and it has been held that such a notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant (*e*). A notice to a weekly tenant whose tenancy commenced on Wednesday, to quit on Friday, provided his tenancy commenced on Friday, or otherwise at the end of his tenancy next after one week from the date thereof, was held to be a good notice to determine the tenancy at the expiration of a week from the subsequent Wednesday (*f*).

Application of notice to current term of hiring.—The notice is always understood to apply to the year in which it is given, whether it expressly refers to the "current year" or not; and it will not operate as a notice to quit for the succeeding year, unless it appears plainly to have been the intention of the lessor that the notice, if invalid for the first year, should apply to the next year of holding (*g*). Where a notice dated the 27th, and served on the 28th, of September, required a tenant to quit "at Lady Day next, or at the end of your current year," and it appeared that the then current year of hiring ended on Michaelmas Day (the 29th of September), two days after the day of the date, and one day after the service of the notice to quit, it was held that it could not be presumed that the notice was intended to apply to the year in which it was given, and of which two days only remained, but that it must be taken to apply to the next year (*h*). So, where the term of hiring

tenancy, see *Bowen* v. *Anderson*, (1894) 1 Q.B. 164, following *Jones* v. *Mills*, 10 C.B. N.S. 738; 31 L.J. C.P. 66; and explaining *Sandford* v. *Clarke*, 21 Q.B.D. 398; 57 L.J. Q.B. 507.

(*b*) *Doe* v. *Bayley*, 5 C. & P. 67; *Doe* v. *Raffan*, 6 Esp. 4; *Doe* v. *Hazell*, 1 Esp. 94; *Kemp* v. *Derrett*, 3 Campb. 510; *Huffell* v. *Armistead*, 7 C. & P. 56, commented on in *Jones* v. *Mills*, *supra*.

(*c*) *Doe* v. *Butler*, 2 Esp. 589.

(*d*) *Sidebotham* v. *Holland*, (1895) 1 Q.B. 378; 64 L.J. Q.B. 200.

(*e*) *Doe* v. *Wrightman*, 4 Esp. 5.

(*f*) *Doe* v. *Scott*, 4 Moo. & P. 20; 8 L.J. (O.S.) C.P. 110.

(*g*) *Mills* v. *Goff*, 14 M. & W. 72; 14 L.J. Ex. 249.

(*h*) *Doe* v. *Culliford*, 4 D. & R. 248; *Weide* v. *Dyer*, (1900) 1 Q.B. 23; 69 L.J. Q.B. 17, commenting on *Doe* v. *Morphett*, 7 Q.B. 577; 14 L.J. Q.B. 345, in which *Doe* v. *Culliford*, *supra*, had been disapproved.

commenced and ended on the 2nd of February, and the lessor, on the 22nd of October, 1833, three months and ten days only before the expiration of the year, gave the tenant notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year's holding shall expire after the expiration of half a year from the delivery of this notice," it was held that the notice, though bad for February, 1834, the succeeding February, was a good notice for February, 1835 (*i*).

The commencement of the current year of the tenancy is generally regulated by the commencement of the original holding. Where premises were demised by an agreement dated the "13th of August, 1838," for the term of "one year and six months certain," at a yearly rent payable quarterly, "three calendar months' notice to be given on either side previous to the termination of the tenancy," and the tenant entered and held possession beyond the year and six months, and on the 7th May, 1840, the lessor gave the tenant notice to quit on the 13th August next, the notice was held to be good, as the year of hiring was to be calculated from that day, and not from the termination of the year and six months (*k*). And, where a tenant entered into possession, under an agreement for a lease for a term of five years and a half, and the lease was never granted, but the tenant continued to occupy, and, when the five years and a half were nearly expired, negotiations were entered into for a further lease at an increased rent, to commence on the expiration of the term of five years and a half, and this second lease was never executed, but the defendant continued in the occupation of the premises, paying the increased rent, it was held that the current year of the tenancy must be calculated from the original entry of the tenant upon the premises (*l*). Where, on the other hand, a lessee of a term granted an underlease for fourteen years and a half from the 25th of December, and the term consequently expired on the 24th of June, and the underlessee continued in possession, paying rent, it was held that the subsequent tenancy commenced from the termination of the preceding underlease, and that a notice given on the 24th of December to quit on the 24th of June was a valid notice (*m*).

(*i*) *Doe* v. *Smith*, 5 Ad. & E. 350 ; 5 L.J. K.B. 216. See also *ante*, p. 723.

(*k*) *Doe* v. *Dobell*, 1 Q.B. 806 ; 10 L.J. Q.B. 242 ; *Doe* v. *Samuel*, 5 Esp. 173.

(*l*) *Berrey* v. *Lindley*, 3 M. & Gr. 498 ; 11 L.J. C.P. 27 ; and see *Kelly* v. *Paterson*, L.R. 9 C.P. 681 ; 43 L.J. C.P. 320.

(*m*) *Doe* v. *Lines*, 11 Q.B. 402 ; 17 L.J. Q.B. 108 ; *Walker* v. *Gode*, 6 H. & N. 594 ; 30 L.J. Ex. 172.

Calculation of current year from one of usual feast days.—The term of hiring is generally, by the express or implied agreement of the parties, calculated from some one or other of the quarterly feasts; and, if the tenant enters in the middle of a customary quarter, and afterwards pays his rent for that half-quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day (*n*). But, if he pays his rent at the end of the quarter or half-year from the time of his coming in, the tenancy will commence from the day of his entry (*o*). If the notice be given to quit at Michaelmas generally, it is good for either Old or New Michaelmas. *Primâ facie* it would be for New Michaelmas; but, if the holding was from Old Michaelmas, this notice would do for that also (*p*). Where a notice was given on the 27th of September, "to quit at the expiration of the term for which you hold," evidence was permitted to be given of a general custom of the country to let from Lady Day, and of the fact of the rent being due at Michaelmas and Lady Day, and it was left to the jury to presume, in the absence of evidence to the contrary, that the tenancy, like other tenancies in that part of the country, was a tenancy from Lady Day to Lady Day (*q*). It has been held that, since the existence of the new style sanctioned by Act of Parliament, a lease by deed of lands "to be holden from the feast of St. Michael" must be taken to mean New Michaelmas, and that extrinsic evidence is not admissible to show that it meant a holding from Old Michaelmas (*r*). But, although the oral expressions and agreements of the parties are inadmissible to alter or contradict the written contract, yet all the surrounding circumstances may be regarded; and, if it can be shown that the rent has always been paid at Old Michaelmas, or that by the custom of the country lands are always let at Old Michaelmas, the holding would be deemed to be from the latter period (*s*).

Admissions by tenant of commencement of term.—The mere service upon the tenant of a notice to quit at a particular time is not *primâ facie* evidence of the termination of the term at the time mentioned in such notice (*t*). But, if the tenant is

(*n*) *Doe* v. *Johnson*, 6 Esp. 10; *Doe* v. *Stapleton*, 3 C. & P. 275. See also *Sandill* v. *Franklin*, L.R. 10 C.P. 377; 44 L.J. C.P. 216; *Sidebotham* v. *Holland*, (1895) 1 Q.B. 378; 64 L.J. Q.B. 200.

(*o*) *Doe* v. *Matthews*, 11 C.B. 675.

(*p*) *Doe* v. *Perrin*, 9 C. & P. 467; *Doe* v. *Vince*, 2 Campb. 256.

(*q*) *Doe* v. *Lamb*. Adams. Eject. 272 (ed. 1).

(*r*) *Doe* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 1 M. & Sc. 380; 2 L.J. C.P. 85.

(*s*) *Furley* v. *Wood*, 1 Esp. 198; *Doe* v. *Benson*, 4 B. & Ald. 588; *Den* v. *Hopkinson*, 3 D. & R. 507; 2 L.J. (O.S.) K.B. 11.

(*t*) *Doe* v. *Calvert*, 2 Campb. 388.

expressly told that he must leave at the expiration of six months, or if a written notice is served personally on the lessee, and the latter reads it, and makes no objection to it, this is *primâ facie* evidence to go to a jury that the time of quitting is correctly stated in the notice. If he cannot read, or does not read the notice in the presence of the person who serves it upon him, it must go for nothing (*u*). An admission by the tenant of a holding corresponding with the time mentioned in the notice may be rebutted by direct evidence of a different holding (*x*). If the period of the commencement of the term is uncertain, and the lessor applies to the lessee to ascertain the time of the commencement of his lease, the lessee is bound by the information he gives, and cannot be permitted afterwards to set up a different holding for the purpose of defeating proceedings that have been taken by the landlord upon the faith of such statement (*y*).

Different periods of entry.—When the demised premises are entered upon at different periods, the notice to quit ought to refer to the time of the tenant's entry upon the principal subject-matter of the demise. Thus, if buildings and lands are let together, to be entered upon at different times, and the buildings constitute the principal subject-matter of demise, the notice to quit should refer to the tenant's entry upon the buildings, and not the land; and it is a question of fact which is the principal and which the accessorial subject of demise (*z*). Though part of a farm is to be entered upon and quitted at different periods, *i.e.*, the pasture at Old Lady Day, the arable land at Old Candlemas, and the meadow at Old May Day, yet that is a letting from Lady Day to Lady Day; for it is no more than the custom of most counties would have directed without any special words for that purpose in any taking from Old Lady Day, viz., that the arable land shall be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May Day, when in the northern counties they are usually heyned for hay (*a*). Where a tenant entered into possession of a farm, under an agreement to enter "on the tillage land at Candlemas last past, and on the house and all other the premises at Lady Day following," and to quit the farm "according to the times of

(*u*) *Thomas* v. *Thomas*, 2 Campb. 647; *Doe* v. *Forster*, 13 East, 405; *Doe* v. *Woombwell*, 2 Campb. 559.

(*x*) *Oakapple* v. *Copous*, 4 T.R. 361; *Brown* v. *Burtinshaw*, 7 D. & R. 610.

(*y*) *Doe* v. *Lumbly*, 2 Esp. 635. As to the converse case where the tenant made the enquiry, see *General Assur. Co.* v. *Worsley*, 64 L.J. Q.B. 253.

(*z*) *Doe* v. *Howard*, 11 East, 498; *Doe* v. *Watkins*, 7 East, 551, 556; *Doe* v. *Hughes*, 7 M. & W. 141; 10 L.J. Ex. 185; *Doe* v. *Rhodes*, 11 M. & W. 600; 12 L.J. Ex. 382.

(*a*) *Doe* v. *Snowdon*, 2 W. Bl. 1224.

entry as aforesaid," and the rent was reserved at Michaelmas and Lady Day, a notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was held good, the taking being in substance from Lady Day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c. (*b*).

Service of notice to quit.—If the notice to quit is served upon the actual occupiers of the demised premises, proof of such service is sufficient to sustain an action of ejectment (*c*). A notice to quit under the Agricultural Holdings Act, 1908 (*d*), may be served on the tenant either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there, and in the case of a notice to a landlord it may be served either on the landlord or on his agent duly authorised in that behalf. Where the lessee puts another into possession of the demised premises, the party so let into possession is presumed to be the assignee of the lessee, and a notice to quit served upon such occupier will sustain an ejectment against the lessee (*e*). If the party in occupation of the house is the mere servant of the lessee, the notice should be a notice to the lessee to quit, and not a notice to the servant (*f*). A delivery of the notice to the wife or servant of the lessee, at the dwelling-house of the latter, is a sufficient service (*g*). But a servant to whom it is delivered should be expressly told that it is a notice to quit, and should be requested, either orally, or by means of a written direction, to deliver it to the tenant (*h*). If there is a personal service of the notice upon the tenant himself, no written direction upon the notice is necessary (*i*); and, if the notice is directed to the tenant by a wrong Christian name and he neglects to repudiate it, he is deemed to have waived the misdirection (*k*). Where a lease contained a proviso that the demise might be put an end to by delivery of written notice to that effect to the tenant or his assigns and the tenant, after mortgaging the premises by way of sub-lease, disappeared, it was held that a notice sent to the tenant's last known address, and delivery of a like notice to the mortgagee and to the occupier

(*b*) *Doe* v. *Spence*, 6 East, 120.
(*c*) *Roe* v. *Street*, 2 Ad. & E. 331; 4 L.J. K.B. 67.
(*d*) 8 Edw. 7, c. 28, s. 45; and see also *Van Grutten* v. *Trerenen*, 71 L.J. K.B. 514, decided on the repealed Act of 1883 (46 & 47 Vict. c. 61), ss. 28, 33.
(*e*) *Doe* v. *Williams*, 6 B. & C. 41; 9 D. & R. 30.
(*f*) *Doe* v. *Woodman*, 8 East, 228.
(*g*) *Jones* v. *Marsh*, 4 T.R. 464; *Doe* v. *Dunbar*, M. & M. 10; *Alford* v. *Vickery*, 1 Car. & M. 280; *Tanham* v. *Nicholson*, L.R. 5 H.L. 561.
(*h*) *Doe* v. *Lucas*, 5 Esp. 152; *Smith* v. *Clark*, 9 Dowl. 202.
(*i*) *Doe* v. *Wrightman*, 4 Esp. 5.
(*k*) *Doe* v. *Spiller*, 6 Esp. 70.

of the premises was not a service of the notice on the lessee, and that as he had not assigned the premises no other service would satisfy the proviso (*l*). If two or more persons hold possession of the demised premises as joint-tenants or tenants in common, notice to one of them is sufficient notice to all to determine the tenancy (*m*).

Service of notice through post-office.—Where a notice to quit properly addressed to the landlord's authorised agent had been put into the post-office, and delivered within the usual business hours, on the 25th of March, it was held to be a good notice for the 29th of September following, although the agent, owing to absence, did not actually receive it until the 26th (*n*).

Acceptance of informal notice—Proof of notice.—If a tenant gives his landlord an insufficient notice to quit, and the landlord at first assents, but ultimately refuses to accept the notice, and the tenant quits according to his notice, the tenancy is not determined (*o*). A written notice to quit may be proved by the production of a copy, although no notice has been given to produce the original (*p*).

Waiver of notice to quit.—If the tenant remains in possession after the expiration of a good notice to quit, his possession then becomes an adverse tenancy, and the landlord may either bring an action of ejectment against him, or in the case of premises not exceeding a certain value or rent proceed in the county court (*q*) or before justices of the peace (*r*), for the recovery of the possession of the demised premises. But, if he permits the tenant to remain in possession after the expiration of the notice, and demands and accepts rent subsequently to the notice, this amounts strictly speaking to a waiver of the right to enforce the notice (*s*). The same result follows, if the lessor distrains for rent which he claims to be due in respect of the tenant's occupation subsequently to the expiration of the notice (*t*). But, if a banker or agent of the lessor, without any special authority from the latter, receives rent from the tenant, the act of such unauthorised agent does not amount to a waiver of the notice (*u*). The money, moreover, must be paid and accepted as rent, and not by way of satisfaction of the lessor's

(*l*) *Hogg* v. *Brooks*, 15 Q.B.D. 256.

(*m*) *Doe* v. *Crick*, 5 Esp. 196 ; *Doe* v. *Watkins*, 7 East, 551.

(*n*) *Papillon* v. *Brunton*, 5 H. & N. 518 ; 29 L.J. Ex. 265. As to service by post on an incorporated company, see 8 & 9 Vict. c. 16, s. 135, or under the Agricultural Holdings Act, 1908, see 8 Edw. 7, c. 28, s. 45.

(*o*) *Bessell* v. *Landsberg*, 7 Q.B. 638 ; 14 L.J. Q.B. 355.

(*p*) *Doe* v. *Somerton*, 7 Q.B. 58 ; 14 L.J. Q.B. 210.

(*q*) See *post*, p. 739.

(*r*) *Ib.*

(*s*) *Goodright* v. *Cordwent*, 6 T.R. 219; *Doe* v. *Batten*, Cowp. 243 ; *Blyth* v. *Dennett*, 13 C.B. 178 ; 22 L.J. C.P. 79.

(*t*) *Zouch* v. *Willingale*, 1 H.Bl. 311.

(*u*) *Doe* v. *Calvert*, 2 Campb. 387.

claim for double rent or double value, under the statutes for holding over. The giving of a second notice to quit before or after the expiration of the first notice does not necessarily amount to a waiver of the latter (*x*); but merely raises a presumption against the person giving it, which may be rebutted, of an existing tenancy (*y*). Nor does a collateral promise by the lessor not to act upon the notice in the case of the happening of a certain event amount to a waiver of the notice (*z*). If a tenant retains possession and receives the produce and profits of the demised premises after the expiration of a notice to quit given by him, this will, in general, as against the tenant, amount to a waiver of the notice (*a*). A waiver of a notice to quit coupled with a continued occupation after the expiration of the notice creates a new tenancy taking effect at the expiration of the old one (*b*).

Proof and effect of holding over.—There is no holding over by a tenant from the mere fact of his not sending the keys of a house to the landlord. It is enough if the tenant vacates the house and gives the landlord the means and opportunity of taking possession when he pleases; for possession is to be given on the land, and the landlord must come and take it. But, if the tenant continues to use and occupy the premises after the term has ceased, he will be responsible for holding over. And the tenant is responsible, if his sub-tenant holds over (*c*). But one joint-tenant is not responsible for a holding over without his assent by the other (*d*). Mere holding over does not create a new tenancy; nor is it in itself any evidence of an agreement to renew the previous tenancy (*e*). There must be a payment and acceptance of rent which accrued subsequently to the expiration of the lease; and then the tenant holds as tenant from year to year upon all such of the terms of the original lease as are applicable to a yearly tenancy (*f*). The same principle is applicable where an express tenancy at

(*x*) *Doe* v. *Humphreys*, 2 East, 237; *Doe* v. *Steel*, 3 Campb. 115.

(*y*) *Doe* v. *Palmer*, 16 East, 53; *Messenger* v. *Armstrong*, 1 T.R. 53.

(*z*) *Whitcacre* v. *Symonds*, 10 East, 13.

(*a*) *Jones* v. *Shears*, 4 Ad. & E. 832; 5 L.J. K.B. 153.

(*b*) *Tayleur* v. *Wildin*, L.R. 3 Ex. 203; 37 L.J. Ex. 173; see *Holme* v. *Brunskill*, 3 Q.B.D. 495; 47 L.J. Q.B. 610.

(*c*) *Henderson* v. *Squire*, L.R. 4 Q.B. 170; 38 L.J. Q.B. 73; *Roe* v. *Wiggs*, 2 Bos. & P. N.R. 330; *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*d*) *Draper* v. *Crofts*, 15 M. & W. 166; 15 L.J. Ex. 92; *Christy* v. *Tancred*, 9 M. & W. 438; 11 L.J. Ex. 109; *Tancred* v. *Christy*, 12 M. & W. 316.

(*e*) *Gray* v. *Bompas*, 11 C.B. N.S. 520; *Jenner* v. *Clegg*, 1 Moo. & R. 213.

(*f*) *Torriano* v. *Young*, 6 C. & P. 11; *Thomas* v. *Packer*, 1 H. & N. 671; 26 L.J. Ex. 207; *Bishop* v. *Howard*, 3 D. & R. 298; *Buckworth* v. *Simpson*, 1 Cr. M. & R. 843; 4 L.J. Ex. 104; *Arden* v. *Sullivan*, 14 Q.B. 839; 19 L.J. Q.B. 271; *Beale* v. *Sanders*, 3 Bing. N.C. 850; 6 L.J. C.P. 283.

will has been created on the termination of a lease (*g*), and it has been held that where an arbitration clause in the old lease was not inconsistent with such a tenancy it applied during the continuance of such tenancy (*h*). If, therefore, the lease contained a proviso for re-entry in case of non-payment of rent, the proviso is impliedly annexed to the yearly tenancy (*i*). But, if there is any evidence to show that the holding after the expiration of the lease was upon new and different terms, the legal presumption is rebutted (*k*), and the nature of the holding becomes a question of fact. Whether any particular covenant is applicable to a yearly tenancy is in some cases a question of fact (*l*). In other cases it will be a question of law. When a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man paying the same rent, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, and is not according to the custom of the country (*m*).

Double yearly value for holding over.—By sect. 1 of the Landlord and Tenant Act, 1730 (*n*), any tenant wilfully holding over and retaining possession of the demised premises after the determination of his term, and after possession has been demanded and notice in writing has been given him by the lessor, is liable to pay to the person kept out of possession double the yearly value of the lands, &c. detained (*o*). An action for the recovery of this penalty may be brought only by the landlord or the person who stands in the situation of landlord, and not by any one who derives title from the lessor (*p*), either before or after he has recovered possession of the land by an action of ejectment (*q*). But it has been held that the Act of 1730 applies only to the case of a wilful and contumacious holding over by the tenant after a valid notice to quit, and not to a holding over under a *bonâ fide* claim of title or right, though

(*g*) *Morgan* v. *Harrison, Ltd.*, (1907) 2 Ch. 137; 76 L.J. Ch. 548.

(*h*) *Ib.*

(*i*) Williams, J., *Doe* v. *Amey*, 12 Ad. & E. 480; *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234.

(*k*) *Thetford (Mayor)* v. *Tyler*, 8 Q.B. 95; 15 L.J. Q.B. 33.

(*l*) *Hyatt* v. *Griffiths*, 17 Q.B. 505; *Oakley* v. *Monck*, L.R. 1 Ex. 159; 35 L.J. Ex. 87.

(*m*) *Oakley* v. *Monck*, *supra*.

(*n*) 4 Geo. 2, c. 28, s. 1.

(*o*) As to the computation of the yearly value, see *Robinson* v. *Learoyd*, 7 M. & W. 48; 10 L.J. Ex. 166.

(*p*) *Blatchford* v. *Cole*, 5 C.B. N.S. 514; 28 L.J. C.P. 140.

(*q*) *Soulsby* v. *Neving*, 9 East, 310; *Wright* v. *Smith*, 5 Esp. 203; *Harcourt* v. *Wyman*, 3 Exch. 817; 18 L.J. Ex. 453; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L.J. Ex. 368. By R.S.C. Ord. XVIII. r. 2, claims for double rent may be joined without leave in actions for recovery of land.

erroneous (*r*). Where there was a demise to a woman and notice to quit given to her, after which, but before the time it expired, she married, it was held that it was not necessary to give a notice to the husband subsequent to the marriage, in order to support an action against him for double value, Mansfield, C.J., observing that if a man marry a woman who is tenant to another, he is bound to enquire under what conditions she holds the estate, and whether she has received any notice to quit, and that the obligation of the woman to pay double the yearly value, in case the notice be not complied with, can never be got rid of by the husband's omitting to make enquiry or the wife deceiving him, or concealing the notice to quit (*s*). A weekly or quarterly tenant has been held not to come within the operation of the statute (*t*). In the case of a tenancy from year to year, the ordinary notice to quit at the end of the current year of hiring is a sufficient demand of possession to entitle the lessor to double yearly value (*u*). If the tenant holds under a lease for a term of years certain, a notice to quit at the expiration of such term is likewise a sufficient demand of possession, and such notice may be given previous to the expiration of such term, or at any time afterwards, so long as the tenant continues to hold as a tenant at will (*x*). If the landlord has done any act amounting to a waiver of his notice to quit, he cannot make such notice the foundation of an action for double value (*y*); and acceptance of single rent is a waiver of the double value (*z*).

Double rent for holding over.—By sect. 18 of the Distress for Rent Act, 1737 (*a*), if any tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession of the premises at the time mentioned, such tenant, his executors, &c., shall from thenceforward pay to the landlord or lessor double the rent which he would otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent could be levied, &c. The tenant's notice to quit need not be in writing in order to support the lessor's claim to double rent, nor need the lease

(*r*) *Hirst* v. *Horn*, 6 M. & W. 393; *Page* v. *More*, 15 Q.B. 684; *Swinfen* v. *Bacon*, *supra*.

(*s*) *Lake* v. *Smith*, 1 Bos. & P. N.R. 174, 179; *Wilkinson* v. *Colley*, 5 Burr. 2694. As to how far the liability of the husband is probably now limited, see 45 & 46 Vict. c. 75, s. 14.

(*t*) *Lloyd* v. *Rosbee*, 2 Campb. 453; *Sullivan* v. *Bishop*, 2 C. & P. 359; but it is doubtful whether this latter case was rightly decided, see *Bullen on Distress* (ed. 2), p. 135, note (c).

(*u*) *Wilkinson* v. *Colley*, 5 Burr. 2694, 2698; *Poole* v. *Warren*, 8 Ad. & E. 582; *Lake* v. *Smith*, 1 Bos. & P. N.R. 174, 179.

(*x*) *Cutting* v. *Derby*, 2 W.Bl. 1075; *Messenger* v. *Armstrong*, 1 T.R. 53.

(*y*) *Ryal* v. *Rich*, 10 East, 48.

(*z*) *Doe* v. *Batten*, Cowp. 243; 9 East 314 (n.).

(*a*) 11 Geo. 2, c. 19, s. 18.

which the tenant has determined by his notice to quit be a lease in writing (*b*). But the notice must be a good notice to quit at some fixed time, and at a period when the tenant is able by notice to put an end to the tenancy. If the tenant merely gives notice that he will quit "as soon as he can possibly get another situation" (*c*), or gives notice to quit in the middle instead of at the termination of the current term of hiring, or a notice of too short a duration, and which does not therefore bind the lessor, the lease is not determined, and there cannot, consequently, be any holding over by the tenant (*d*). A tenant who holds over for one year after notice to quit, paying double rent, may quit at the end of such year without fresh notice (*e*).

Determination of tenancies by railway notices.—If lands held by tenants from year to year are required by a railway company for the making of a railway, the company may, in general, under the powers of their Act, either give the ordinary landlord's notice to quit ending with the current year of the tenancy, in which case no compensation would be payable in respect of any unexpired term, or six months' notice under their Act to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. If, after having given a notice not ending with the expiration of the current year, the company inform the tenant that he may hold on till the end of the current year, and he does so, the situation of the parties is the same as if a regular landlord's notice had been originally given (*f*). If the tenant continues in possession after the expiration of the notice he holds simply as a tenant at sufferance, without any estate or interest at all in the premises, unless rent is received from him, or the premises are re-demised to him (*g*).

Recovery of possession.—Possession of land cannot be gained by an act of trespass which has never been acquiesced in by the landowner. Every person who trespasses upon another man's land and remains there tortiously may be expelled by main force (*h*). But if he has once gained a lawful possession which is determined, and he then continues unlawfully to hold the land, the landowner is punishable for a forcible entry, if he

(*b*) *Timmins* v. *Rowlinson*, 3 Burr. 1608.

(*c*) *Farrance* v. *Elkington*, 2 Campb. 591.

(*d*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L.J. (O.S.) K.B. 71.

(*e*) *Booth* v. *Macfarlane*, 1 B. & Ad. 904; 9 L.J. (O.S.) K.B. 161.

(*f*) *Reg.* v. *L. & Southampton Ry.*, 10 Ad. & E. 3; 8 L.J. Q.B. 220. As to the effect of a tenant terminating his interest by notice to the railway company, see *Reg.* v. *Poulter*, 20 Q.B.D. 132; 57 L.J. Q.B. 138.

(*g*) *Nadin, Ex parte*, 17 L.J. Ch. 421.

(*h*) *Browne* v. *Dawson*, 12 Ad. & E. 624, 629; 10 L.J. Q.B. 7.

enters with a strong hand to dispossess him (*i*). The tenant, however, cannot maintain an action for damages against the landlord for a trespass upon the realty in respect of the forcible entry; for there is no trespass by the latter in entering on property which is his own, and on which he has a legal right to enter (*k*). Where a tenant wrongfully remained in possession, and the landlord, for the purpose of rebuilding the premises, removed the roof and in so doing unavoidably damaged the tenant's furniture, it was held that no action would lie (*l*). It is now well-established law that at the determination of the term the landlord may legally enter and take possession of the demised premises, and, after civilly requesting the tenant to depart, may, in the case of his refusal, gently lay hands upon him and turn him out, subject only to the liability to be indicted for a forcible entry (*m*). If the landlord, having no right to enter, takes advantage of the temporary absence of the tenant to fasten up the door of his apartments and exclude him from re-entering, the tenant may recover damages against the landlord for breaking and entering, although the landlord has never actually entered the rooms (*n*).

Licence to eject.—Where it was provided that, in case of non-payment of rent or non-performance of covenants, the lessor and his agents might immediately enter upon and take possession of the demised premises, and expel the lessee and all persons claiming under him, without any legal process, it was held that the lessor had a right, as between himself and the lessee, under the agreement, to eject the lessee by main force, and might plead the leave and licence of the lessee in bar of an action of trespass brought by the latter (*o*). But it has been held that a similar proviso, being in effect a licence to commit a crime made illegal by 5 Rich. 2, stat. 1, c. 8, is void (*p*).

Recovery of land under provisoes for re-entry.—When the lessor has a right to re-enter in case of non-payment of rent, and brings an action, he must show that demand was made of the rent upon the demised premises, unless there is no one there

(*i*) *Rex* v. *Bathurst*, Say. 227; *Rex* v. *Wilson*, 8 T.R. 361.

(*k*) *Burling* v. *Read*, 11 Q.B. 890, 904; 19 L.J. Q.B. 291; *Davison* v. *Wilson*, 17 L.J. Q.B. 196; 11 Q.B. 890; *Harvey* v. *Brydges*, 14 M. & W. 437; 14 L.J. Ex. 272.

(*l*) *Jones* v. *Foley*, (1891) 1 Q.B. 730; 60 L.J. Q.B. 464.

(*m*) *Davis* v. *Burrell*, 10 C.B. 822; *Harvey* v. *Brydges*, *supra*; *Jones* v. *Chapman*, 2 Exch. 803, 821; 18 L.J. Ex. 456; *Pollen* v. *Brewer*, 7 C.B. N.S. 371; *Laws* v. *Telford*, 1 App.Cas. 414; 45 L.J. Ex. 613; *Beddall* v. *Maitland*, 17 Ch. 174; 50 L.J. Ch. 401. See also *Addison on Torts*, 317 (ed. 8).

(*n*) *Lane* v. *Dixon*, 3 C.B. 776; 16 L.J. C.P. 129.

(*o*) *Kavanagh* v. *Gudge*, 7 Man. & Gr. 316; 13 L.J. C.P. 99. Such a proviso is now within 44 & 45 Vict. c. 41, s. 14 (1).

(*p*) *Edwick* v. *Hawkes*, 18 Ch. D. 199; *sub nom. Edridge* v. *Hawker*, 50 L.J. Ch. 577, *sed quære*.

on whom demand can be made, and that the demand has been made on the party liable to pay (*q*), and that the same or some part thereof has not been paid (*r*), unless the proviso is for re-entry without any demand of the rent (*s*). The demand must be of the precise sum due (*t*), and must be made on the day when the rent was due and payable by the terms of the lease, and at a convenient time (which ought to be an hour) before sunset (*u*). Where the proviso is for re-entry in case of non-payment of rent within a specified number of days after it has become due, the demand cannot be made until the expiration of the last of the specified days (*x*). Where rent was payable quarterly, and two quarters were in arrear and were demanded together, it was held that the lessor could not avail himself of the proviso for re-entry in case of non-payment for twenty-one days, as the first quarter ought to have been demanded on the twenty-first day after it had become due (*y*).

Where there is no sufficient distress and one half-year's rent is due and in arrear, and the lessor has a right by law to re-enter for non-payment thereof, proceedings may be taken under sect. 210 of the Common Law Procedure Act, 1852 (*z*). The operation of the statute appears to be confined to cases where the tenant was six months in arrear at the very time when the landlord had recourse to the statutory remedy (*a*). Proof of no sufficient distress being on the premises on any one day after the right to re-enter accrued is *primâ facie* proof of there being no sufficient distress at the time of the service of process (*b*). If more than half a year's rent is in arrear, the case is within the statute (*c*), when there is not sufficient distress on the premises to countervail all the arrears due (*d*).

(*q*) *Manser* v. *Dix*, 8 De G. M. & G. 703; *Phillips* v. *Bridge*, L.R. 9 C.P. 48; 43 L.J. C.P. 13.

(*r*) Bro.Abr. Demande, 19; *Kidwelly* v. *Brand*, Plowd. 70, a, b.

(*s*) *Doe* v. *Masters*, 2 B. & C. 490; 2 L.J. (O.S.) K.B. 117.

(*t*) *Fabian* v. *Winston*, Cro.Eliz. 209; *Scot* v. *Scot*, *ib.* 73; *Doe* v. *Paul*, 3 C. & P. 613.

(*u*) Co. Litt. 202, a; 1 Saund. 287, n. 16; *Tinckler* v. *Prentice*, 4 Taunt. 549; *Doe* v. *Brydges*, 2 D. & R. 29; 1 L.J. (O.S.) K.B. 9; *Acocks* v. *Phillips*, 5 H. & N. 182.

(*x*) *Phillips* v. *Bridge*, L.R. 9 C.P. 48; 43 L.J. C.P. 13; *Hill* v. *Grange*, Plowd. 172, a, 173; *Clun's Case*, 10 Co. 129, a; *Wood* v. *Chivers*, 4 Leon. 179; *Doe* v. *Wandlass*, 7 T.R. 117.

(*y*) *Doe* v. *Paul*, 3 C. & P. 613. As to recovery of possession by landlord of a company being wound up or entering into liquidation, see *General Share Co.* v. *Wetley Brick Co.*, 20 Ch.D. 260; *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743.

(*z*) 15 & 16 Vict. c. 76, s. 210; *Doe* v. *Franks*, 2 C. & K. 678. See *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395. As to costs of obtaining relief in contested proceedings, see *Howard* v. *Fanshawe*, (1895) 2 Ch. 581; 64 L.J. Ch. 666; *Humphreys* v. *Morten*, (1905) 1 Ch. 739; 74 L.J. Ch. 370.

(*a*) *Cotesworth* v. *Spokes*, 30 L.J. C.P. 220, 222; 10 C.B. N.S. 103; *Thomas* v. *Lulham*, (1895) 2 Q.B. 400; 64 L.J. Q.B. 720; *Rickett* v. *Green*, (1910) 1 K.B. 253; 79 L.J. K.B. 193.

(*b*) *Doe* v. *Fuchau*, 15 East, 286.

(*c*) *Doe* v. *Alexander*, 2 M. & S. 525.

(*d*) *Cross* v. *Jordan*, 8 Exch. 149; 22 L.J. Ex. 70, overruling *Doe* v. *Roe*, 9 Dowl. 548.

But the distress must be available; and therefore, if the tenant locks up the premises, so that the landlord cannot get at the goods which may happen to be upon them, he may proceed under the statute (*e*). The right of re-entry must be absolute and unqualified. If he has a right only to re-enter and hold until arrears of rent are satisfied, and not to avoid the lease altogether, he cannot avail himself of the statute (*f*). The tenant or his assignee may, at any time *before* trial (sect. 212), stay all further proceedings by paying or tendering to the lessor, or bringing into court, the rent and arrears with costs, or may obtain relief upon similar terms *after* trial and within the time limited by sect. 210 (*g*). A sub-lessee in possession, who has not proved any title under the original lessee but who has paid rent to the lessor, is a tenant within the meaning of, and therefore entitled to the benefit of, sect. 212 (*h*).

Recovery of possession of deserted demised premises.—Sect. 16 of 11 Geo. 2, c. 19 (local), and 57 Geo. 3, c. 52, give a summary remedy by proceedings before justices for recovery of demised premises, when the tenant has deserted them, and left them uncultivated or unoccupied, so that no sufficient distress can be had. And by 3 & 4 Vict. c. 84, police magistrates and police constables within the metropolitan police district are enabled to put the lessor into possession and determine the lease. But this power is not by any of the provisions of the last-named statute, or by 11 & 12 Vict. c. 43, s. 34, vested in the Lord Mayor or alderman sitting in the justice room at the Mansion House or Guildhall (*i*). The record of the proceedings need not show that any complaint or inquiry was made before the justices upon oath, nor state that the landlord had a right of re-entry (*k*). Where a bankrupt lessee of a dwelling-house went away, leaving a person in the house whose possession was merely colourable, it was held that the justices were warranted in finding that the lessee had deserted the premises (*l*). But where the tenant, having left his wife and children in the house, took away his furniture and went away himself, it was held that there was no desertion; and the judges of assize, on

(*e*) *Doe* v. *Dyson*, M. & M. 77.

(*f*) *Doe* v. *Bowditch*, 8 Q.B. 973; 15 L.J. Q.B. 267.

(*g*) See 23 & 24 Vict. c. 126, s. 1. After judgment and execution, no relief can be given to an assignee of a lease, an under-lessee, mortgagee or any other person interested in the lease unless the original lessee is made a party to the application or good ground shown for omitting to do so: see *Hare* v. *Elms*, (1893) 1 Q.B. 604; 62 L.J. Q.B. 187.

(*h*) *Moore* v. *Smee*, (1907) 2 K.B. 8; 76 L.J. K.B. 658, which applied *Doe* v. *Byron*, 1 C.B. 623; 14 L.J. C.P. 207, decided on 4 Geo. 2, c. 28, s. 4 (repealed).

(*i*) *Edwards* v. *Hodges*, 15 C.B. 477; 24 L.J. M.C. 81.

(*k*) *Basten* v. *Carew*, 5 D. & R. 558; 3 L.J. (O.S.) K.B. 111.

(*l*) *Pilton, Ex parte*, 1 B. & Ald. 369.

appeal, ordered restitution of the demised premises with costs (*m*). Where the justices go the first time and find the premises deserted, then, unless some one appears and pays the rent, when they go the second time they are to deliver possession to the lessor. The proceedings of the justices are examinable in a summary way by the judges (sect. 17).

Recovery of possession of houses and small tenements.—The Small Tenements Recovery Act, 1838 (*n*), enables justices of the peace to give possession to the landlord of houses and land held for a term not exceeding seven years, rent free or at a rent not exceeding 20*l.* per annum, upon which no fine is payable, provided the tenancy has been duly determined, and notice has been given as therein provided (*o*). If under this statute a tenancy is proved, and a determination of that tenancy, and a refusal to quit, it is not competent to the tenant to set up the title of any third party, or raise any question of title (*p*). By sect. 138 of the County Courts Act, 1888 (*q*), when the term and interest of the tenant, where neither the value of the premises nor the rent payable in respect thereof exceed 50*l.* by the year, has expired or been duly determined by notice to quit, and the tenant refuses to deliver up possession, the landlord may, by proper proceedings in the county court, obtain a warrant of possession. The plaint must be brought in the district where the tenements are situate; and the court will have jurisdiction, even though a *bonâ fide* question of title is raised, where neither the annual value of the lands nor the rent payable in respect thereof exceed 50*l.* by the year (*r*). If, however, the annual value or rent exceed that sum, the jurisdiction of the court will be ousted if a *bonâ fide* question of title is raised; and, even if neither rent nor value exceed 50*l.* by the year, yet the defendant may have the action tried in the high court if he can satisfy a judge that the title to lands of greater annual value than 50*l.* will be affected by the decision (*s*). A tenant is, in general, estopped from disputing his landlord's title; but he may show that it has expired; and, if there is some evidence to support the defence, and the rent or annual value of the premises exceed 50*l.*, the judge of the county court should refrain from trying the question (*t*).

Where on the hearing of a plaint it appeared that one of

(*m*) *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; 1 L.J. K.B. 209.
(*n*) 1 & 2 Vict. c. 74.
(*o*) *Delaney* v. *Fox*, 1 C.B. N.S. 166; 26 L.J. C.P. 5.
(*p*) *Rees* v. *Davies*, 4 C.B. N.S. 56, 62.
(*q*) 51 & 52 Vict. c. 43, s. 138.
(*r*) 51 & 52 Vict. c. 43, s. 60.
(*s*) *Ib.*, s. 59.
(*t*) *Mountnoy* v. *Collier*, 1 E. & B. 630; 22 L.J. Q.B. 124; *Marsh* v. *Dewes*, 17 Jur. 558; *Kerkin* v. *Kerkin*, 3 E. & B. 399; *Latham* v. *Spedding*, 17 Q.B. 440; 20 L.J. Q.B. 302.

the matters seriously in dispute was whether the whole or part of a house had been demised, it was held that the inquiry involved a question of title, and that the county court had no jurisdiction in the matter (*u*). A decision of a county court judge, that the title is not in question, is by no means conclusive of the fact. The question may be determined by an application either to the high court or to a judge thereof during the sittings or in vacation (*x*) for a writ of prohibition; the matter is to be finally disposed of by order, no declaration or further proceedings in prohibition being allowed; and the application is to be proceeded with and heard in the same manner as an appeal brought from a decision of a judge (*y*). Neither the tenant nor any one claiming through him, nor any one put into possession by him, can, during the demise, controvert the landlord's title in an action of ejectment; but he may show that the title has expired (*z*). But a third person not claiming possession to the land, who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title (*a*). If a tenancy is sought to be established through the medium of payment of rent to the plaintiff or to his agent, it must be shown that the rent was either paid by the defendant himself, or by some person through whom he claims, or by his authorised agent; for an unauthorised payment of rent by a stranger will not be binding on the defendant. Where a party distrained for rent, and the lessee paid the rent due under the distress without protest, it was held that he could not after that controvert the title of the plaintiff (*b*).

Rights of outgoing and incoming tenants—Away-going crops, allowances for tillage, manure, &c.—The rights of tenants to way-going crops, tillages, and value of improvements, &c., are now dealt with in the Agricultural Holdings Act, 1908 (*c*), which consolidated the enactments relating to agricultural holdings in England and Wales (*d*), and which came into operation

(*u*) *Chew* v. *Holroyd*, 8 Exch. 249; 22 L.J. Ex. 95.

(*x*) 51 & 52 Vict. c. 43, s. 127.

(*y*) *Ib.*, s. 128.

(*z*) *Ante*, p. 655; *Doe* v. *Smythe*, 4 M. & S. 347; *Doe* v. *Mills*, 2 Ad. & E. 17; 4 L.J. K.B. 10; *Doe* v. *Baytup*, 3 Ad. & E. 190; 4 L.J. K.B. 263.

(*a*) *Tudman* v. *Henman*, (1893) 2 Q.B. 168.

(*b*) *Doe* v. *Mitchell*, 3 Moore, 229; *Hitchings* v. *Thompson*, 5 Exch. 50; 19 L.J. Ex. 146.

(*c*) 8 Edw. 7, c. 28. The Act applies to a "holding," which is defined as meaning any parcel of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord: s. 48. See also s. 46 as to general saving of rights, and s. 47 as to improvements executed under repealed enactments.

(*d*) These enactments are 46 & 47 Vict. c. 61; 53 & 54 Vict. c. 57; 58 & 59 Vict. c. 27; 63 & 64 Vict. c. 50; 6 Edw. 7, c. 56; 7 Edw. 7, c. 54. See

on Jan. 1, 1909 (*e*). The Act makes provision for the payment to a tenant, on quitting his holding, of compensation for such improvements as are specified in Sched. I. of the Act (*f*); also for damage by game and for disturbance (*g*); and in cases where a person occupies a holding under a contract of tenancy (*h*) with a mortgagor which is not binding on the mortgagee (*i*). The Act applies to crown lands (*k*), to lands of the Duchy of Lancaster (*l*) or of Cornwall (*m*); and also to ecclesiastical (*n*) and charity (*o*) land. Special provisions are also made with regard to agreements in writing that a holding shall be let or treated as a market garden (*p*). The compensation for any improvement comprised in Sched. I. to the Act to which a tenant of a holding is entitled, at the determination of a tenancy (*q*), on quitting his holding is such sum as fairly represents the value of the improvement to an incoming tenant (*r*); but nothing in sect. 1 is to prejudice the right of a tenant to any compensation to which he may be entitled under custom, agreement, or otherwise, in lieu of any compensation provided by the section (*s*). Compensation under specific agreements is substituted in certain cases for the compensation given by the Act (*t*). An incoming tenant, who with the consent in writing of his landlord has paid compensation for improvements to an outgoing tenant, is entitled on quitting the holding to claim compensation under the Act in like manner as the outgoing tenant would have been entitled if he had remained tenant of the holding and quitted it at the time at which the incoming tenant quits it (*u*). A tenant who has remained in his holding during two or more tenancies is not, on quitting his holding, deprived of his right to claim compensation by reason only that the improvements were not made during the tenancy on the determination of which he quits the holding (*x*). Restrictions are imposed on claims for compensation in respect of improvements made by a tenant who is about to quit a

8 Edw. 7, c. 28, s. 41, and Sched. IV., as to extent to which they have been repealed.

(*e*) 8 Edw. 7, c. 28, s. 50.

(*f*) *Ib.*, ss. 1—9.

(*g*) *Ib.*, ss. 10, 11.

(*h*) "Contract of tenancy" means a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year: see s. 48 (1).

(*i*) 8 Edw. 7, c. 28, s. 12.

(*k*) *Ib.*, s. 37.

(*l*) *Ib.*, s. 38.

(*m*) *Ib.*, s. 39.

(*n*) *Ib.*, s. 40.

(*o*) *Ib.*, s. 41.

(*p*) *Ib.*, s. 42, and Sched. III.

(*q*) "Determination of tenancy" means the cesser of a contract of tenancy by effluxion of time or from any other cause: see s. 48 (1). The determination of the tenancy takes place when the holding ends under the custom of the country: *Paul, In re*, 24 Q.B.D. 247; 59 L.J. Q.B. 30.

(*r*) 8 Edw. 7, c. 28, s. 1 (1), and Sched. I. As to mode of ascertaining the amount to be paid to the tenant, see s. 1 (2).

(*s*) 8 Edw. 7, c. 28, s. 1 (3).

(*t*) *Ib.*, ss. 2, 3, 4, 6 (4).

(*u*) *Ib.*, s. 7.

(*x*) *Ib.*, s. 8.

holding (*y*). The compensation for any improvement due, under the Act of 1908 or under custom or agreement, to a tenant which has been ascertained before the landlord distrains for rent, may be set off against the rent, and the landlord may not distrain for more than the balance (*z*). The compensation to be given to tenants for improvements is subject to certain deductions (*a*). The consent of the landlord is necessary in the case of some improvements (*b*), and in the case of drainage improvements notice must have been given to him (*c*) in order to entitle the tenant to compensation, but the notice may be dispensed with by agreement or by the contract of tenancy (*d*). Any contract (whether under seal or not) made by a tenant by which he is deprived of his right to claim compensation for any improvement is void so far as it deprives him of that right (*e*). The landlord paying compensation may obtain from the Board of Agriculture an order charging the holding or any part thereof (*f*). The term "landlord" was held under the repealed Act of 1883 (*g*) to include the executor of the landlord (*h*). The landlord of a holding or any person authorised by him has a right of entry at all reasonable times for the purpose of viewing the state of the holding (*i*); and notwithstanding any provision in a contract of tenancy, making the tenant liable to pay a higher rent or damages in the event of any breach or non-fulfilment of a term or condition in the contract, a landlord cannot recover, by distress or otherwise, any sum in consequence thereof in excess of the damage actually suffered by him from such breach or non-fulfilment; but this does not apply to any term or condition in a contract against breaking up permanent pasture, grubbing underwoods, or felling, cutting, lopping or injuring trees, or regulating burning of heather (*k*).

All claims to compensation, whether under the Act or under custom or agreement or otherwise, are, in case of difference, to be settled by arbitration (*l*), due notice having been given to the landlord of the claim (*m*); and the arbitration is, after a specified notice has been given either by the landlord or by

(*y*) 8 Edw. 7, c. 28, s. 9.
(*z*) *Ib.*, s. 31.
(*a*) *Ib.*, s. 1 (2).
(*b*) *Ib.*, s. 2, and Sched. I., Pt. I.
(*c*) *Ib.*, s. 3, and Sched. I., Pt. II.
(*d*) *Ib.*, s. 3 (4).
(*e*) *Ib.*, s. 5.
(*f*) *Ib.*, s. 15. See, as to the incidence of a charge, s. 16; as to advances made by a company, s. 17; as to the certificate as to charges, s. 18; and as to registration of charges, s. 19.
(*g*) 46 & 47 Vict. c. 61.
(*h*) *Gough* v. *Gough*, (1891) 2 Q.B. 665; 60 L.J. Q.B. 726.
(*i*) 8 Edw. 7, c. 28, s. 24.
(*k*) *Ib.*, s. 25.
(*l*) *Ib.*, s. 6 (1).
(*m*) *Ib.*, s. 6 (2). As to the meaning of "determination of the tenancy" in the proviso, see *Morley* v. *Carter*, (1898) 1 Q.B. 8; 66 L.J. Q.B. 843.

the tenant, extended to certain claims in addition to a claim by the tenant for compensation for improvements (*n*). The Arbitration Act, 1889 (*o*), does not apply to any arbitration under the Act of 1908 (*p*). The arbitration, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different mode of arbitration, is to be determined by a single arbitrator in accordance with the provisions set out in the Act (*q*). The award is final and binding on the parties and persons claiming under them (*r*); but it may be set aside by the county court (*s*) when an arbitrator has misconducted himself, or when an arbitration or award has been improperly procured (*t*). The costs of and incidental to the arbitration and award are in the discretion of the arbitrator (*u*). The arbitrator may at any stage of the proceedings, and shall, if so directed by the county court judge, state a special case for the opinion of the county court on any question of law arising during the arbitration (*x*), and the opinion of that court is to be final, unless either party, in accordance with the rules of the Supreme Court, appeals to the Court of Appeal, from whose decision no appeal lies (*y*).

All tenants who held by an uncertain tenure, and whose interest might at any time be determined by the will of the lord, were by the common law entitled to emblements and the crops and annual produce of the soil which had been sown or planted by them, and which had not come to maturity at the period of the determination of their interest (*z*). In farming leases, the custom of the country (*a*) with respect to the mode of cultivation (*b*) and the right to the away-going crop, is impliedly annexed to the terms of the lease, unless it is excluded by express provisions and stipulations (*c*). The general rule in the case of farm leases is that the tenant is bound to leave the land, when he quits, in the same state as he found it on taking possession (*cc*). If he has taken the farm under a custom by which the outgoing tenant is bound to leave a certain quantity of growing wheat or other produce, or a certain quantity of hay

(*n*) 8 Edw. 7, c. 28, s. 6 (3).
(*o*) 52 & 53 Vict. c. 49.
(*p*) 8 Edw. 7, c. 28, s. 13 (4).
(*q*) *Ib.*, s. 13 (1), and Sched. II.
(*r*) *Ib.*, Sched. II. (11).
(*s*) An order of the county court cannot be quashed for want of form or removed by certiorari or otherwise into any superior court: see s. 43.
(*t*) 8 Edw. 7, c. 28, Sched. II. (13).
(*u*) *Ib.*, Sched. II. (14), (15).
(*x*) *Ib.*, Sched. II. (9).
(*y*) *Ib.*, s. 13 (3).
(*z*) Litt. ss. 68, 69.
(*a*) See *Dixon's Law of the Farm.* (ed. 6), pp. 710—747, for a statement of agricultural customs prevailing in different parts of England and Wales.
(*b*) See *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234, as to cultivation regulated by the custom of the country.
(*c*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L.C. 545 (ed. 11).
(*cc*) See *Rush* v. *Lucas*, (1910) 1 Ch. 437; 79 L.J. Ch. 172.

and straw, or manure, on the demised premises, he must in his turn, when he quits the land, leave it in the same state and condition, and with the same privileges and advantages for the benefit of his successor, that he himself enjoyed when he entered upon it.

By the custom of the country in some districts, the outgoing tenant takes two-thirds of particular crops, leaving one-third to the incoming tenant (*d*). In some districts, all the hay and straw must be left to be consumed on the farm; whilst in others, the tenant is entitled to take it away with him. Sometimes the landlord or the incoming tenant has a right, and in some instances he is bound by custom, to take the away-going crops, and also the straw and hay, and sometimes the manure, from the outgoing tenant at a valuation; and, when such a custom exists, the tenant has a right, after the expiration of his lease, and after he has quitted the premises, to enter upon the land as occasion may require to tend the crop. If the landlord or the incoming tenant does not take the crop at a valuation, the tenant has, by general custom and usage, all such rights and privileges as are necessary to enable him to gather it in, and secure it, and sell it when arrived at maturity, such as free ingress and egress into and from the demised premises, the temporary use of the barns to thrash it out, and yard-room for the straw; and he has a right, moreover, to the possession of the field for a reasonable time for the carrying away as well as the cutting of his corn (*e*). If no custom exists giving the tenant a right to the away-going crop, the landlord is entitled thereto. The tenant, therefore, must in all cases make out and establish the custom (*f*). If no such custom existed, the natural consequence would be that the tenant would not till or sow the ground at the close of his term of hiring; and a custom therefore prevails, in many localities (*g*) where the outgoing tenant is not entitled to the away-going crop, for the incoming tenant or the landlord to enter to manure and till the land, and plant the spring corn, and prepare for the harvest, prior to the termination of the lease and the commencement of his own term and interest. The custom varies according to the locality, and whether the hiring commences at Lady Day or Michaelmas Day.

(*d*) *Holding* v. *Pigott*, 5 Moo. & P. 427; 9 L.J. (O.S.) C.P. 124; *Griffiths* v. *Tombs*, 7 C. & P. 810.

(*e*) *Boraston* v. *Green*, 16 East, 81; *Beaty* v. *Gibbons*, *ib.* 118; *Strickland* v. *Maxwell*, 2 Cr. & M. 539; 3 L.J. Ex. 161; *Griffiths* v. *Puleston*, 13 M. & W. 358; 14 L.J. Ex. 33.

(*f*) *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*g*) See *Dixon's Law of the Farm* (ed. 6), pp. 710 *et seq.*, where the customs prevailing in different counties on this point are set out.

Whatever custom regulates the tenant's rights (*h*) on entering, the same custom regulates his rights on leaving; and the custom may be given in evidence, although there is a lease under seal, or a written contract of demise between the parties (*i*). All customary allowances, also, as between the outgoing tenant and the landlord or incoming tenant, are impliedly annexed to the express terms of the lease, such as allowances for expenses incurred in draining lands that required draining according to good husbandry, though the drainage was done without the landlord's knowledge or consent (*k*); also for manuring, tilling, fallowing, half-fallowing, and sowing the land, for seeds, and labour, foldage, and manure (*l*). The tenant's rights to growing crops and produce are in all cases strictly confined to annual crops, or the first year's produce of seeds and roots sown or planted by him during the last year of his tenancy, and do not extend to trees, shrubs, and plants of a perennial character (excepting the fruit-trees, plants, and shrubs of seedsmen and nursery gardeners, an exception introduced for the benefit of trade) (*m*). Thus a border of box, planted by a tenant in a garden demised to him, cannot be taken up and removed at the expiration of his term (*n*), nor a strawberry-bed (*o*), nor hedges, nor fruit-trees (*p*).

The person primarily liable to the outgoing tenant is the landlord (*q*), who, on the other hand, is entitled to be allowed the amount of rent due to him. But it constantly happens that the incoming tenant, who in the end, by his bargain with the landlord, is to take and pay for the tillages, in order to avoid circuity and the trouble and expense of two valuations, agrees with the outgoing tenant that the valuation shall be made directly from the latter to him. That, however, does not rest upon the custom, but is a mere conventional arrangement with-

(*h*) As to the saving of tenant's rights by Agricultural Holdings Act, 1908, see 8 Edw. 7, c. 28, s. 1 (3).

(*i*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L.C. 545 (ed. 11); *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234; *Wilkins* v. *Wood*, 17 L.J. Q.B. 319.

(*k*) *Mousley* v. *Ludlam*, 21 L.J. Q.B. 64. As to the right of a tenant to compensation for drainage improvements executed with the consent of the landlord, see the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 3.

(*l*) *Dalby* v. *Hirst*, 3 Moore, 536; 1 B. & B. 224; *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234; *Wilkins* v. *Wood*, 12 Jur. 583; 17 L.J. Q.B. 319; *Faviell* v. *Gaskoin*, 7 Exch. 273; 21 L.J. Ex. 85; *Martin* v. *Coulman*, 4 L.J. K.B. 37. See also *Dixon's Law of the Farm*, pp. 710 *et seq.*

(*m*) *Wardell* v. *Usher*, 3 Sc. N.R. 508; 10 L.J. C.P. 316.

(*n*) *Empson* v. *Soden*, 4 B. & Ad. 655.

(*o*) *Watherell* v. *Howells*, 1 Campb. 227.

(*p*) *Wyndham* v. *Way*, 4 Taunt. 316.

(*q*) *Bradburn* v. *Foley*, 3 C.P.D. 129; 47 L.J. C.P. 331; *Faviell* v. *Gaskoin*, *supra*; *Mansel* v. *Norton*, 22 Ch.D. 769; 72 L.J. Ch. 357; *Bennett* v. *Stone*, (1902) 1 Ch. 226; 71 L.J. Ch. 60; and see *Codd* v. *Brown*, 15 L.T. 536, as to when an incoming tenant may be sued.

out which there would be no privity between the outgoing and the incoming tenant. There is, generally speaking, no formal agreement, but each appoints a valuer, and the valuers settle the amount to be paid; and in that case there is an implied contract that if rent is due from the outgoing tenant to the landlord, and such rent is paid by the incoming tenant, it may be set off against the value of the tillages (*r*).

Where the lease or tenancy determines by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, the tenant, instead of claims to emblements, may continue to hold the farm or lands until the expiration of the then current year of his tenancy (*s*); and the succeeding landlord is entitled to recover and receive of the tenant a fair proportion of the rent for the period which may have elapsed from the lessor's death or cesser of the estate of such lessor to the time of the tenant's quitting; and may distrain for such proportion (*t*).

Sale of hay, straw or manure off land.—If by the terms of the lease the hay, straw or manure are to be consumed by the tenant on the land, and the lessee sells the crop, and the purchaser removes it, the landlord may under sect. 11 of the Sale of Farming Stock Act, 1816 (*u*), maintain an action against the purchaser for the value of the hay, straw or manure, &c. so removed (*x*). It is no answer to an action for carrying away and selling manure, contrary to a covenant against so doing, to show that the tenant has brought back an equivalent in the shape of manure (*y*). It is doubtful, where the value of straw sold off is to be returned in manure, whether the tenant would be bound to return in manure the price or market value of the straw itself or whether he would be only bound to spend upon the land as much manure as the straw would have produced if it had not been sold (*z*). In one case it was proved that according to the custom of the country in the particular

(*r*) *Stafford* v. *Gardner*, L.R. 7 C.P. 242. As to setting off amount of valuation against arrears of rent where the tenant becomes bankrupt, see *Wilson, In re, Hastings* (*Lord*), *Ex parte*, 62 L.J. Q.B. 628.

(*s*) 14 & 15 Vict. c. 25, s. 1; if there are from the nature of the case no claims to emblements, the section will not apply: *Haines* v. *Welch*, L.R. 4 C.P. 91; 38 L.J. C.P. 118.

(*t*) *Haines* v. *Welch*, L.R. 4 C.P. 91; 38 L.J. C.P. 118.

(*u*) 56 Geo. 3, c. 50, s. 11; repealed as to assignee of insolvent debtor, see St. L. R. Act, 1873. This section is with this exception still in force, see *Lybbe* v. *Hart*, 29 Ch.D. 8; 54 L.J. Ch. 860.

(*x*) *Wilmot* v. *Rose*, 3 E. & B. 563; 23 L.J. Q.B. 281; see *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772. As to the covenant, on a demise by a mortgagee as agent, running with the reversion, see *Chapman* v. *Smith*, (1907) 2 Ch. 97; 76 L.J. Ch. 394.

(*y*) *Legh* v. *Lillie*, 6 H. & N. 165, 171; 30 L.J. Ex. 25.

(*z*) See *Lowndes* v. *Fountain*, 11 Exch. 487, 491; 25 L.J. Ex. 49, where the Court was divided upon this point.

district, the incoming tenant, in the absence of a special agreement, would pay the outgoing tenant a consuming price, or two-thirds the market price for the straw; but that, if the outgoing tenant was bound to consume all the manure on the farm, the allowance in respect of straw, as between him and the incoming tenant, would be only half the market price, called a fodder price (*a*). Where there is no special agreement to the contrary, the tenant is often by custom entitled to go out as he came in (*b*). An outgoing tenant, therefore, who on coming in has paid for straw in accordance with the custom, is entitled to be paid for straw on going out; and a stipulation in a lease binding the tenant during the term to "consume with stock on the said farm all the hay, straw, and clover grown thereon, which manure shall be used on the said farm," has, in the absence of any provision as to straw unconsumed on quitting, been held to be in nowise inconsistent with the tenant's customary right to receive payment for the unconsumed straw on his going out (*c*).

Non-payment of tithe rentcharge by tenant.—By sect. 4 of the Landlord and Tenant Act, 1851 (*d*), if any occupying tenant quits leaving unpaid any tithe rentcharge, and the tithe-owner gives notice of proceeding by distress for its recovery, the landlord or succeeding tenant may pay the tithe rent and any expenses incident thereto, and may recover the amount from the outgoing tenant or his legal representatives, in the same manner as if the same were a debt by simple contract due to the landlord or tenant making such payment. By the Tithe Act, 1891 (*e*), tithe rentcharge as defined by the Act (*f*) issuing out of any land is payable by the owner of the lands, notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of the Act, for the payment of the tithe rentcharge by the occupier is void. Where the occupier is liable under any contract made before the passing of the Act to pay the tithe rentcharge, then he ceases to be bound by that part of his contract, but is liable to pay the owner such sum as the latter has properly paid on account of the tithe rentcharge which such occupier is liable under his contract to pay exclusive of any costs incurred or paid by the owner in respect of such rentcharge (*g*); and such sum is recoverable from the occupier

(*a*) *Clarke* v. *Westrope*, 18 C.B. 765, 774; 25 L.J. C.P. 287.
(*b*) *Clarke* v. *Westrope*, *supra*.
(*c*) *Muncey* v. *Dennis*, 1 H. & N. 216, 220; 26 L.J. Ex. 66.
(*d*) 14 & 15 Vict. c. 25, s. 4.
(*e*) 54 & 55 Vict. c. 8, s. 1 (1).
(*f*) *Ib.*, s. 9 (2).
(*g*) *Ib.*, s. 1 (2).

by distress as provided by the Tithe Act, 1836 (*h*), and amending enactments and not otherwise (*i*).

Inclosures of waste land by tenants.—If the tenant during the demise has inclosed land from the adjoining waste, and used it in common with the demised premises, the title of the landlord will, as between him and the tenant, prevail over the whole whether the tenant made the inclosure with or without the assent of the landlord (*k*); unless the encroachment has been made under circumstances which show that the tenant intended to hold it for his own benefit alone, and not as part of his holding under the landlord (*l*). The rule is not confined to cases where the encroachment is upon land to which the landlord is entitled, but applies to cases where the land encroached upon does not belong to the landlord (*m*). The encroachment need not adjoin the holding; it is enough if it is so near that by nature of its nearness the tenant gained the opportunity of making it (*n*). In either case, the Statute of Limitations will not begin to run against the landlord until the termination of the tenancy (*o*). But one who occupies, as his own, land belonging to another, and before he has acquired a title by the Statutes of Limitation, becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a title to the land first occupied by him (*p*). The doctrine that encroachments made by tenants enure for the benefit of their landlords involves, however, a presumption of fact which is capable of being rebutted (*q*).

Leases obtained by misrepresentation.—An estate or interest in land, once vested, cannot afterwards be divested on the ground that the deed creating the estate has been obtained by a fraudulent misrepresentation respecting some matter collateral to the contract. Where, therefore, a lessor had been induced to execute a lease by reason of a fraudulent representation on the part of the lessee as to the use to which he intended to apply the premises, it was held in an action of ejectment by the lessee that the lease was not thereby avoided and the term

(*h*) 6 & 7 Will. 4, c. 71, ss. 81, 85.

(*i*) 54 & 55 Vict. c. 8, s. 1 (3).

(*k*) *Andrews* v. *Hailes*, 22 L.J. Q.B. 409; 2 E. & B. 349; *Kingsmill* v. *Millard*, 11 Exch. 313.

(*l*) *Whitmore* v. *Humphries*, L.R. 7 C.P. 1; 41 L.J. C.P. 43; *Tabor* v. *Godfrey*, 64 L.J. Q.B. 245.

(*m*) *Whitmore* v. *Humphries*, *supra*; *Att.-Gen.* v. *Tomline*, 5 Ch.D. 750; 46 L.J. Ch. 654.

(*n*) *Lisburne* (*Earl*) v. *Davies*, L.R. 1 C.P. 259; 35 L.J. C.P. 193; *East Stonehouse Urban Council* v. *Willoughby*, (1902) 2 K.B. 318; 71 L.J. K.B. 873.

(*o*) *Whitmore* v. *Humphries*, *supra*; *Att.-Gen.* v. *Tomline*, *supra*.

(*p*) *Dixon* v. *Baty*, L.R. 1 Ex. 259.

(*q*) *Per* Thesiger, L.J., *Att.-Gen.* v. *Tomline*, 15 Ch.D. at p. 161.

gone, but that the lessor's proper remedy, if any, was in a court of equity (*r*); but, where the lease is granted for the express purpose of carrying into effect an illegal act, the courts will not lend their aid for the enforcement of any of the provisions of the illegal contract (*s*).

The cancellation of a lease after entry by mutual consent of the parties discharges the covenants and promises therein contained, but does not divest the estate created by the lease, or destroy the lessor's right of action for the rent founded on the privity of estate. Arrears of rent, therefore, which accrue due prior to the cancellation of a lease may be recovered by the landlord in an action founded on the privity of estate (*t*).

Assignment.—The doctrine of covenants running with the land is confined to covenants annexed to the land by the indenture of demise; and the assignment of a parol tenancy does not pass to the assignee a right of action upon a special stipulation between the original landlord and the lessee (*u*). If, however, the landlord has consented to the substitution of the assignee in the place of the original tenant, that will create a new contract between the landlord and the assignee upon which either may sue (*x*). The equitable assignee of a legal term is not liable to the lessor for rent, or for damages in respect of breaches of covenants, even though he may have been in possession (*y*).

Breach of contract to grant lease.—The rule which governs sales of real property, that, if the vendor fails to make a good title, the purchaser is only entitled to recover the amount of his deposit and the expenses to which he has been put (*z*), does not apply to the case of a lease granted by a lessor in excess of his leasing powers, and containing a covenant for quiet enjoyment; and, if the lease is repudiated by a person having a good title so to do, the lessee is entitled to recover the full value of the lease; and it makes no difference that the lease was a reversionary lease, and that it was repudiated before the lessee had entered into possession under it. In such a case it was held that the lessee was entitled to recover the value of the

(*r*) *Feret* v. *Hill*, 15 C.B. 207, 226; 23 L.J. C.P. 185, 190.

(*s*) *Gas Light Co.* v. *Turner*, 6 Bing. N.C. 324; 9 L.J. Ex. 336; *Ritchie* v. *Smith*, 6 C.B. 462; 18 L.J. C.P. 9. See also *ante*, p. 85.

(*t*) *Ward* (*Lord*) v. *Lumley*, 5 H. & N. 87, 656; 29 L.J. Ex. 322; *Bolton* v. *Carlisle* (*Bishop*), 2 H.Bl. 263; *Doe* v. *Bingham*, 4 B. & Ald. 672, 677.

(*u*) *Elliott* v. *Johnson*, L.R. 2 Q.B. 120; 36 L.J. Q.B. 44.

(*x*) *Buckworth* v. *Simpson*, 1 Cr. M. & R. 834; 4 L.J. Ex. 104.

(*y*) *Cox* v. *Bishop*, 8 De G. M. & G. 815; 26 L.J. Ch. 389. See *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *Ramage* v. *Womack*, (1900) 1 Q.B. 116; 69 L.J. Q.B. 40; *Bagot Tyre Co.* v. *Clipper Tyre Co.*, (1902) 1 Ch. at p. 156; 71 L.J. Ch. at p. 161. As to effect of subsequent bankruptcy, see *Stein* v. *Pope*, (1902) 1 K.B. 595; 71 L.J. K.B. 322.

(*z*) See *Flureau* v. *Thornhill*, 2 W.Bl. 1078; *Bain* v. *Fothergill*, L.R. 7 H.L. 158; 43 L.J. Ex. 243; and *ante*, p. 513.

lease and the expense of the lease so repudiated, but not the expense of a lease of the demised premises which he took from the person really entitled to grant one after the repudiation of the first lease, nor to a 10*l.* per cent. compensation given by the jury, on a supposed analogy to the case of a compulsory sale to a railway company under an Act of Parliament (*a*). If a man contracts to grant a good and valid lease, without having any colour of title to the premises intended to be demised, the intended lessee is to be placed as far as money can do it in the same position as he would have been in if the contract had been fulfilled, and may recover all the damages he has sustained by reason of the non-performance of the contract, including the loss of the lease (*b*), but not damages and costs arising out of the re-sale of the lease to a third person, these being too remote (*c*).

Actions by landlords for use and occupation of premises.—If lands and houses have been occupied by a tenant under a lease void as to the duration of the term by the Statute of Frauds, the rent reserved in the lease will be the measure of damages resulting from the breach of the implied contract to pay for the actual use and occupation of the property (*d*). But, when no rent has been fixed upon or ascertained by the agreement of the parties, or the contract has been so far departed from that the stipulated rent forms no just criterion of value, the actual value of the occupation will constitute the damage recoverable by the plaintiff (*e*). In case of an eviction from part of the premises, the jury must ascertain, independently of any agreement, what ought to be paid (*f*).

Damages for breach of covenants for quiet enjoyment.—A lessee under a void lease who has been ejected by a rightful owner has a right, in an action against the lessor for breach of an absolute covenant for quiet enjoyment contained in his lease, to recover not only the full value of the unexpired term, but also the costs of defending an action of ejectment, and the amount recovered against him for mesne profits (*g*). If however the rightful owner subsequently grants a new lease the difference between the value of the two leases may be used

(*a*) *Lock* v. *Furze*, L.R. 1 C.P. 441 ; 35 L.J. C.P. 141.

(*b*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L.J. Ex. 202. See, however, *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357 ; 51 L.J. Q.B. 330 ; see *ante*, p. 283.

(*c*) *Spedding* v. *Nevell*, L.R. 4 C.P. 212 ; 38 L.J. C.P. 133.

(*d*) *Ante*, pp. 681 *et seq.* ; *De Medina* v. *Polson*, Holt, 47.

(*e*) *Thetford* (*Mayor*) v. *Tyler*, 8 Q.B. 95 ; 15 L.J. Q.B. 33.

(*f*) *Tomlinson* v. *Day*, 5 Moore, 558 ; 2 B. & B. 680 ; and see observations of Ld. Denman on this case in *Neale* v. *Mackenzie*, 1 M. & W. at p. 764.

(*g*) *Williams* v. *Burrell*, 1 C.B. 402 ; 14 L.J. C.P. 98.

as a test of the amount of the damages (*h*). Where a lessee has been evicted, so that he cannot have another action under the covenant, the damages must be assessed once for all; but where there has been no eviction, only the damages actually sustained are recoverable (*i*).

Damages for breach of covenant not to assign.—The measure of damages for a breach by an assignee of the lessee of a covenant not to assign without licence in such a sum as will, as far as money can, put the lessor in the same position as if he had still the original assignee's liability, instead of the liability of a subsequent assignee of inferior pecuniary ability, for breaches both past and future (*k*). Where a lessee sub-let the demised premises, without obtaining the lessor's consent, to a person who (to the lessee's knowledge) intended to, and in fact did, use them, for the purpose of carrying on a dangerous business, and the premises were damaged by a fire caused by such use, it was held in an action by the lessor claiming damages for breach of a covenant not to sub-let without his consent that he could recover the full damage caused by the fire, as it was the natural and probable result of the breach of covenant (*l*).

Damages for breach of covenant to repair (*m*).—In estimating the damages recoverable for breach of a covenant to keep in repair, all the circumstances must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the diminution of the value of the reversion by the breach (*n*); and the statement by Lord Holt, that the proper measure of damages is the amount that it will take to put the premises into repair (*o*), if it meant to lay down a hard-and-fast rule as to the damages recoverable by the lessor during the currency of a lease for breach of a covenant to keep in repair, has been criticised in several cases (*p*). In estimating the damages to be recovered, the age and general state and condition of the property at the time of the demise must, as we have already seen, be taken into consideration (*q*). If build-

(*h*) *Lock* v. *Furze*, L.R. 1 C.P. 441; 35 L.J. C.P. 141.

(*i*) *Per* Jessel, M.R., *Child* v. *Stenning*, 11 Ch.D. 82, 85; 48 L.J. Ch. 392.

(*k*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*l*) *Lepla* v. *Rogers*, (1893) 1 Q.B. 31.

(*m*) As to covenants to repair, see *ante*, pp. 685 *et seq.*

(*n*) *Conquest* v. *Ebbetts*, (1896) A.C. 490; 65 L.J. Ch. 808; *Smith* v. *Peat*, 9 Exch. 161; 23 L.J. Ex. 84; *Turner* v. *Lamb*, 14 M. & W. 412. As to damages for breach of covenant to leave premises in repair, see *Davies* v. *Underwood*, 2 H. & N. 571; 27 L.J. Ex. 113; *Joyner* v. *Weeks*, (1891) 2 Q.B. 31; 60 L.J. Q.B. 510; *Henderson* v. *Thorn*, (1893) 2 Q.B. 164; 62 L.J. Q.B. 586.

(*o*) *Vivian* v. *Champion*, 2 Ld. Raym. 1125; 1 Salk. 141.

(*p*) See *per* Ld. Herschell in *Conquest* v. *Ebbetts*, *supra*; and *per* Parke, B., in *Turner* v. *Lamb*, *supra*.

(*q*) *Ante*, pp. 685—689; *Burdett* v.

ings fall to the ground by reason of the neglect of the covenantor to repair them, or if they are blown down by the wind, or burned by an accidental fire, the proper measure of damages is the amount that it will take to rebuild, deducting the difference in value between old materials and new, as the landlord is not entitled to be put in a better position than he was in before the fire took place, and cannot have the value of a new house when the one he has lost was an old house (*r*). If there be both a covenant to repair and a covenant to insure against loss from fire for a specific sum, the liability of the covenantor in respect of the cost of rebuilding in case the premises are burned down is not limited to the amount of the sum covenanted to be insured (*s*). If the party suing upon the covenant is only tenant for life, with remainder in tail and a reversion in fee, he can only recover such damages as are commensurate with the injury done to his life estate (*t*). Where a defendant held premises under a lease with a covenant to keep and yield them up in repair, and at the expiration of the lease the premises were dilapidated to an amount fixed by the jury at 22*l*., and the plaintiff had, before this time, made a verbal agreement with a third person to grant him a lease for a long term, and at once proceeded to pull down the premises, it was held that the plaintiff was, notwithstanding, entitled to recover substantial damages (*u*).

If a lessor has covenanted to repair a dwelling-house demised by him, and the building is destroyed by fire or becomes ruinous and uninhabitable, the lessee may rebuild, if the lessor neglects so to do within a reasonable period after request; and the measure of damages to be recovered by the lessee in such a case will be the costs and expenses of the rebuilding. Covenants to pay rent and covenants to repair, contained in a lease, are independent covenants, and the lessee is not exonerated from his liability to pay rent under his covenant so to do by reason of the non-performance of the lessor's covenant to repair (*ante*, p. 674). A lessor who covenants to repair and to keep in repair is not bound to find the lessee another residence whilst part of the demised premises is being rebuilt any more than he would have been bound to do so if the premises had been consumed by fire. Thus, where the lessor had positively refused

Withers, 7 Ad. & E. 136; 6 L.J. K.B. 219; *Payne* v. *Hayne*, 16 M. & W. 541; 16 L.J. Ex. 130. See also *Mayne on Damages*, p. 289 (ed. 7).

(*r*) *Yates* v. *Dunster*, 11 Exch. 15; 24 L.J. Ex, 226.

(*s*) *Digby* v. *Atkinson*, 4 Campb. 275.

(*t*) *Evelyn* v. *Raddich*, Holt, 543. As to damages recoverable by a reversioner, see *Bedingfield* v. *Onslow*, 3 Lev. 209.

(*u*) *Rawlings* v. *Morgan*, 18 C.B. N.S. 776; 34 L.J. C.P. 185.

to repair, it was held that the lessee could not recover either the rent and taxes of a house taken and occupied during the execution of the repairs, or the sums expended on the house for alterations and work done there, or a sum paid for restoring the house when he quitted it (*x*). If an action is brought against an assignee of a lease for damages for a breach of covenant to repair, in respect of dilapidations that accrued during the time he was assignee, the measure of damage is the loss which the landlord would sustain by the non-repair if he went into the market to sell the reversion (*y*). If an under-lessee refuses to repair according to his agreement, and his immediate lessor (the mesne landlord), who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enters and repairs them, the measure of damages is the sum necessarily expended in putting them into repair, and not the costs of an action brought by the original lessor against the mesne landlord for non-repair, unless the under-lease contains a covenant to indemnify (*z*), or to perform the covenants of the head lease (*a*). Where an under-lease is granted containing similar covenants to those in the lease as to repair, with notice to the under-lessee of the original lease, and the lessee sues the under-lessee for breach of such covenants, the liability of the lessee on the covenants in the original lease must be taken into account in assessing the damages (*b*).

Breach of covenants to consume hay and straw on farm.—If a tenant who has covenanted not to carry away hay or straw from the demised premises (*c*) nevertheless sells it off the land, the proper measure of damages is not the value of the hay or straw, which is the property of the tenant, but the value of it to the land in the shape of manure, if it had been eaten and consumed by cattle and deposited on the soil. Where the landlord had agreed to purchase the outgoing tenant's straw at a valuation, and the tenant by the terms of the lease was to return the manure value of straw sold off, it was held that the landlord must pay a fodder price, which is one-half of the market

(*x*) *Green* v. *Eales*, 2 Q.B. 225 ; 11 L.J. Q.B. 63.

(*y*) *Per* Martin, B., *Smith* v. *Peat*, 9 Exch. 161 ; 23 L.J. Ex. 84 ; *Doe* v. *Rowlands*, 9 C. & P. 734, 739 ; *Mills* v. *East London Union*, L.R. 8 C.P. 79 ; 42 L.J. C.P. 46.

(*z*) *Logan* v. *Hall*, 4 C.B. 598 ; 16 L.J. C.P. 252 ; *Smith* v. *Howell*, 6 Exch. 737 ; 20 L.J. Ex. 377 ; *Walker* v. *Hatton*, 10 M. & W. 249 ; 11 L.J. Ex. 361 ; *Colley* v. *Streeton*, 2 B. & C. 273 ; 2 L.J. (O.S.) K.B. 25 ; *Clow* v. *Brogden*, 2 Sc. N.R. 303 ; 2 M. & Gr. 39.

(*a*) *Hornby* v. *Cardwell*, 8 Q.B.D. 329; 51 L.J. Q.B. 89.

(*b*) *Conquest* v. *Ebbetts*, (1896) A.C. 490 ; 65 L.J. Ch. 808 ; *Clare* v. *Dobson*, (1911) 1 K.B. 35 ; 80 L.J. K.B. 158.

(*c*) As to a tenant's right to dispose of produce notwithstanding any custom of the country or contract of tenancy, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 26.

price (*d*); and, where the tenant was not to sell straw off the land without returning the value of it in manure, it was held that the tenant was not bound to return the marketable value, but the manure value of the straw to the premises (*e*). Where a tenant agreed to stack on the premises all hay and corn arising from the farm and to consume all hay, straw, chaff, &c., arising therefrom, and the stacks were destroyed by an accidental fire, it was held that he had not committed any breach of the agreement, which only applied to things in existence which could be consumed on the farm (*f*).

Damages for holding over.—If the tenant holds over, the landlord may, in some cases (see *ante*, p. 734), recover double the yearly value, or he may recover the reasonable damages and costs he has incurred by not being able to give possession to the succeeding tenant (*g*), and also the costs incurred in ejecting the person in possession (*h*).

Mortgagor becoming tenant to mortgagee.—If the mortgage deed contains a clause whereby the mortgagor attorns (*i*) and becomes tenant to the mortgagee at a specified annual rent payable half-yearly so long as the mortgage money remains secured upon the mortgaged premises, and the mortgagor continues in the occupation of the mortgaged premises and pays rent, the subsequent occupation taken in connexion with the clause of attornment constitutes the relation of landlord and tenant between the parties, and the mortgagee may distrain for the rent, although he never himself executed the mortgage deed (*k*). And this is so though there may have been a prior mortgage and attornment to another mortgagee (*l*). Such attornment clause must be *bonâ fide*, and not merely for the purpose of enabling the mortgagee to oust the creditors (*m*). The proceeds of a distress for rent under an attornment clause

(*d*) *Clarke* v. *Westropp*, 11 C.B. 765, 774; 25 L.J. C.P. 287; *ante*, p. 747.

(*e*) *Lowndes* v. *Fountain*, 11 Exch. 487, 491; 25 L.J. Ex. 49. The Court, however, were equally divided on this point, *ante*, p. 746.

(*f*) *Hull* v. *Mews* (*Lady*), *In re*, (1905) 1 K.B. 588; 74 L.J. K.B. 252.

(*g*) *Bramley* v. *Chesterton*, 2 C.B. N.S. 592; 27 L.J. C.P. 23; and see *Watson* v. *Lane*, 11 Exch. 769; 25 L.J. Ex. 101, *per* Martin, B.

(*h*) *Henderson* v. *Squire*, L.R. 4 Q.B. 170; 38 L.J. Q.B. 73.

(*i*) As to an attornment clause being "deemed to be" a bill of sale, and void so far as it gives power to distrain unless registered, see *Green* v. *Marsh*, (1892) 2 Q.B. 330; 61 L.J. Q.B. 442; 44 & 45 Vict. c. 31, s. 6; 45 & 46 Vict. c. 43, s. 8.

(*k*) *West* v. *Fritche*, 3 Exch. 216; 18 L.J. Ex. 50; *Morton* v. *Woods*, L.R. 4 Q.B. 302; 38 L.J. Q.B. 81; *Threlfall*, *In re*, *infra*; *Voisey*, *Ex parte*, 21 Ch.D. 442; 52 L.J. Ch. 121; *Scobie* v. *Collins*, (1895) 1 Q.B. 375; 64 L.J. Q.B. 10.

(*l*) See *Punnett*, *Ex parte*, 16 Ch.D. 226; 50 L.J. Ch. 212.

(*m*) *Jackson*, *Ex parte*, 14 Ch.D. 725; *Stockton Iron Co.*, *In re*, 10 Ch.D. 335; 48 L.J. Ch. 417; *Threlfall*, *In re*, 16 Ch.D. 274; 50 L.J. Ch. 318; and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42, which gives a landlord certain rights where the tenant becomes bankrupt.

are applicable to the payment of principal as well as interest(*n*). When the mortgage deed contains a clause of this description, a right of entry should be reserved in default of payment of the rent, so as to enable the mortgagee, in case the rent remains unpaid, to enter upon the lands or bring an action of ejectment, without giving a notice to quit (*o*). If by the terms of the mortgage deed the mortgagor is to hold possession for any certain or determined period, there will then be a demise to him of the mortgaged estate for the term specified. If he is to hold until the happening of some uncertain event, he will have a conditional estate, and will be tenant to the mortgagee until the event has happened. If the mortgage deed contains a clause of attornment, or creates a tenancy as between the mortgagor and mortgagee, but does not create any definite or certain term of holding, the mortgagor will be tenant at will. The reservation of a yearly rent is not inconsistent with a tenancy at will (*ante*, p. 661). Therefore, a clause in a mortgage deed that the mortgagor shall become tenant to the mortgagee at a yearly rent does not necessarily create a yearly tenancy (*p*). If by the mortgage deed it is covenanted or agreed that the mortgagor shall hold as tenant at will to the mortgagee at an annual rent recoverable by distress, and the mortgagor demises the premises to a third party, the tenancy at will is not determined, and the mortgagee is not deprived of his right to distrain (*q*). But where the mortgage deed provided that, in case of default in payment, the mortgagor should hold the premises as yearly tenant to the mortgagees from the date of the deed at a specified rent which might be recovered by distress, it was held that the mortgagees, in the absence of notice of their intention to treat the mortgagor as tenant, were not entitled to distrain where he had made default (*r*).

When the mortgaged premises are in the possession and occupation of lessees or tenants holding under leases granted by the mortgagor prior to the making of the mortgage, the mortgagee takes the mortgaged premises subject to those leases. The mortgage in such a case operates as a grant of the reversion and with it of the rent; and the mortgagee is entitled, as assignee of the reversion, to the rent reserved on such leases,

(*n*) *Harrison, Ex parte*, 48 Ch.D. 127; 50 L.J. Ch. 832.

(*o*) *Doe* v. *Tom*, 4 Q.B. 615; 12 L.J. Q.B. 264; *Metropolitan Counties Assurance Co.* v. *Brown*, 4 H. & N. 434; 28 L.J. Ex. 340.

(*p*) *Doe* v. *Davies*, 7 Exch. 89; 21 L.J. Ex. 60; *Doe* v. *Goldwin*, 2 Q.B. 143; 10 L.J. Q.B. 275.

(*q*) *Pinhorn* v. *Souster*, 8 Exch. 763; 22 L.J. Ex. 266; *Brown* v. *Metropolitan Counties Assurance Soc.*, 28 L.J. Q.B. 236; *Kearsley* v. *Phillips*, 11 Q.B.D. 621; 52 L.J. Q.B. 581.

(*r*) *Clowes* v. *Hughes*, L.R. 5 Ex. 160; 39 L.J. Ex. 62.

after he has given the lessees notice of the mortgage, and required them to pay their rents to him. Though attornment is no longer necessary to perfect the title of a mortgagee of the reversion to the rent reserved on the demise, yet notice of the mortgage must be given to the tenants to enable the mortgagee to maintain an action against them for use and occupation, or to distrain for arrears of rent (*s*). When there is no clause in the mortgage deed giving to the mortgagor a right to the possession of the mortgaged premises, and creating a tenancy between the mortgagor and mortgagee, the mortgagee has a right to all the rents which have become due subsequently to the making of his mortgage, and which are unpaid at the time the occupying tenant from whom such rent is due receives notice of the mortgage. The tenant is not bound to pay the mortgagee without notice; and if, at the time he receives notice, he has paid the rent to the mortgagor, it is a good excuse for him (*t*); but payment of the rent to the mortgagor before it is due is no answer to a claim by the mortgagee for rent which has accrued due after the giving of the notice (*u*). When lands in the possession of tenants holding under-leases have been mortgaged, the mortgagee, as assignee of the reversion, may sue on any of the covenants which are annexed to the reversion and run with the land; and he is also liable to be sued thereon. Hence it followed that, whenever a man had demised to a tenant at a rent, and then had mortgaged his reversion, the mortgagor could not bring an action of ejectment, nor an action for the rent in his own name, nor sue upon any covenants running with the land, whether the mortgagee had or had not given notice of the mortgage, for the tenant might avail himself of the defence that the lessor had assigned all his estate and interest in the demised premises (*x*). But, by the Judicature Act, 1873 (*y*), "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such

(*s*) 4 & 5 Ann. c. 16, ss. 9, 10; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith's L.C. 514 (ed. 11); *Lumley* v. *Hodgson*, 16 East, 99; see *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.

(*t*) Buller, J., *Birch* v. *Wright*, 1 T.R. 384, 885.

(*u*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89; *ante*, p. 667.

(*x*) *Doe* v. *Edwards*, 5 B. & Ad. 1065; *Mountnoy* v. *Collier*, 1 E. & B. 636; 22 L.J. Q.B. 124.

(*y*) 36 & 37 Vict. c. 66, s. 25 (5). See *Fairclough* v. *Marshall*, 4 Ex.D. 37; 48 L.J. Ex. 146. As to right of mortgagor, where lease granted before mortgage, to sue in his own name to recover damages for breach of covenant, see 44 & 45 Vict. c. 41, s. 10, and *Turner* v. *Walsh*, (1909) 2 K.B. 484; 78 L.J. K.B. 753.

rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." This enactment does not give a mortgagor any rights which he did not possess before, and he cannot as reversioner sue for possession and damages on the ground of breach of a covenant in a lease granted before the mortgage (*z*). And, if the mortgagee does not give notice to the tenant to pay the rent to himself, but permits the mortgagor to go on receiving the rent as before the mortgage was made, and does not think fit to interfere with the tenancy, the mortgagor is deemed in law to have authority from the mortgagee to distrain for the rent if it falls into arrear, the rent being the obvious and natural source for the mortgagor to obtain funds from, to enable him to pay the interest of the mortgage debt. He may distrain in the mortgagee's name as the mortgagee's bailiff; and, if he distrains in his own name, he may justify in the name of the mortgagee (*a*).

Leases by mortgagor and mortgagee after making of mortgage. —If no right of possession is reserved by the mortgage deed to the mortgagor, and no tenancy is created between him and the mortgagee, and the mortgagor remains in possession on sufferance after the making of the mortgage, and demises the mortgaged land to a tenant at a rent, the demise is absolutely void as against the mortgagee, but it is nevertheless valid, by estoppel, as between the mortgagor and his tenant until the mortgagee interferes. As between himself and the tenant, the mortgagor may exercise all the ordinary rights of a landlord, unless the mortgagee interferes to prevent him; for the lessee cannot deny his lessor's title at the time of granting the lease (*b*); and the mortgagor is entitled to receive the rent for his own use and to distrain for it in his own name if it is not paid when due. Mere notice by the mortgagee to the tenant to pay the rent to the mortgagee is not an attornment to the latter, and is, without actual payment, no answer to the mortgagor's claim for rent (*c*). If the mortgagor assigns his interest, such as it is, his assignee has the same title by estoppel against the lessee, and, as assignee of the reversion by estoppel, may sue the tenant for waste in breach of the covenants in the

(*z*) *Molyneux* v. *Richard*, (1906) 1 Ch. 34; 75 L.J. Ch. 39; following *Matthews* v. *Usher*, (1900) 2 Q.B. 535; 69 L.J. Q.B. 856.

(*a*) *Trent* v. *Hunt*, 9 Exch. 14; 22 L.J. Ex. 320; *Snell* v. *Finch*, 32 L.J. C.P. 117; 13 C.B. N.S. 651.

(*b*) *Wheeler* v. *Branscombe*, 5 Q.B. 373; 13 L.J. Q.B. 83; *Wilton* v. *Dunn*, 17 Q.B. 294; 21 L.J. Q.B. 60.

(*c*) *Hickman* v. *Machin*, 4 H. & N. 716; 28 L.J. Ex. 310.

lease (*d*). A tenant who comes in under the mortgagor after the mortgage may be treated by the mortgagee as a trespasser, and may be ejected without any notice to quit (*e*), unless the mortgagee is a party to, or has authorised the making of, the lease; or he may be converted into a tenant to the mortgagee by continuing to occupy the mortgaged premises by the sufferance and permission of the mortgagee, after he has received notice of the mortgage. But where a person occupies a holding—which is within the Agricultural Holdings Act, 1908 (*f*) or the Tenants' Compensation Act, 1890 (*g*)—under a contract of tenancy with a mortgagor, which is not binding on the mortgagor, then if the contract of tenancy is for a tenancy from year to year or for a term of years, not exceeding twenty-one, at a rackrent, the mortgagee must before he can deprive the occupier of possession otherwise than in accordance with the contract of tenancy, give the occupier six months' notice in writing (*h*). The mortgagee cannot, by giving notice to the tenant, entitle himself to distrain for the rent that the tenant has contracted to pay to the mortgagor; nor can he sue for any arrears of such rent (*i*). But, if there is a clause in the mortgage deed creating a tenancy as between himself and the mortgagor at a specified rent, he may, of course, distrain on the mortgaged premises for that rent (*k*). And, if rent is due on a demise from the mortgagee to the mortgagor after the making of the mortgage, and the mortgagee threatens to distrain for such rent, or to evict the tenant, and the latter pays the rent to avoid the threatened distress or eviction, such payment is a good payment as against the mortgagor on the ground that the tenant has been compelled to pay for the mortgagor what the mortgagor ought himself to have paid (*l*).

By sect. 18 of the Conveyancing Act, 1881 (*m*) a mortgagor in possession as against every incumbrancer, and a mortgagee in possession as against all prior incumbrancers, have power to make agricultural or occupation leases (*n*) for any term not

(*d*) *Cuthbertson* v. *Irving*, 29 L.J. Ex. 485; 6 H. & N. 135.

(*e*) *Keech* v. *Hall*, 1 Doug. 21; 1 Smith's L.C. (ed. 11); *Thunder* v. *Belcher*, 3 East, 449.

(*f*) 8 Edw. 7, c. 28.

(*g*) 53 & 54 Vict. c. 57, s. 2; 8 Edw. 7, c. 36, s. 47.

(*h*) 8 Edw. 7, c. 28, s. 12 (2).

(*i*) *Rogers* v. *Humphreys*, 4 Ad. & E. 299; 5 L.J. K.B. 65; *Wilton* v. *Dunn*, 17 Q.B. 294; 21 L.J. Q.B. 60; *Turner* v. *Cameron's Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71.

(*k*) See *Kearsley* v. *Phillips*, 11 Q.B.D. 621; 52 L.J. Q.B. 581; also *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. Q.B. 81; *West* v. *Fritche*, 3 Exch. 216; 18 L.J. Ex. 50.

(*l*) *Johnson* v. *Jones*, 9 Ad. & E. 809; 8 L.J. Q.B. 124; approved in *Underhay* v. *Read*, 20 Q.B.D. 209; 57 L.J. Q.B. 129; *Poole* (*Mayor*) v. *Whitt*, 15 M. & W. 571; 16 L.J. Ex. 229.

(*m*) 44 & 45 Vict. c. 41, s. 18.

(*n*) The provisions of s. 18 apply to any letting or agreement to let whether in writing or not: see 44 & 45 Vict. c. 41, s. 18 (17).

exceeding twenty-one years, and building leases for any term not exceeding ninety-nine years (*o*), if made according to the provisions of the section (*p*). A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding (*q*). A lease which in other respects complies with the requirements of sect. 18 is not rendered invalid because it contains an option of renewal, or because it may be determined at the lessee's option at definite periods during the term (*r*). Where a lease is made by a mortgagor in possession under sect. 18, the mortgagee, on giving notice to the tenant and going into possession, is entitled by virtue of the Act to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such right cannot be affected by any collateral agreement between the mortgagor and the lessee (*s*). A mortgagor who has granted a lease under the powers given by sect. 18 of the Act of 1881 cannot accept a surrender of the lease without the concurrence of the mortgagee (*t*).

Notice of mortgage to lessee.—Where a tenancy is created subsequently to a mortgage, the mortgagee cannot by merely giving notice of the mortgage to the lessee and requiring the rent to be paid to himself make the lessee his tenant (*u*); and if the tenant continues in possession after the receipt of such a notice, he will not be deemed to hold as tenant to the mortgagee in the absence of any other circumstance from which an agreement for a tenancy can be inferred (*x*). A payment of rent to a mortgagee by the mortgagor's lessee under an authority given by the mortgagor to the mortgagee for that purpose makes no change in the tenancy, but leaves the lessee still tenant to

(*o*) Leases are not to be made for a longer term or on any conditions except such as could be granted or imposed by the mortgagor with the concurrence of all the incumbrancers without the Act: s. 18 (15). Special provisions may be made as to leasing, and leases so made are in the same position as leases authorized by the section, see s. 18 (14).

(*p*) The section only applies when no contrary intention is expressed in the mortgage deed or otherwise in writing: s. 18 (13). As to sporting rights, see *Browne* v. *Peto*, (1900) 2 Q.B. 653; 69 L.J. Q.B. 869.

(*q*) 44 & 45 Vict. c. 41, s. 18 (12). The section only applies to mortgages made after the Act, but it may be agreed to apply it to those before the Act, so as not to prejudicially affect any right of a mortgagee not adopting the agreement: s. 18 (16).

(*r*) *King* v. *Bird*, (1909) 1 K.B. 837; 78 L.J. K.B. 499; *Edwards* v. *Millbank*, 4 Drew. 606; 29 L.J. Ch. 45.

(*s*) *Municipal Investment Building Soc.* v. *Smith*, 22 Q.B.D. 70; 58 L.J. Q.B. 81. As to the lease being binding on the mortgagee, see *Wilson* v. *Queen's Club* (1891) 3 Ch. 522; 60 L.J. Ch. 698.

(*t*) *Robbins* v. *Whyte*, (1906) 1 K.B. 125; 75 L.J. K.B. 38.

(*u*) *Evans* v. *Elliott*, 9 Ad. & E. 342; 8 L.J. Q.B. 51; approved of in *Towerson* v. *Jackson*, *infra*. The statement to the contrary effect in *Waddilove* v. *Barnett*, 2 Bing. N.C. 538; 5 L.J. C.P. 145, doubted in *Partington* v. *Woodcock*, 6 Ad. & E. 690, 695; 4 L.J. K.B. 239; *Wilton* v. *Dunn*, 17 Q.B. 294, 301; 21 L.J. Q.B. 60.

(*x*) *Towerson* v. *Jackson*, (1891) 2 Q.B. 484; 61 L.J. Q.B. 36, doubting *Brown* v. *Storey*, *post*, p. 760, on the point as to the effect of notice.

the mortgagor (*y*). A new tenancy, however, may be created at the old rent where such a notice has been given, and the rent paid accordingly to the mortgagee (*z*): and the new tenancy will be a yearly tenancy (*a*). A mortgagee who gives notice of the mortgage to a tenant let into possession by the mortgagor subsequently to the making of the mortgage, cannot maintain an action either for mesne profits (*b*), or for the recovery of any satisfaction (*c*), in respect of the use and occupation of the mortgaged property by such tenant prior to the receipt of the notice; for in the former case the doctrine of relation applies only as between disseisor and disseisee, and an estate which was lawful at its commencement cannot be made tortious by a subsequent act, and in the latter there is no contract between the mortgagee and the tenant before notice of the mortgage.

Contracts for letting and hiring of furnished houses and lodgings.—Contracts for the letting and hiring of ready-furnished houses and apartments are contracts of a mixed nature, partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of movable chattels (*post*, p. 806); and the lessor, therefore, in contracts of this description, is clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels in addition to those which have been previously described as flowing from demises of realty simply.

Implied warranties on part of lessor of furnished apartments.—If a man furnishes a dwelling-house or an apartment in a house, and offers it to be let ready-furnished, he impliedly holds it out as fit for immediate habitation and use, and the contract for the letting and hiring of it is analogous to a contract for the letting and hiring of a ship rigged and manned and prepared for sea, or of a carriage horsed and equipped and made ready for a journey on land: and there is, consequently, an implied warranty on the part of the lessor that such ready-furnished house or lodging is reasonably fit for habitation and occupation by a tenant. If apartments have been taken on condition that they were reasonably fit for habitation and the furniture for use, and the furniture is unfit for use, or is encumbered with a nuisance of so serious a nature as to deprive the

(*y*) *Wheeler* v. *Branscombe*, 5 Q.B. 373; 13 L.J. Q.B. 83.

(*z*) *Per* Pattison, J., *Partington* v. *Woodcock*, *ante*, p. 759; *per* Kay, L.J., *Towerson* v. *Jackson*, *ante*, p. 759.

(*a*) *Doe* v. *Bucknell*, 8 C. & P. 566; *Doe* v. *Ongley*, 10 C.B. 25; 20 L.J. C.P. 26; *Brown* v. *Storey*, 1 M. & Gr. 117; 9 L.J. C.P. 225.

(*b*) *Litchfield* v. *Ready*, 5 Exch. 939; 20 L.J. Ex. 45; Buller, J., *Birch* v. *Wright*, 1 T.R. 378, 382.

(*c*) *Turner* v. *Cameron's Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71.

tenant of all beneficial enjoyment of it, the latter is entitled to throw up both house and furniture, and bring an action against the landlord for a breach of contract. Thus, where the beds of a ready-furnished house, let to a tenant at a rent of eight guineas per week, were so infested and overrun with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house and resisting the landlord's demand for the rent (*d*). In the case of a contract for the hire of a ready-furnished house, observes Lord Abinger, "the letting of the goods and chattels, as well as the house, implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use" (*e*). In a contract for the letting of a furnished house or rooms there is no implied condition that the house shall *continue* fit for habitation during the term (*f*).

Rights and liabilities of lodging-house keepers and lodgers.—It has been held that a contract for board and lodging, where the lodging-house keeper undertakes generally to provide food and shelter for man and beast, and does not agree to let any particular room, is not a contract for an interest in land (*g*). A tenant of lodgings is not always entitled to the exclusive possession of his rooms. He may sometimes have "a mere easement of sleeping in one room and eating and drinking in another;" and the landlord and his servants may have a right to enter at all times (*h*). When a man lets apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessorial things as are necessary to enable him to enjoy the principal subject-matter of the demise in the manner intended (*i*). The lodging-house keeper, moreover, who remains in the general possession of the house, is bound to exercise all ordinary and reasonable (*k*), but it is suggested not more than reasonable (*l*), care for the protection of the persons and property of his tenants and lodgers. He is bound, moreover, to exercise ordinary care and vigilance in the selection and appointment of the servants

(*d*) *Smith* v. *Marrable*, 11 M. & W. 5; 12 L.J. Ex. 223; cited in *Sutton* v. *Temple*, 12 M. & W. 60; 13 L.J. Ex. 17; *Campbell* v. *Wenlock* (*Lord*), 4 F. & F. 716.

(*e*) *Sutton* v. *Temple*, 12 M. & W. at p. 61; see also *Wilson* v. *Finch Hatton*, 2 Ex.D. 336; 46 L.J. Ex. 489.

(*f*) *Sarson* v. *Roberts*, (1895) 2 Q.B. 395; 65 L.J. Q.B. 37.

(*g*) *Ante*, p. 24.

(*h*) Maule, J., *Lane* v. *Dixon*, 3 C.B. 784; 16 L.J. C.P. 129.

(*i*) *Underwood* v. *Burrows*, 7 C. & P. 28.

(*k*) *Scarborough* v. *Cosgrove*, (1905) 2 K.B. 805; 74 L.J. K.B. 892.

(*l*) *Holder* v. *Soulby*, 8 C.B. N.S. 254; 29 L.J. C.P. 246.

and domestics within the house, and to take all such precautions as a prudent householder may be expected to take to guard against robbery and fire; and if, after having taken ordinary care in the selection of his servants, a theft is committed on the property of a lodger, in consequence of the front door having been incautiously left open by one of the servants who has been sent out on an errand by the guest, the lodging-house keeper is not responsible for the loss (*m*). A lodging-house keeper, to whom a lodger has delivered property for safe custody, is bound to use ordinary diligence in the care and custody of the property entrusted to him (*n*). The lodger on the other hand may be sued for use and occupation (*ante*, p. 682); and, if he brings goods and chattels of his own upon the premises, it would seem that they can only be distrained for the rent of the lodgings if there has been something more than a mere licence to use the premises, as, for instance, a demise of premises with furniture therein, the rent in such case being deemed to issue out of the realty alone (*o*). A lodger's goods are protected from distress levied by a superior landlord if they come within the provisions of the Law of Distress Amendment Act, 1908 (*p*), which repeals the Lodgers' Goods Protection Act, 1871 (*q*), wherever and so far as the Act of 1908 applies (*r*). If the possession as well as the use of the furniture is granted to the lessee, the latter is bound to deliver up the furniture at the expiration of the term in good order and condition, deteriorated only by ordinary wear and tear and the reasonable use of it. If he received linen, plate, and household utensils clean and fit for use, and agreed "to leave them as he found them," he is bound to render the things back to the lessor in a clean state (*s*).

Destruction of buildings by fire.—Where a contract is entered into for the use of a furnished saloon for the giving of a concert, and the saloon is destroyed by fire before the time appointed for the concert, the parties to the contract are excused from performance of it (*t*).

Proof of duration of term of hiring.—Lodgings and ready-furnished apartments are rarely the subject of a yearly hiring;

(*m*) *Dansey* v. *Richardson*, 3 E. & B. 144; 23 L.J. Q.B. 217.

(*n*) See *post*, p. 846; *Addison on Torts* (ed. 8), pp. 747, 748; 1 Smith's L.C. (ed. 11), p. 204, notes to *Coggs* v. *Bernard*, Ld. Raym. 909; *Scarborough* v. *Cosgrove*, *ante*, p. 761; *Dansey* v. *Richardson*, *supra*.

(*o*) See *Newman* v. *Anderton*, 2 Bos. & P. N.R. 227; and *Foa on Landlord and Tenant* (ed. 4), pp. 480, 481.

(*p*) 8 Edw. 7, c. 53.

(*q*) 34 & 35 Vict. c. 79.

(*r*) 8 Edw. 7, c. 53, s. 8.

(*s*) *Stanley* v. *Agnew*, 12 M. & W. 827; 13 L.J. Ex. 197.

(*t*) *Taylor* v. *Caldwell*, 32 L.J. Q.B. 164; 3 B. & S. 826; see observations of Baggallay, L.J., on this case in *Marshall* v. *Schofield & Co.*, 52 L.J. Q.B. 58, at p. 60.

and there is no presumption, from a general holding thereof, in favour of a hiring for a year, and from year to year, as in the case of a demise of land (*u*). The duration of the term corresponds, in general, with the time limited for the payment of the rent. If the rent is payable quarterly, the presumption is in favour of a hiring by the quarter; if, on the other hand, it is payable monthly or weekly, there is a hiring by the month or week. Where a tenant agreed to pay for the occupation of furnished apartments, "from March the 4th to September the 4th, the sum of 52*l.* 10*s.*," also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, viz., 26*l.* 5*s.* for the three months, or to take them unfurnished at the *rate* of 84*l.* per annum," it was held that this was a lease for six months and for a further period of three months, and not a lease from year to year (*x*).

Notice to quit.—If the tenancy is for one single quarter, month, or week, no notice to quit is requisite, as the duration of the holding is fixed and determined; but if the hiring be from half-year to half-year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice to quit is, in general, requisite by custom and usage (*y*). If there is no custom, a reasonable notice is requisite (*z*); and, where a lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's, or a week's rent, according to the term of hiring; and the lodging-house keeper may recover such rent, although he has put a bill in the windows advertising the apartments to be let, or has lighted fires in the rooms (*a*), or has temporarily occupied them either by his servants or his workmen but without any intention of taking possession of them (*b*). The length of the notice may be otherwise regulated by the express agreement of the parties, and also by the custom and usage of the district. It must, however, in all cases, expire at the end of the current term of hiring. If a tenant remains in possession of lodgings after the termination of his term of hiring, or after the expiration of a notice to quit, the landlord may, as we have seen (*ante*, p. 736), assert his rights by force.

(*u*) *Wilson* v. *Abbott*, 3 B. & C. 88; 2 L.J. (O.S.) K.B. 215.

(*x*) *Atherstone* v. *Bostock*, 2 Sc. N.R. 643; 10 L.J. C.P. 113.

(*y*) But the custom must be proved: *Huffell* v. *Armitstead*, 7 C. & P. 56.

(*z*) *Jones* v. *Mills*, 10 C.B. N.S. 788; 31 L.J. C.P. 66; *Bowen* v. *Anderson*, (1894) 1 Q.B. 164; explaining *Sandford* v. *Clarke*, 21 Q.B.D. 398; 57 L.J. Q.B. 507.

(*a*) *Redpath* v. *Roberts*, 3 Esp. 225; *Griffiths* v. *Hodges*, 1 C. & P. 419; *ante*, p. 682.

(*b*) *Oastler* v. *Henderson*, 2 Q.B.D. 575; 46 L.J. Q.B. 607.

Letting and hiring places of stowage and deposit.—A contract for the letting and hiring of a vault, or store, or place of deposit in a warehouse, is a contract analogous to the letting and hiring of an apartment in a house for the occupation of a tenant or lodger. But the landlord only contracts that the place is fit for use so far as reasonable care can make it so; and therefore, where a tenant hired the ground-floor of a warehouse, the upper part of which was occupied by the landlord himself, and the water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains, and a hole was made in the box by rats, through which the water entered the warehouse and wetted the tenant's goods, but the landlord had exercised reasonable care in examining and seeing to the security of the gutters and box, it was held that he was not liable for the damage so caused (*c*); but it is otherwise where a landlord had notice of the condition of a gutter and delayed taking any steps to clear it out, owing to which delay the tenant's floor was flooded (*d*).

Room or standing-places in factories.—An agreement for the use of room in a factory for the purpose of working machines will amount to a demise, if it is a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it; but will not amount to a demise if it is a mere letting of an on-stand for a machine (*e*), or is a mere contract to supply power (*f*).

Innkeepers—Who is a common innkeeper.—Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not (*g*). A London "coffee-house," where beds and provisions are furnished by the day, or for the night, or for a longer period, to all persons who may think fit to apply for them, is a common inn; and all persons who are willing and able to pay the customary hire are entitled to be received as guests at an inn, whether they are wayfarers or travellers, or merely residents in the locality (*h*). But, if a man merely opens a house

(*c*) *Carstairs* v. *Taylor*, L.R. 6 Ex. 217; 40 L.J. Ex. 129.

(*d*) *Hargroves, Aronson & Co.* v. *Hartop*, (1905) 1 K.B. 472; 74 L.J. K.B. 233.

(*e*) See *Selby* v. *Greares*, L.R. 3 C.P. 594; 37 L.J. C.P. 251, where it was held there was a demise; and *Hancock* v. *Austin*, 14 [C.B. N.S. 634; 32 L.J. C.P. 252, where the contrary was held; see also 1 Edw. 7, c. 22, s. 149, as to meaning of "tenement factory."

(*f*) *Bentley Bros.* v. *Metcalfe & Co.*, (1906) 2 K.B. 548; 75 L.J. K.B. 891.

(*g*) Bac.Abr. Inns (B.); *Parker* v. *Flint*, 12 Mod. 255.

(*h*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper (*i*). And, if he professes to let only private lodgings, and does not offer his house to the public as a house for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Innkeepers—Duty to receive guest.—Every man who opens an inn and professes to exercise the business of a common innkeeper, is bound to afford such accommodation as he possesses to all travellers (*k*) who are ready to pay the customary hire, and are not drunk or disorderly, or labouring under contagious or infectious diseases. And, if he neglects so to do, he is liable in an action for damages (*l*) and also to an indictment at common law (*m*); but if all his bedrooms be full he is not bound to receive a traveller who asks to be allowed to pass the night in the empty coffee room (*n*). The innkeeper is bound, if he has room in his stables, to receive the horses of travellers intending to become guests; but he is not bound to receive horses from parties who merely intend to make use of his stables as livery stables, resorting elsewhere for lodging and entertainment; nor is he bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest (*o*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night; all that he is required to do is to find reasonable accommodation for his guests; and, if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation elsewhere (*p*). A traveller who goes to a common inn is not necessarily entitled to accommodation therein as long as he chooses to remain on payment of the inn charges and conducting himself properly, and if he forms an intention of staying in the inn and has no intention of going on to any other place, he ceases to be a traveller, and the innkeeper is entitled to terminate the relation of host and guest by reasonable notice (*q*). The question whether a traveller staying in a

(*i*) *Doe* v. *Laming*, 4 Campb. 77.

(*k*) *Taylor* v. *Humphreys*, 30 L.J. M.C. 242; 10 C.B. N.S. 429; see *Copley* v. *Burton*, L.R. 5 C.P. 489; 39 L.J. M.C. 141.

(*l*) See *Le Blanche* v. *London & N. W. Ry.*, 1 C.P.D. 286; 45 L.J. C.P. 521.

(*m*) *Hawthorn* v. *Hammond*, 1 C. & K. 404; *Howell* v. *Jackson*, 6 C. & P. 725; *Rex* v. *Ivens*, 7 C. & P. 219.

(*n*) *Browne* v. *Brandt*, (1902) 1 K.B. 696; 71 L.J. K.B. 367.

(*o*) *Smith* v. *Dearlove*, 6 C.B. 132; 17 L.J. C.P. 219; *Binns* v. *Pigot*, 9 C. & P. 209; but see *Day* v. *Bather*, 2 H. & C. 14; 32 L.J. Ex. 171.

(*p*) *Fell* v. *Knight*, 8 M. & W. 276; 10 L.J. Ex. 277.

(*q*) *Lamond* v. *Richard*, (1897) 1 Q.B. 541; 66 L.J. Q.B. 315.

common inn has ceased to be a traveller is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive (*r*).

Innkeepers—Extent of obligation.—The extent of the obligation of the innkeeper depends mainly upon the nature of his public profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of extraordinary bulk, nor goods which do not accompany the person of the guest (*s*). An innkeeper is not an insurer of the goods of his guest, but is answerable for negligence (*t*). The innkeeper cannot discharge himself of the duty imposed upon him by the common law by express notice to his guests (*u*), or under pretence of sickness, want of understanding, or absence from home (*x*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom (*y*). The liability of the innkeeper continues during the temporary absence of his guest (*z*).

Innkeepers—Protection of guest from loss of goods.—The relationship of guest and innkeeper must be completely established in order to render the innkeeper liable for the loss of a guest's goods (*a*). The responsibility of an innkeeper for the safety of a guest's property begins the moment the relation of guest and innkeeper arises—a relation which arises as soon as the guest enters the inn with the intention of using it as such, and is received on that basis by the innkeeper (*b*); and this is so notwithstanding the fact that some one other than the particular guest is to pay for the accommodation received by him (*c*). It is said that the innkeeper is not liable for the loss of his guest's goods by burglary or robbery with violence where he can show that the force which occasioned the loss was truly irresistible (*d*). But however this may be, it is certain that

(*r*) *Lamond* v. *Richard*, *ante*, p. 765.

(*s*) *Broadwood* v. *Granara*, 10 Exch. 423; 24 L.J. Ex. 1.

(*t*) *Calye's Case*, 1 Smith's L.C. 119 (ed. 11); *Dawson* v. *Chamney*, 5 Q.B. 164; 13 L.J. Q.B. 33. As to liability to person coming to the inn but not to deal there, see *Oxford* v. *Prior*, 14 W.R. 611; and as to a temporary caller for refreshment, see *Bennett* v. *Mellor*, 5 T.R. 173.

(*u*) *Morgan* v. *Rarey*, 6 H. & N. 265; 30 L.J. Ex. 131; see, however, 26 & 27 Vict. c. 41, *post*, p. 769.

(*x*) Bac.Abr. Inns, C. 4.

(*y*) *Crosse* v. *Andrews*, Roll.Abr. 2; Carth. 161.

(*z*) *Day* v. *Bather*, 2 H. & C. 14; 32 L.J. Ex. 171.

(*a*) *Strauss* v. *County Hotel Co.*, 12 Q.B.D. 27; 58 L.J. Q.B. 25; *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q.B. 11; 60 L.J. Q.B. 209.

(*b*) *Wright* v. *Anderton*, (1909) 1 K.B. 209; 78 L.J. K.B. 165.

(*c*) *Ib.*

(*d*) *Jones on Bailment*, 96 (ed. 4).

to the obligations which attach to innkeepers in common with all lodging-house keepers and lessors of furnished rooms and apartments for immediate occupation (*ante*, p. 761), the law has superadded the duty of protecting the goods of their guests from robbery (*e*). But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant (*f*). The question as to what constitutes negligence on the part of the landlord or of the guest depends on the particular circumstances of each case (*g*). The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man might reasonably have been expected to take under the circumstances (*h*).

"If a guest come to a common innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged" (*i*). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss (*k*). "All that Lord Coke in *Calye's Case* (*l*) means when he says the innkeeper is liable though the guest has a key and does not use it is that the innkeeper cannot get rid of his common law liability by giving the guest a key. But he by no means lays it down that a guest may not be guilty of negligence in abstaining from using it. For instance, if there were races in the neighbourhood which caused a great number of suspicious characters to be about the inn" (*m*). "If there

(*e*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131; but see now 26 & 27 Vict. c. 41, *post*, p. 769; as to the sufficiency of notice under the Act, see *Spice* v. *Bacon*, 3 Ex.D. 463; 46 L.J. Ex. 713.

(*f*) *Calye's Case*, 8 Co. Rep. 32, a; 1 Smith's L.C. 119 (ed. 11).

(*g*) *Kent* v. *Shuckard*, 2 B. & Ad. 803 (bag containing money left in bedroom); *Richmond* v. *Smith*, 8 B. & C. 9; 6 L.J. (O.S.) K.B. 219 (goods left in commercial room); *Armistead* v. *White*, 20 L.J. Q.B. 524; S. C. *nom. Armistead* v. *Wilde*, 17 Q.B. 261; *Burgess* v. *Clements*, 1 Stark. 251, n.; 4 M. & S. 306; *Sandars* v. *Spencer*, Dyer, 266, a.

(*h*) *Cashill* v. *Wright*, 6 E. & B. 891, 900; *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515; 40 L.J. C.P. 231.

(*i*) *White's Case*, Dyer, 158, b; Bac. Abr. Inns, C. 4.

(*k*) *Farnworth* v. *Packwood*, 1 Stark. 249. But see *Bennett* v. *Mellor*, 5 T.R. 276 (goods left on floor of inn in servant's charge).

(*l*) 8 Co. 32; 1 Smith's L.C. 119 (ed. 11).

(*m*) *Per* Willes, J., *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515, at p. 520; 40 L.J. C.P. 231.

is evidence," observes Lord Ellenborough, "that the guest accepted the key, and took on himself the care of his goods, surely it is for the jury to determine whether the evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room" (*n*). The weight of the evidence depends upon the state of society and the place, for "What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably three hundred bed-rooms are occupied by people of all sorts" (*o*).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants the latter cannot discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken (*p*). The innkeeper is also liable, although sick at the time and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself (*q*). Where the plaintiff, on his way home from business in the evening, called at the defendants' hotel for the purpose of dining only, and was supplied with dinner in the dining-room of the hotel, a large room structurally forming part of the hotel and reached by the same entrance as the rest of the hotel, but capable of accommodating and wont to accommodate a large number of persons in addition to those who were staying in the house: it was held that there was evidence that the relationship of guest and innkeeper existed between him and the defendants so as to make them liable for the value of his overcoat lost in the hotel (*r*). The extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (14 Geo. 3, c. 78, s. 86), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken

(*n*) *Burgess* v. *Clements*, 4 M. & S. at p. 310; 1 Stark. 252, n.

(*o*) *Per* Montague Smith, J., *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. at p. 522.

(*p*) *Jones* v. *Tyler*, 1 Ad. & E. 522; 3 L.J. K.B. 166 (gig stolen from outside an inn).

(*q*) *Cross* v. *Andrews*, Cro.Eliz. 622.

(*r*) *Orchard* v. *Bush & Co.*, (1898) 2 Q.B. 284; 67 L.J. Q.B. 650.

all due care to prevent the introduction into the stables of vicious and kicking horses (*s*).

Innkeepers—Limitation by statute of liability of innkeepers.—By sect. 1 of the Innkeepers' Liability Act, 1863 (*t*), no innkeeper is to be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of *thirty pounds;* except where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property have been deposited expressly (*u*) for safe custody with such innkeeper (*v*); and in the case of a deposit for safe custody, the innkeeper may require, as a condition of his liability, that the goods or property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (*w*). If an innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of the innkeeper, is unable to deposit such goods or property as are mentioned in the Act, the innkeeper will not be entitled to the benefit of the Act in respect of such goods or property (s. 2).

Every innkeeper is required to cause at least one copy (*x*) of the first section of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the Act in respect of such goods or property only as shall be brought to his inn while such copy shall be exhibited (s. 3). By the interpretation clause (s. 4) the word "inn" means any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word "innkeeper" means the keeper of any such place.

Innkeepers—Who is a guest and traveller.—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has

(*s*) *Dawson* v. *Chamney*, 5 Q.B. 164; 13 L.J. Q.B. 33, explained and qualified by *Morgan* v. *Ravey*, 30 L.J. Ex. 134; 6 H. & N. 265.

(*t*) 26 & 27 Vict. c. 41.

(*u*) The word "expressly" means that the guest's intention must be brought to the mind of the innkeeper or his servant in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions prescribed in the section: *Whitehouse* v. *Pickett*, (1908) A.C. 357; 77 L.J. P.C. 89.

(*v*) *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q.B. 11; 60 L.J. Q.B. 209.

(*w*) *Medawar* v. *Grand Hotel Co.*, *supra*.

(*x*) Such copy should be a correct copy: see *Spice* v. *Bacon*, 2 Ex.D. 463; 46 L.J. Ex. 713.

been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep (*y*). It has been said, however, that a man may become "a guest by leaving his horse as much as if he had stayed himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing" (*z*). "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is robbed, yet shall not the host be charged" (as an innkeeper), "for this guest was no traveller" (*a*).

The question whether a person staying at a common inn has ceased to be a traveller, is a question of fact (*ante*, p. 765), in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive (*b*). Thus, "if A. comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though perhaps, being at the end of his journey, he cannot then be said *transeuns* according to the writ in the register" (*c*). But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in an inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper (*d*). Holt, C.J., is reported to have held, "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there" (*e*). A person taking a meal at an inn has been held to be a guest (*f*), and so has a person making use, for the purpose of washing and dressing, of a room already engaged by a guest (*g*); but a person taking

(*y*) *Gelley* v. *Clerk*, Cro.Jac. 188; *Smith* v. *Dearlove*, 6 C.B. 132; 17 L.J. C.P. 219.

(*z*) *York* v. *Grindstone*, 1 Salk. 388; *Bather* v. *Day*, 32 L.J. Ex. 171; 2 H. & C. 14.

(*a*) Bac.Abr. Inns, C. 5.

(*b*) *Lamond* v. *Richard*, (1897) 1 Q.B. 541; 66 L.J. Q.B. 315.

(*c*) Bac.Abr. Inns, C. 5.

(*d*) Warburton, J., *Watbroke* v. *Griffith*, Moore, 877; *Grimston* v. *An Innkeeper*, Hetley, 49.

(*e*) *Parker* v. *Flint*, 12 Mod. 255.

(*f*) *Orchard* v. *Bush & Co.*, (1898) 2 Q.B. 284; 67 L.J. Q.B. 650.

(*g*) *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q.B. 11; 60 L.J. Q.B. 209.

a drink at the counter of the bar of an inn (*h*), or one taking temporary refreshment at a railway company's refreshment-room has been held not to be a guest (*i*).

Innkeepers' lien.—An innkeeper has a lien upon goods belonging to the guest, and brought by him to the inn, for his charges for board and lodging supplied to the guest (*j*); and it has been held that the lien attaches even when the goods do not belong to the guest, if the innkeeper receives them in the belief that they do so belong; and when the goods are such as the innkeeper was not bound to receive (*k*); and also when the goods are deposited with him by his guest (*l*). The lien upon the goods of a commercial traveller who is a guest extends to all goods which a commercial traveller would in the ordinary course carry about with him to the inns at which he puts up as part of the regular apparatus of his calling, though they be in fact the property of the firm for whom he travels. If the goods are received as part of the commercial traveller's baggage, it makes no difference whether they were brought with him originally or were afterwards sent to him at the inn (*m*). An innkeeper does not waive his lien by accepting security for the charges incurred, unless there is something in the nature of the security or in the circumstances under which it was given which is inconsistent with the continuance of the lien (*n*). But he cannot detain the person of his guest, or take off his clothing, in order to obtain payment of his bill (*o*). If he sells the goods his lien is destroyed (*p*). He has a right to sell goods left at his inn after six weeks, where the person depositing is his debtor, subject to certain provisions (*q*). Where a husband and wife stayed at the plaintiffs' hotel, the wife bringing with her a quantity of luggage, which was her separate property, and credit being given to the husband, who made payments on account, it was held that the plaintiffs were entitled to a lien upon the wife's luggage, notwithstanding that it was her separate property, for the unpaid balance of the plaintiffs' bill (*r*).

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards re-

(*h*) *Reg.* v. *Rymer*, 2 Q.B.D. 136; 46 L.J. M.C. 108.
(*i*) *Strauss* v. *County Hotel Co.*, 12 Q.B.D. 27; 53 L.J. Q.B. 25.
(*j*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.
(*k*) *Threfall* v. *Borwick*, L.R. 10 Q.B. 210; 44 L.J. Q.B. 87.
(*l*) *Mulliner* v. *Florence*, 3 Q.B.D. 484; 47 L.J. Q.B. 700.
(*m*) *Robins* v. *Gray*, (1895) 2 Q.B. 501; 65 L.J. Q.B. 44.
(*n*) *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587; see *post*, p. 905.
(*o*) *Sunbolf* v. *Alford*, 3 M. & W. 248; 7 L.J. Ex. 60.
(*p*) *Mulliner* v. *Florence*, *supra*.
(*q*) 41 & 42 Vict. c. 38.
(*r*) *Gordon* v. *Silber*, 25 Q.B.D. 491; 59 L.J. Q.B. 507.

take them. Therefore, if the innkeeper allows his guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former (*s*). And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid (*t*). If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise (*u*). However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made (*v*). Where an innkeeper is holding goods of his guest under his lien he is not bound to take greater care of them than if he were an ordinary bailee of them (*w*). The lien upon a traveller's goods terminates at the same time as the right of the traveller to be lodged in the inn as a traveller (*x*).

Sub-section I.

distress for rent.

Distress for rent in arrear.—By the common law, as we have seen (*ante*, p. 680), landlords to whom rent is due, and who are clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by their certified bailiff (*y*), upon the demised premises (*z*), and seizing the movables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained.

It is essential to the lawful exercise of the power of distress, that there be a tenancy (*a*) for a term, or at the least, at will,

(*s*) *Jones* v. *Thurloe*, 8 Mod. 173; *Jones* v. *Pearle*, 1 Str. 556, 557.

(*t*) *Moss* v. *Townsend*, 1 Bulstr. 207.

(*u*) *Rosse* v. *Bramsteed*, 2 Roll. 438.

(*v*) *Allen* v. *Smith*, 12 C.B. N.S. 638; 31 L.J. C.P. 306.

(*w*) *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587.

(*x*) *Lamond* v. *Richard*, (1897) 1 Q.B. 41; 66 L.J. Q.B. 315.

(*y*) See 51 & 52 Vict. c. 21, and *Addison on Torts*, 320 (ed. 8) as to the appointment of a bailiff to distrain.

(*z*) See *Selby* v. *Greaves*, L.R. 3 C.P. 594; 37 L.J. C.P. 251.

(*a*) See *Clowes* v. *Hughes*, L.R. 5 Ex. 160; 39 L.J. Ex. 62, in which case the distress was made by a mortgagee upon the mortgaged lands under an agreement contained in the mortgage deed:

at an ascertained rent (*b*), and that the distrainor be the person entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy. If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party (*c*), or, being himself only a lessee, he has assigned his lease, or if, after granting an underlease, he is evicted by title paramount, and the superior landlord has entered, and the under tenant has attorned to the latter (*d*), or if his lease expires (*e*), he has no right or power to distrain. A sublease for a period co-extensive with, or longer than, the sub-lessor's term operates as an assignment, and the sub-lessor cannot distrain for rent in arrear (*f*). It has been held, that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such underlease (*g*). However, although the distrainor be not entitled to the immediate reversion, the distrainee may be estopped from denying that he is entitled to it (*h*). A landlord who has merely a reversion by estoppel cannot distrain the goods of a third person brought upon the demised premises by leave of the tenant (*i*).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrongdoer, the lessor has no power at common law to distrain the goods and chattels of the tenant for rent in respect of such occupation (*j*). Neither can he distrain, except under the statute of Anne (*post*, p. 778), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent (*k*). A

Kearsley v. *Phillips*, 11 Q.B.D. 621 ; 52 L.J. Q.B. 581.

(*b*) *Anderson* v. *Midland Ry.*, 30 L.J. Q.B. 94 ; 3 E. & E. 614 ; *Howe* v. *Scarrott*, 28 L.J. Ex. 325 ; 4 H. & N. 723 ; *Jolly* v. *Arbuthnot*, 28 L.J. Ch. 547 ; 4 De G. & J. 224.

(*c*) *Parmenter* v. *Webber*, 8 Taunt. 593 ; 2 Moore, 656 ; *Preece* v. *Corrie*, 5 Bing. 24 ; 6 L.J. (O.S.) C.P. 205 ; *Smith* v. *Mapleback*, 1 T.R. 441.

(*d*) *Hopcroft* v. *Keys*, 2 M. & Sc. 760 ; 9 Bing. 613 ; *Langford* v. *Selmes*, 3 K. & J. 220.

(*e*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*f*) *Lewis* v. *Baker* (No. 1), (1905) 1 Ch. 46 ; 74 L.J. Ch. 39.

(*g*) *Curtis* v. *Wheeler*, M. & M. 493.

(*h*) *Morton* v. *Woods*, L.R. 4 Q.B. 293 ; 38 L.J. Q.B. 81 ; *Alchorne* v. *Gomme*, 2 Bing. 54 ; 2 L.J. (O.S.) C.P. 18.

(*i*) *Tadman* v. *Henman*, (1893) 2 Q.B. 168.

(*j*) *Jenner* v. *Clegg*, 1 M. & Rob. 213 ; *Alford* v. *Vickery*, 1 Car. & Marsh. 283 ; *Phené* v. *Popplewell*, 12 C.B. N.S. 334 ; 31 L.J. C.P. 235.

(*k*) *Zouch* v. *Willingale*, 1 H.Bl. 311 ; *Beavan* v. *Delahay*, 1 H.Bl. 8.

distress affirms the tenancy up to the day when the rent became due (*l*).

By sect. 42 of the Bankruptcy Act, 1883 (*m*), as amended by the Bankruptcy Act, 1890 (*n*), if a tenant becomes bankrupt the landlord or other person to whom any rent is due may either before or after the commencement of the bankruptcy distrain upon the goods and effects of the bankrupt, but if the distress be levied after the commencement of the bankruptcy, it is available only for six months' rent accrued due prior to the date of the order of adjudication (*o*); but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available. *A fortiori* therefore if the trustee in bankruptcy declines to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy of his right to distrain (*p*). The protection afforded by the above enactment applies in terms only to the goods or effects of the bankrupt, and not to those of third persons which may be upon the demised premises (*q*). If a lessee, having granted an underlease, becomes bankrupt, the lessor, upon disclaimer of the lease by the trustee under sect. 55 of the Bankruptcy Act, 1883 (*r*), is entitled to distrain for the rent reserved (*s*). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown (*t*).

By sect. 28 of the Agricultural Holdings Act, 1908 (*u*), it shall not be lawful for a landlord entitled to the rent of a holding to distrain for rent which became due in respect of that holding more than one year before the making of the distress, unless the payment of rent has, according to the ordinary course of dealing between the landlord and tenant, been de-

(*l*) *Cotesworth* v. *Spokes*, 10 C.B. N.S. 103; 30 L.J. C.P. 220. See *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395; *Thomas* v. *Lulham*, (1895) 2 Q.B. 400; 64 L.J. Q.B. 720.

(*m*) 46 & 47 Vict. c. 52, s. 42.

(*n*) 53 & 54 Vict. c. 71, s. 28.

(*o*) *Hart Dyke, Ex parte*, 22 Ch.D. 410; 52 L.J. Ch. 570; *Birm. & Staff. Gas Light Co., Ex parte*, L.R. 11 Eq. 615; 40 L.J. Bankr. 52; see *Hill, Ex parte*, 6 Ch.D. 63; *Harrison, Ex parte*, 13 Q.B.D. 753; 53 L.J. Ch. 977; and *Lundy Granite Co., In re*, L.R. 6 Ch. 462; 40 L.J. Ch. 588; *Wilson, In re*, 62 L.J. Q.B. 628; *Howell, In re*, (1895) 1 Q.B. 844; 64 L.J. Q.B. 454.

(*p*) *Briggs* v. *Sowry*, 8 M. & W. 729; 11 L.J. Ex. 193; *Newton* v. *Scott*, 10 M. & W. 471; 12 L.J. Ex. 488; *Phillips* v. *Shervill*, 6 Q.B. 944; 14 L.J. Q.B. 144; see 46 & 47 Vict. c. 52, s. 55.

(*q*) *Brocklehurst* v. *Lawe*, 7 E. & B. 176; 26 L.J. Q.B. 107; *Railton* v. *Wood*, 15 App.Cas. 363; 59 L.J. P.C. 84; *Addison on Torts*, 324 (ed. 8).

(*r*) 46 & 47 Vict. c. 52, s. 55.

(*s*) *Walton, Ex parte*, 17 Ch.D. 746; 50 L.J. Ch. 657.

(*t*) *Rex* v. *Cotton*, Parker, 112.

(*u*) 8 Edw. 7, c. 28, s. 28.

ferred until the expiration of a quarter or half-year after the date at which the rent legally became due, in which case, the rent shall, for the purposes of the section, be deemed to have become due at the expiration of that quarter or half-year, and not at the date at which it legally became due. In such a case the landlord may distrain for rent then legally due, but not yet payable according to the ordinary course of dealing, and also for rent which has become legally due more than a year previously, but has become payable according to the ordinary course of dealing less than a year previously, and he may do this even although the total amount distrained for exceeds one year's rent (*v*).

Distress—No right to distrain where no certain ascertained rent.—To entitle a landlord to distrain the rent must be ascertained (*x*). Where lands and tithes were let at one entire rent upon a parol agreement which was void as to the tithes, it was held that the landlord could not distrain, because the amount in respect of the part of the land for which the agreement was good was not ascertained (*y*). But where a new agreement is come to, providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress (*z*). If there be a tenancy of a brickfield, the tenant paying a fixed sum for every thousand bricks made, the landlord may distrain, for *id certum est quod certum reddi potest* (*a*).

Formerly if a tenant entered into possession under an agreement which did not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and no lease was granted, the landlord had no right to distrain (*b*); but since the Judicature Acts, a landlord may distrain where the tenant has entered under an agreement of which the landlord may have a decree for specific performance (*c*). But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only (*d*), or whenever by payment of rent, or otherwise, any tenancy at a

(*v*) *Bull, Ex parte, Bew, In re*, 11 Q.B.D. 642; 56 L.J. Q.B. 270.

(*x*) 2 Wms.Saund. 284, c, note (*e*), notes to *Poole* v. *Longueville*. See, further, *Addison on Torts*, 319 (ed. 8).

(*y*) *Gardiner* v. *Williamson*, 2 B. & Ad. 336; 9 L.J. (O.S.) K.B. 233; *Neale* v. *Mackenzie*, 1 M. & W. 747; 6 L.J. Ex. 263.

(*z*) *Watson* v. *Waud*, 8 Exch. 335; 22 L.J. Ex. 161.

(*a*) *Daniel* v. *Gracie*, 6 Q.B. 145; 13 L.J. Q.B. 309; *Pollitt* v. *Forrest*, 11 Q.B. 909; 16 L.J. Q.B. 424.

(*b*) *Hegan* v. *Johnson*, 2 Taunt. 148.

(*c*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9; 52 L.J. Ch. 2; *Swain* v. *Ayres*, 21 Q.B.D. 289; 57 L.J. Ch. 428; *Lowther* v. *Heaver*, 41 Ch.D. 248; 58 L.J. Ch. 482. See also *Addison on Torts*, 319 (ed. 8).

(*d*) *Anderson* v. *Midland Ry.*, 30 L.J. Q.B. 94; 3 E. & E. 614.

fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due (*e*). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain" (*f*). So, if a man, on being let into possession under an agreement for purchase, signs an agreement admitting that he is tenant at a certain rent, he may be distrained upon (*g*).

By sect. 1 of the Landlord and Tenant Act, 1851 (*h*), where the lease or tenancy of any farm or lands shall determine by the death or cesser of the estate of a landlord entitled for life or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease, in the same manner as if his lease had then expired by effluxion of time; and the succeeding landlord shall be entitled "*to recover* and receive of the tenant" a fair proportion of the rent for the period since the lessor's death. The above Act applies to all tenancies in respect of which there exists a valid claim to emblements, and confers a right to distrain for the rent as well as to recover it by action (*i*).

Distress—Conditions precedent to the right to distrain.—The right to distrain may be made conditional, or may be postponed by the contract of the parties (*k*). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

Distress—Agreements not to distrain.—The right to distrain, not being an inseparable incident to a rent service, may be waived, abandoned, or postponed by the express contract or agreement of the landlord (*l*), or by conduct (*m*). If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him (*n*).

(*e*) *M'Leish* v. *Tate*, Cowp. 781.

(*f*) *Knight* v. *Bennett*, 11 Moore, 222; 4 L.J. (O.S.) C.P. 95; *Cox* v. *Bent*, 2 M. & P. 281; 7 L.J. (O.S.) C.P. 68.

(*g*) *Yeoman* v. *Ellison*, L.R. 2 C.P. 681; 36 L.J. C.P. 326; see *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. C.P. 81; *ante*, p. 773.

(*h*) 14 & 15 Vict. c. 25, s. 1.

(*i*) *Haines* v. *Welch*, L.R. 4 C.P. 91; 38 L.J. C.P. 118; see The Apportionment Act, 1870 (33 & 34 Vict. c. 35).

(*k*) *Giles* v. *Spencer*, 3 C.B. N.S. 244; 26 L.J. C.P. 237; *Regnart* v. *Porter*, 5 M. & P. 370; 9 L.J. (O.S.) C.P. 168; *Mechelen* v. *Wallace*, 7 Ad. & E. 54, n.

(*l*) *Giles* v. *Spencer*, 3 C.B. N.S. 244; 26 L.J. C.P. 237.

(*m*) *Horsford* v. *Webster*, *infra*; *Papé* v. *Westcott*, (1894) 1 Q.B. 272; 63 L.J. Q.B. 222.

(*n*) *Horsford* v. *Webster*, 1 C. M. & R. 696; 4 L.J. Ex. 100; *Welsh* v. *Rose*, 6 Bing. 638; 8 L.J. (O.S.) C.P. 246.

Distress—Acceptance of bill or note by way of payment.—A landlord is not deprived of his right to distrain by taking a bill, or note, or other security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain (*o*), or unless it be proved that the note was paid at maturity (*p*). The mere fact that a bill of exchange is given by a tenant to his landlord in respect of rent due is some evidence of an agreement by the landlord to suspend his right of distress until the bill matures (*q*). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonoured, the landlord may return the money to the bailiff or treat it as an advance or loan from him, and distrain again for the unpaid rent (*r*).

Distress—Rent payable in advance (*s*).—Rent may be made payable in advance, either by agreement (*t*) or by custom (*u*), so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter.

Distress—Rent when payable—Several demises.—When there is a reservation of an annual rent, or a covenant or agreement by a tenant to pay so much a year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly (*x*). Where a landlord agreed to let a house at a yearly rent of 50*l.*, and likewise the stable and loft at a further rental of 25*l.* per annum, to be paid on the usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50*l.* rent was payable yearly, and the 25*l.* rent payable quarterly (*y*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration

(*o*) *Davis* v. *Gyde*, 2 Ad. & E. 623; 4 L.J. K.B. 84; see *Bramwell* v. *Eglinton*, 33 L.J. Q.B. 130; 5 B. & S. 39.

(*p*) *Harris* v. *Shipway*, Bull. N.P. 182, a.

(*q*) *Palmer* v. *Bramley*, (1895) 2 Q.B. 405; 65 L.J. Q.B. 42. Where there is a covenant to pay rent in advance, evidence of a parol agreement to give bills of exchange is not admissible, *Henderson* v. *Arthur*, (1907) 1 K.B. 10; 76 L.J. K.B. 22.

(*r*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 L.J. Ex. 291.

(*s*) See *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *post*, p. 780.

(*t*) *Lee* v. *Smith*, 9 Exch. 662; 23 L.J. Ex. 198; *London & Westminster Loan Co.* v. *L. & N. W. Ry.*, (1893) 2 Q.B. 49; 62 L.J. Q.B. 370.

(*u*) *Buckley* v. *Taylor*, 2 T.R. 600.

(*x*) *Collett* v. *Curling*, 10 Q.B. 785; 16 L.J. Q.B. 390.

(*y*) *Coomber* v. *Howard*, 1 C.B. 440.

of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly (*z*). If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*a*).

Distress after termination of term.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the termination thereof, as his reversion was then gone, the entire estate being revested in him in possession (*b*); but by 8 Anne, c. 14, ss. 6, 7, it is enacted, that it shall be lawful for any person, having rent in arrear or due upon any lease ended or determined, to distrain for such arrears after the determination of the lease in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due (*c*). *Primâ facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon; but a distress has been held to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant (*d*). Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain (*e*). Where a tenant went away, leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the

(*z*) *Mallam* v. *Arden*, 3 M. & S. 795; 3 L.J. C.P. 48.

(*a*) 1 Inst. 47, b, 161, a; *Gilbert on Distress*, 61.

(*b*) *Williams* v. *Stiven*, 9 Q.B. 14; 15 L.J. Q.B. 321.

(*c*) This right of the landlord is not affected by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11; *Mackenzie, In re*, (1899) 2 Q.B. 566; 68 L.J. Q.B. 1003.

(*d*) *Braithwaite* v. *Cooksey*, 1 H.Bl. 465.

(*e*) *Turner* v. *Barnes*, 2 B. & S. 435; 31 L.J. Q.B. 170; see the Apportionment Act, 1870 (33 & 34 Vict. c. 35).

premises (*f*). And where a tenant, in order to prevent a distress, fraudulently removed his goods on the day on which his tenancy came to an end, it was held that the landlord could not follow and distrain the goods because the tenant's interest in the premises had come to an end, and he was no longer in possession (*g*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop; all the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain; and, therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord (*h*). Where a new tenancy has been created as to part of the property comprised in a lease of which notice to quit has been given, a landlord, after the expiration of such notice, is not entitled to distrain on such new tenancy for arrears of rent due in respect of the old tenancy, the distress not being made "during the possession of the tenant" within the meaning of 8 Anne, c. 14, s. 7 (*i*). If, by the tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it, the tenant holds over, with the consent of the landlord, he must hold upon the terms, and is liable to all the conditions and covenants, of the lease (*k*). If, after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy (*l*).

Distress by agents—Joint tenants—Tenants in common, &c.—A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorized to collect and receive the rents for his own

(*f*) *Taylerson* v. *Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*g*) *Gray* v. *Stait*, 11 Q.B.D. 668; 52 L.J. Q.B. 412.

(*h*) *Beavan* v. *Delahay*, 1 H.Bl. 5; *Lewis* v. *Harris*, *ib.* 7, n. (*a*); *Nuttall* v. *Staunton*, 4 B. & C. 51; 3 L.J. (O.S.) K.B. 135.

(*i*) *Wilkinson* v. *Peel*, (1895) 1 Q.B. 516; 64 L.J. Q.B. 178.

(*k*) *Beavan* v. *Delahay*, *supra*; *ante*, p. 773.

(*l*) *Zouch* v. *Willingale*, 1 H.Bl. 311.

benefit (*m*). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner (*n*). But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor (*o*). A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The *cestui que trust*, therefore, may distrain in the name of the trustee; and a mortgagor, in certain cases, in the name of the mortgagee (*p*). Where a receiver is appointed by a mortgagee under s. 24 of the Conveyancing Act, 1881 (*q*), he only or a person with his authority, and not the mortgagor, is empowered to distrain (*r*). A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that purpose (*s*). One joint-owner or joint-reversioner may distrain alone, but he must, it seems, avow and justify the taking of the distress in his own right, and as bailiff to the other (*t*). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent (*u*). The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conusance as the bailiff of the others without averring or showing any express authority from them to distrain (*x*). If one of several joint tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion (*y*). The payment of rent in advance to a landlord mortgagor, unless by agreement the tenant is bound to do it, is not valid as against mortgagees, who may consequently distrain for it (*z*).

(*m*) *Ward* v. *Shew*, 9 Bing. 608; 2 L.J. C.P. 58.

(*n*) *Bullen on Distress*, 78.

(*o*) *Trent* v. *Hunt*, 9 Exch. 14; 22 L.J. Ex. 320.

(*p*) *Trent* v. *Hunt*, *supra*; *Snell* v. *Finch*, 32 L.J. C.P. 177; 13 C.B. N.S. 651; see, further, 44 & 45 Vict. c. 41, s. 18.

(*q*) 44 & 45 Vict. c. 41, s. 24.

(*r*) *Woolston* v. *Ross*, (1900) 1 Ch. 788; 69 L.J. Ch. 363.

(*s*) *Brandon* v. *Brandon*, 5 Madd. 473; *Bennett* v. *Robins*, 5 C. & P. 379.

(*t*) *Pullen* v. *Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

(*u*) *Robinson* v. *Hoffman*, 4 Bing. 562; 6 L.J. (O.S.) C.P. 113.

(*x*) *Leigh* v. *Shepherd*, 5 Moore, 297; 2 B. & B. 465.

(*y*) *Staveley* v. *Allcock*, 16 Q.B. 636; 20 L.J. Q.B. 321.

(*z*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89. By 51 & 52 Vict. c. 21, s. 7, any bailiffs distraining on any holding to which that Act applies must be authorised by a county court judge, who, under s. 1, has power at any time to

Tenants in common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses (*a*). They may, of course, authorize a bailiff to distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of others, but they must avow and justify the taking of the distress separately in respect of their several shares (*b*). And one of two tenants in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to both generally, and not in several sums payable to each, if the lessee after notice not to do so, has paid the whole of the rent to the other tenant in common (*c*). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l.* per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest (*d*).

Distress by executors and administrators.—By 3 & 4 Will. 4, c. 42, ss. 37, 38, the executors and administrators of any lessor may distrain upon lands demised for any term or at will for arrearages of rent accrued to such lessor during his lifetime. The distress however if made after the determination of the term must be made within six calendar months from such determination and during the continuance of the possession of the tenant from whom the arrears became due (*e*). A distress may be levied by executors before probate has been obtained (*f*).

Distress—Tender of rent before distress renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of distress, but, before it is executed, the rent is tendered, the right to distrain is gone (*g*).

Distress—Time, mode and place of distraining.—The tenant has the whole day on which the rent becomes due to pay such rent; and a distress therefore cannot be made until the day after the day appointed for the payment of the rent (*h*); nor

cancel their certificates; *Hogarth* v. *Jennings*, (1892) 1 Q.B. 907; 61 L.J. Q.B. 601.

(*a*) As to distress against one of several tenants in common of land held under separate demises: see *Parke, Ex parte*, L.R. 18 Eq. 381; 43 L.J. Bankr. 139.

(*b*) Litt. sects. 314—317; *Philpott* v. *Dobbinson*, 3 M. & P. 320; 7 L.J. (O.S.) C.P. 248.

(*c*) *Harrison* v. *Barnby*, 5 T.R. 246.

(*d*) *Whitley* v. *Roberts*, M'Cl. & Y. 107.

(*e*) See 8 Anne, c. 14, s. 7.

(*f*) *Whitehead* v. *Taylor*, 10 Ad. & E. 210; 9 L.J. K.B. 65.

(*g*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L.J. Ex. 224; *Holland* v. *Bird*, 10 Bing. 15; 2 L.J. C.P. 201; see, further, *Addison on Torts* (ed. 8), pp. 339 *et seq.*

(*h*) 21 Hen. 6, 40; *Duppa* v. *Mayo*, 1 Saund. 287.

can it be made between sunset and sunrise (*i*). A landlord or his certified bailiff (*k*) cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building (*l*), or even enter by a window which is shut but not fastened (*m*), in order to make a distress, but he may enter by a door which is shut but not fastened, for that is the ordinary method of entry, and a person who leaves his door unfastened implies a licence to any one who has business to enter the premises, and so he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house (*n*), or enter by an open window (*o*), or by further opening a window which is partly opened (*p*). At common law (*q*), and by the Statute of Marlbridge (*r*), it is unlawful for any person (except the Crown and its officers) to make a distress out of his fee, or in the King's highway, or in the common street. But he may enter upon any part of the land out of which the rent issues (*s*). A distress, moreover, cannot be made upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue (*t*), unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress (*u*). If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third person, and has, in the *bonâ fide* exercise of such right, placed his goods and chattels on the land of such third person, the lessor has no right to distrain them there (*x*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor; but by 11 Geo. 2, c. 19, s. 8, lessors or landlords are empowered to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants

(*i*) Co. Litt. 142, a; *Gilbert on Distress*, 50; *Tutton* v. *Darke*, 5 H. & N. 647; 29 L.J. Ex. 271.

(*k*) See 51 & 52 Vict. c. 21, s. 7, and *Addison on Torts*, 320 (ed. 8).

(*l*) *Brown* v. *Glenn*, 16 Q.B. 254; 20 L.J. Q.B. 205.

(*m*) *Nash* v. *Lucas*, L.R. 2 Q.B. 590.

(*n*) *Ryan* v. *Shilcock*, 7 Exch. 72; 21 L.J. Ex. 55.

(*o*) *Nixon* v. *Freeman*, 5 H. & N. 647; 29 L.J. Ex. 271.

(*p*) *Crabtree* v. *Robinson*, 15 Q.B.D. 312; 54 L.J. Q.B. 544; see, further, as to mode of entry, *Addison on Torts*, 321 (ed. 8).

(*q*) Co. Inst. 131.

(*r*) 52 Hen. 3, c. 15.

(*s*) *Capel* v. *Buszard*, 6 Bing. 150, at p. 161.

(*t*) *Lewis* v. *Read*, 13 M. & W. 834; 14 L.J. Ex. 235.

(*u*) See 11 Geo. 2, c. 19, and *post*, p. 794.

(*x*) *Buszard* v. *Capel*, 8 B. & C. 141; 6 L.J. (O.S.) K.B. 267; in error, 6 Bing. 150.

feeding or depasturing upon any common appendant or appurtenant or any ways belonging to all or any part of the demised premises. By the terms of the lease a right to distrain upon other lands may be given (*y*).

Distress—Things not distrainable.—The property of the Crown, even though the Crown be not the tenant, is not distrainable (*z*). Tenants' fixtures (*a*) annexed to the freehold by nails and permanent fastenings, such as furnaces, chimney-pieces, kitchen-ranges, stoves, coppers, grates, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury (*b*). But if they are attached to the freehold by bolts and screws, so as to be movable, they may be distrained and taken. Therefore cotton-spinning machines fixed by means of screws, some into a wooden floor and others into lead which had been poured in a molten state into holes in stones for the purpose of receiving the screws, but fastened so as to be readily removable, have been held to be by law distrainable (*c*); but it has been doubted (*d*) whether the law laid down in this case, which has often been recognized (*e*) was correctly applied to the facts. It has been recently held (*f*) that a gas engine laid on a raised bed of concrete and screwed down on to bolts sunk in the concrete and fastened into the ground is a fixture, and is therefore not distrainable. Where, under an agreement by which the landowners let to a company the right to fix advertisement hoardings on their land for a term of seven years at a specified rent, the company erected on the land hoardings supported by vertical posts sunk four feet into the ground and strengthened by cross-pieces attached to them and further secured from behind by a strut and stay let substantially into the ground, the court held that the hoardings, though removable by the company during the term were so affixed to the land that they could not be distrained for rent due under the agreement (*g*).

(*y*) *Daniel* v. *Stepney*, L.R. 9 Ex. 185; 41 L.J. Ex. 208.

(*z*) *Secretary of State for War* v. *Wynne*, (1905) 2 K.B. 845; 75 L.J. K.B. 25.

(*a*) As to what are tenant's fixtures, see *ante*, p. 696, and *Addison on Torts*, 326 (ed. 8).

(*b*) Co. Litt. 47, b; *Pitt* v. *Shew*, 4 B. & Ald. 207; *Darby* v. *Harris*, 1 Q.B. 898; 10 L.J. Q.B. 294; *Dalton* v. *Whittem*, 3 Q.B. 961; 12 L.J. Q.B. 55.

(*c*) *Hellawell* v. *Eastwood*, 6 Exch. 295; 20 L.J. Ex. 154.

(*d*) *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; see also *Mather* v. *Fraser*, 2 K. & J. 536; 25 L.J. Ch. 361.

(*e*) *Waterfall* v. *Penistone*, 6 E. & B. 876; 26 L.J. Q.B. 100; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; *Sheffield, &c. Building Soc.* v. *Harrison*, 15 Q.B.D. 358; 54 L.J. Q.B. 15 (cases as between mortgagor and mortgagee).

(*f*) *Crossley* v. *Lee*, (1908) 1 K.B. 86; 77 L.J. K.B. 199; following *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114, and *Reynolds* v. *Ashby & Son*, (1903) 1 K.B. 87; 72 L.J. K.B. 51.

(*g*) *Provincial Bill-posting Co.* v. *Low Moor Iron Co.*, (1909) 2 K.B. 344; 78 L.J. K.B. 702; *Darby* v. *Harris*, 1 Q.B. 895; 10 L.J. Q.B. 294.

A millstone in a mill, and an anvil in a smith's shop, however, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though when taken it is not actually affixed to the freehold (*h*). Tram-plates and sleepers of a railway merely laid upon the ground, although they have become indented in the soil by user, are distrainable (*i*); but if they have been packed in ballast, so that they cannot be removed without making holes in the ballast, they are not (*k*).

By 51 Hen. 3, stat. 4, no man of religion, nor other person, shall be distrained by his beasts that gain his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; but to render other animals exempt on the ground that they profit the land, within the above statute, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been broken to harness, and are regularly employed in ploughing, harrowing, or drawing carts or waggons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that gain" the land within the meaning of the statute. Sheep, also, are exempt from distress at common law, independently of the statute, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent (*l*).

Implements of husbandry are also exempt from distress (*m*), and so are the tools and implements of a man's trade (*n*) or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the loom (*o*) or the stocking-frame of the weaver (*p*), the threshing-machine of the farmer (*q*), and the spade and axe of the labourer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them (*r*). Wear-

(*h*) Bro.Abr. Distress, pl. 23.

(*i*) *Beaufort* (*Duke*) v. *Bates*, 3 De G. F. & J. 381; 31 L.J. Ch. 481.

(*k*) *Turner* v. *Cameron*, L.R. 5 Q.B. 306; 39 L.J. Q.B. 125.

(*l*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L.J. Ex. 157.

(*m*) *Davies* v. *Aston*, 1 C.B. 746; 14 L.J. C.P. 228.

(*n*) As to statutory exemption in case of tools and implements of trade, see *post*, p. 786.

(*o*) *Gorton* v. *Falkner*, 4 T.R. 565; *Harvey* v. *Pocock*, 11 M. & W. 740; 11 L.J. Ex. 434.

(*p*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith's L.C. 437 (ed. 11).

(*q*) *Fenton* v. *Logan*, 9 Bing. 676; 21 L.J. C.P. 102.

(*r*) *Simpson* v. *Hartopp*, *supra*; *Wood* v. *Clarke*, 1 Cr. & J. 484; 9 L.J. (O.S.) Ex. 187; *Harvey* v. *Pocock*, *supra*; Co. Litt. 47, a; *Nargatt* v. *Nias*, 28 L.J. Q.B. 143; 1 E. & E. 439.

ing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house (*s*). A cab let to the driver for the purposes of his trade has been held to be an implement of trade (*t*); but a typewriter carried as a sample of his employers' machines by a traveller employed to sell typewriters has been held not to be a tool or implement of trade (*u*).

Distress—Perishable articles, growing crops, fruit, money, &c., have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered (*x*), and other things of a perishable nature, could not be distrained; but as 2 W. & M. c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored again in the same condition (*y*); and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable (*z*), unless found in a cart (*a*). Growing corn, grass, fruits, hops, roots, and growing produce, also, were not distrainable, as the crop was attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed (*b*). But now by 2 W. & M. c. 5, s. 3, the lessor can distrain for rent in arrear any corn in the sheaf, or corn loose or in the straw, or hay lying or being in any barn or granary or otherwise upon any part of the demised land, and

(*s*) Bac.Abr. Inns, B. As to special statutory exemption of wearing apparel, bedding and tools, see *post*, p. 786.

(*t*) *Lavell* v. *Ritchings*, (1906) 1 K.B. 480; 75 L.J. K.B. 287; and see *post*, p. 787.

(*u*) *Addison* v. *Shepherd*, (1908) 2 K.B. 118; 77 L.J. K.B. 534.

(*x*) *Morley* v. *Pincombe*, 2 Exch. 101; 18 L.J. Ex. 272.

(*y*) Bac.Abr. Distress, B.

(*z*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith's L.C. (11th ed.) 437; *Wilson* v. *Ducket*, 2 Mod. 61.

(*a*) Co. Litt. 47, a; *Johnson* v. *Faulkner*, 2 Q.B. 925; 11 L.J. Q.B. 193.

(*b*) 1 Roll.Abr. 667; *Bradby on Distress*, 213; *Gilbert on Distress*, 32.

by 11 Geo. 2, c. 19, ss. 8 and 9, all sorts of corn and grass, hops, roots, fruits, pulse, or other produce whatsoever growing on any part of the demised land. These Acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money (*c*).

Distress—Property of strangers on demised premises in their own possession.—The landlord has no right to distrain the carriage and horses of a stranger; if, however, they are left upon the premises, in the possession or use, or under the care of the tenant or his servants, then they are distrainable (*d*). But the goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third persons placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostelry, nor the materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn nor meal in a mill, nor in a market, for it is in custody (protection) of law (*e*).

Distress—Property of strangers placed on the demised premises with the leave and licence of the landlord is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them (*f*).

Distress—Statutory exemption—Wearing apparel, bedding, tools and implements of trade.—By the combined operation of sect. 4 of the Law of Distress Amendment Act, 1888 (*g*), and sect. 147 of the County Courts Act, 1888 (*h*), which is substituted for sect. 96 of the County Courts Act, 1846 (*i*), the wear-

(*c*) *Clark* v. *Gaskarth*, 2 Moore, 491; 8 Taunt. 431.

(*d*) *Muspratt* v. *Gregory*, 3 M. & W. 677; 7 L.J. Ex. 385; *Rede* v. *Burley*, Cro. Eliz. 596.

(*e*) 7 Hen. 7, 1 b; Bro.Abr. Distress, pl. 57, 71; 1 Roll.Abr. 688, pl. 12; Co. Litt. 47, a; *Gisbourn* v. *Hurst*, 1 Salk. 249.

(*f*) *Joyce* v. *Fowkes*, 2 Vern. 129; *Horsford* v. *Webster*, 1 Cr. M. & R. 696; 4 L.J. Ex. 100; *Giles* v. *Spencer*, 3 C.B. N.S. 244; 26 L.J. C.P. 237.

(*g*) 51 & 52 Vict. c. 21, s. 4.

(*h*) 51 & 52 Vict. c. 43, s. 147.

(*i*) 9 & 10 Vict. c. 95, s. 96.

ing apparel and bedding (*k*) of a tenant or his family, and the tools and implements of his trade, to the value of 5*l.*, are to that extent exempt from distress for rent. But this enactment does not extend to any case where the lease, term or interest of the tenant has expired, and where possession of the premises in respect of which the rent has been demanded, and where the distress is made not earlier than seven days after such demand. The goods which are exempt from seizure are limited to the above-mentioned goods to the total value of 5*l.*; so that if, for instance, under a distress, wearing apparel and bedding, together of the value of 5*l.*, were left on the demised premises, all implements of trade would be liable to seizure (*l*); but if the only chattel on the premises is an implement of trade exceeding the value of 5*l.*, it cannot be distrained (*m*). A typewriter, carried as a sample of his employer's machines by a traveller employed to sell typewriters, is not a tool or implement of trade within sect. 147 of the County Courts Act, 1888 (*n*). By sect. 4 of the Law of Distress Amendment Act, 1895 (*o*), a court of summary jurisdiction on complaint that goods or chattels exempt under sect. 4 of the Act of 1888 from distress for rent, have been taken under such distress, may, by summary order, direct that the goods and chattels so taken, if not sold, shall be restored; or if they have been sold, that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied.

Distress—Statutory exemption—Goods of undertenant and lodger.—By the Law of Distress Amendment Act, 1908 (*p*), if the goods of an undertenant (*q*) or of a lodger (*r*) or of any other person whatsoever not being a tenant of, and not having any beneficial interest in any tenancy of, the premises or any part thereof (*s*), are taken as a distress by the superior landlord for arrears of rent due by his immediate tenant, such undertenant, &c., may serve upon the landlord or his bailiff a declaration (*ss*) in writing that the immediate tenant has no right of property or beneficial interest in the goods and that such goods are the

(*k*) "Bedding" includes a bedstead: *Davis* v. *Harris*, (1900) 1 Q.B. 729; 69 L.J. Q.B. 232.

(*l*) *Boyd* v. *Bilham*, (1909) 1 K.B. 14; 78 L.J. K.B. 50.

(*m*) *Lavell* v. *Ritchings*, (1906) 1 K.B. 480; 75 L.J. K.B. 287.

(*n*) *Addison* v. *Shepherd*, (1908) 2 K.B. 118; 77 L.J. K.B. 534.

(*o*) 58 & 59 Vict. c. 24, s. 4.

(*p*) 8 Edw. 7, c. 53, s. 1.

(*q*) See *ib.*, s. 5, as to certain undertenants who are excluded from the Act.

(*r*) "Lodger," see *Heawood* v. *Bone*, 13 Q.B.D. 179; *Morton* v. *Palmer*, 51 L.J. Q.B. 7.

(*s*) These words were introduced to meet the decision in *Challoner* v. *Robinson*, (1908) 1 Ch. 49; 77 L.J. Ch. 72.

(*ss*) As to the form, see *Rogers, Eungblut & Co.* v. *Martin*, (1911) 1 K.B. 19; 80 L.J. K.B. 208.

property or in the lawful possession of such undertenant, &c., and are not goods or live stock to which the Act is expressed not to apply (*t*); and also, in the case of an undertenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due and the amount thereof and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of the distress have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the undertenant, &c., of the goods referred to in the declaration. An inventory is sufficiently subscribed by the undertenant, &c., if it is referred to in the declaration to which it is annexed and the declaration is signed by the undertenant, &c. (*u*). By sect. 2, if after service of such declaration and inventory or after the undertaking has been given and the amount of rent (if any) then due has been paid or duly tendered, the superior landlord proceeds with the distress, he will be deemed to be guilty of an illegal distress (*x*), and application may be made to a stipendiary magistrate or to two justices where there is no stipendiary magistrate for an order for the restoration of the goods, and the superior landlord will be liable to an action at law at the suit of the undertenant, &c., in which action the truth of the declaration and inventory may likewise be inquired into. The declaration it would seem must be made afresh each time that a distress is levied on the goods (*y*), but it need not state that the declarant is an undertenant or lodger, or that no rent is due, if such is in fact the case (*z*). Where the rent of the immediate tenant is in arrear, the superior landlord, in order to avoid a distress, may serve by registered post upon any undertenant or lodger a notice stating the amount of arrears of rent and requiring all future payments of rent, whether already accrued due or not, to be made by the undertenant or lodger direct to the superior landlord giving the notice until the arrears have been duly paid, and the notice so given entitles the landlord to give a discharge for such rent (*a*).

Distress—Statutory exemption—Live stock and machinery.—By the Agricultural Holdings Act, 1908 (*b*), where live stock

(*t*) See 8 Edw. 7, c. 53, s. 4. *Shenstone* v. *Freeman*, (1910) 2 K.B. 84; 79 L.J. K.B. 982.

(*u*) See *Godlonton* v. *Fulham Property Co.*, (1905) 1 K.B. 431; 74 L.J. K.B. 242.

(*x*) See *Lowe* v. *Dorling*, (1906) 2 K.B. 772; 75 L.J. K.B. 1019.

(*y*) *Thwaites* v. *Wilding*, 12 Q.B.D. 4; 53 L.J. Q.B. 1.

(*z*) *Harris, Ex parte*, 16 Q.B.D. 130; 55 L.J. M.C. 24.

(*a*) 8 Edw. 7, c. 53, s. 6.

(*b*) 8 Edw. 7, c. 28, s. 29. The Law of Distress Amendment Act, 1908, does not apply to any live stock to which s. 29 applies. See 8 Edw. 7, c. 53, s. 4 (1).

belonging to another person has been taken in by the tenant of a holding to be fed at a fair price (*c*), the stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and, if so distrained by reason of other sufficient distress not being found, there shall not be recovered by that distress a sum exceeding the amount of the price agreed to be paid for the feeding, or any part thereof which remains unpaid (*d*). The owner of the stock may, at any time before it is sold, redeem the stock by paying to the distrainor a sum equal to such amount as aforesaid, and any payment so made to the distrainor will be in full discharge as against the tenant for the amount due to him in respect of the price of feeding (*e*); but any portion of the stock so long as it remains on the holding continues liable to be distrained for the amount for which the whole of the stock is distrainable (*f*).

Agricultural or other machinery which is the property of a person other than the tenant, and is on the holding under an agreement with the tenant for the hire or use thereof in the conduct of his business, and also live stock belonging to a stranger but on the holding of the tenant solely for breeding purposes, cannot be distrained for rent (*g*).

Distress—Statutory exemption—Railway rolling stock.—By 35 & 36 Vict. c. 50, the rolling stock (*h*) of a railway company at any works to which there is a siding, which rolling stock is not the property of the tenant of such works, is exempt from distress if it has a distinguishing brand or other conspicuous mark sufficiently indicating the actual owner (*i*); but the landlord may distrain upon the rolling stock, where it is partly the property of the tenant, to the extent of the tenant's interest in it (*k*). A summary order for restoration may be made if rolling stock is distrained contrary to the above provisions.

Distress—Other statutory exemptions.—By various statutes, frames, looms, and apparatus entrusted or hired for use in textile manufactories (*l*), gas meters and fittings (*m*), water meters (*n*), and communication pipes (*o*), electric meters, accu-

(*c*) See *London and Yorkshire Bank* v. *Belton*, 15 Q.B.D. 457; 54 L.J. Q.B. 468; *Masters* v. *Green*, 20 Q.B.D. 807.

(*d*) 8 Edw. 7, c. 28, s. 29 (1).

(*e*) *Ib.*, s. 29 (2).

(*f*) *Ib.*, s. 29 (3).

(*g*) *Ib.*, s. 29 (4). The county court or a court of summary jurisdiction has cognizance of any dispute relating to a distress under the Act of 1908: see ss. 30, 43, 44, and 51 & 52 Vict. c. 21.

(*h*) 35 & 36 Vict. c. 50, s. 3.

(*i*) As to the meaning of "rolling stock," "rent," and "tenant," see 35 & 36 Vict. c. 50, s. 2.

(*k*) 35 & 36 Vict. c. 50, s. 5.

(*l*) 6 & 7 Vict. c. 40, s. 18.

(*m*) 10 & 11 Vict. c. 15, s. 14; 34 & 35 Vict. c. 41, s. 18. A gas stove let for hire by a gas company is exempt: *Gas Light Co.* v. *Hardy*, 17 Q.B.D. 619; 56 L.J. Q.B. 168.

(*n*) 26 & 27 Vict. c. 93, s. 14.

(*o*) 10 & 11 Vict. c. 17, s. 44.

mulators, lines, fittings and apparatus (*p*) belonging to public companies, are exempt from distress.

Distress—Materials placed on demised premises to be manufactured or worked upon.—The goods and chattels of third persons placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as goods sent to a market to be sold, or being in a common inn (*q*), or delivered to a carrier to be carried, or a horse sent to a smith to be shod (*r*); yarn sent to a stocking weaver, to be woven into stockings, but not the frame delivered to the weaver to enable him to weave the yarn (*s*); also silk delivered to a silk weaver to be made into velvet at his own house (*t*); beasts sent to a slaughterer (*u*); corn sent to a miller to be ground; or clothes to a tailor, casks to a cooper, or boats to a boat builder, to be repaired (*x*); goods sent to a weigher to be weighed (*y*), or to an auctioneer to be sold (*z*), or to commission agent (*a*), factor (*b*), warehouseman (*c*), granary keeper (*d*), wharfinger (*e*), pawnbroker (*f*), to be dealt with in the course of trade. But in order that they may be exempt from distress, the goods must have been delivered by the owner to the tenant of the premises to be worked upon in the way of his trade; and therefore, where a ship was being built upon premises of which a shipbuilder was tenant, it was held not to be exempt from distress for rent of the premises (*g*). If the trade can be carried on with profit and advantage without the particular goods being left upon the demised premises, the goods are not exempt. Therefore, barges sent to salt works, and awaiting their turn to be loaded, have been held distrainable (*h*). Casks sent by a brewer to the keeper of a public-house to be returned when empty are not exempt from distress (*i*); nor are horses and carriages standing at livery (*k*),

(*p*) 45 & 46 Vict. c. 56, s. 25.

(*q*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith's L.C. 437 (ed. 11).

(*r*) Y.B. Mich. 7 Hen. 7, f. 2, pl. 1; Co.Litt. 47, a.

(*s*) *Wood* v. *Clarke*, 1 Cr. & J. 484; 9 L.J. (O.S.) Ex. 187.

(*t*) *Gibson* v. *Ireson*, 3 Q.B. 39.

(*u*) *Brown* v. *Shevill*, 2 Ad. & E. 138; 4 L.J. K.B. 50.

(*x*) Bac.Abr. Distress B.; Co.Litt. 47, a; 3 Bl.Com. 8. See also *Wood* v. *Clarke*, 1 Cr. & J. 484; 9 L.J. (O.S.) Ex. 187; and *per* Parke, B., *Muspratt* v. *Gregory*, 7 M. & W. 633; 7 L.J. Ex. 385.

(*y*) *Read* v. *Burley*, Cro. Eliz. 596.

(*z*) *Adams* v. *Grane*, 1 Cr. & M. 380; 2 L.J. Ex. 105; *Brown* v. *Arundell*, 10 C.B. 54; 20 L.J. C.P. 30; *Williams* v. *Holmes*, 8 Exch. 861; 22 L.J. Ex. 283.

(*a*) *Findon* v. *M'Laren*, 6 Q.B. 891; 18 L.J. Q.B. 183.

(*b*) *Gilman* v. *Elton*, 6 Moore, 243.

(*c*) *Miles* v. *Furber*, L.R. 8 Q.B. 77; 42 L.J. Q.B. 41.

(*d*) *Matthias* v. *Mesnard*, 2 C. & P. 353.

(*e*) *Thompson* v. *Mashiter*, 8 Moore, 254; 1 L.J. (O.S.) C.P. 104.

(*f*) *Swire* v. *Leach*, 18 C.B.N.S. 479; 34 L.J. C.P. 150.

(*g*) *Clarke* v. *Millwall Dock Co.*, 17 Q.B.D. 494; 55 L.J. Q.B. 378.

(*h*) *Muspratt* v. *Gregory*, 1 M. & W. 633; 7 L.J. Ex. 385.

(*i*) *Joule* v. *Jackson*, 7 M. & W. 450; 10 L.J. Ex. 142.

(*k*) *Parsons* v. *Gingell*, 4 C.B. 545; 16 L.J. C.P. 227; following *Francis* v. *Wyatt*, 3 Burr. 1498; 1 W.Bl. 483.

nor are goods to be sold not upon the premises of the auctioneer but upon those of the owner (*k*).

Distress—Property of guests at a common inn cannot be distrained for the rent of the inn, for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns, if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn (*m*).

Distress—Chattels in custody of law not distrainable.—Goods and chattels which have been actually seized under a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be distrained for rent, as they are in the custody of the law (*n*); but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent (*o*), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due. If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. c. 25, s. 2), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent (*p*), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken (*q*).

The landlord is entitled, in some cases, to a year's rent (*r*) and in other cases to four weeks' arrears of rent (*s*), before goods taken in execution can be removed from the premises either by the sheriff in the former case or by the bailiff of a county court in the latter case.

Distress—Statutory exemption—Foreign ambassadors.—By 7 Anne, c. 12, s. 3, on grounds of public policy, process of distress against the goods of any ambassador, or other public minister of any foreign prince or state authorised and received as such by the crown, or of his domestic servants, shall be void.

Sed quære, see *Miles* v. *Furber*, L.R. 8 Q.B. 77; 42 L.J. Q.B. 41.

(*l*) *Lyons* v. *Elliott*, 1 Q.B.D. 210; 45 L.J. Q.B. 159.

(*m*) Bro.Abr. Distress, pl. 57, 71; 1 Roll.Abr. 68, pl. 12; Y.B. Mich. 7 Hen. 7, f. 2, pl. 1; Co. Litt. 47, a.

(*n*) *Wharton* v. *Naylor*, 12 Q.B. 673; 17 L.J. Q.B. 278.

(*o*) 3 & 4 Will. 4, c. 27, s. 42; *Humfrey* v. *Gery*, 7 C.B. 567.

(*p*) *Smith* v. *Russell*, 3 Taunt. 400; *St John's College* v. *Murcott*, 7 T.R. 263.

(*q*) *Blades* v. *Arundale*, 1 M. & S. 713.

(*r*) 8 Anne, c. 14, s. 1. See *Addison on Torts*, 970 (ed. 8).

(*s*) 51 & 52 Vict. c. 43, s. 160. See *Addison on Torts*, 990 (ed. 8).

Distress—Statutory exemption—Companies in liquidation.—Sect. 211 of the Companies (Consolidation) Act, 1908 (*t*), provides that where any company (being a company registered in England or Ireland) is being wound up by, or subject to the supervision of the court (*u*), any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding up, shall be void to all intents (*x*). And sect. 142 provides that when a winding-up order has been made, no action, or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose (*y*). However, if a company, being equitable owner of a lease, continues in occupation after a winding-up order, the landlord would not be prevented by either of the above sections from distraining upon the goods of the company for rent accrued since the winding up (*z*); and if he has no right of proof for the rent he may distrain where the company is undertenant to a lessee (*a*); but he cannot distrain where he has a right to prove in the bankruptcy in respect of a collateral security for the rent (*b*).

Distress—Things distrainable—Chattels of traders left on demised premises in possession of tenant.—With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, pp. 785, 786), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody

(*t*) 8 Edw. 7, c. 69, s. 211, re-enacting 25 & 26 Vict. c. 89, s. 163.

(*u*) *I.e.*, in the case of companies registered in England, the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and the County Courts, see 8 Edw. 7, c. 69, ss. 131, 285.

(*x*) See *Progress Assurance Co., In re*, L.R. 9 Eq. 370; 39 L.J. Ch. 504.

(*y*) 8 Edw. 7, c. 69, s. 142, re-enacting 25 & 26 Vict. c. 89, s. 87. A similar provision is made in respect to companies authorized to be registered under Part VII. of the Act by s. 266, and in respect of unregistered companies by s. 271.

(*z*) See *Lundy Granite Co., In re*, L.R. 6 Ch. 462; 40 L.J. Ch. 588; whether the leave of the court is necessary, *quære*; *S. C.* See *Oak Pits Co., In re*, 21 Ch. D. 322; 51 L.J. Ch. 768; *Lancashire Cotton Co., In re*, 35 Ch.D. 656; 56 L.J. Ch. 761. As to rent payable in advance, see *Shackell* v. *Churlton*, (1895) 1 Ch. 378; 64 L.J. Ch. 353.

(*a*) *Clemence, Ex parte*, 23 Ch.D. 154; 52 L.J. Ch. 472.

(*b*) See on this point, *New City Constitutional Club, In re*, 34 Ch.D. 646; 56 L.J. Ch. 332; and *Harpur Cycle Fittings Co., In re*, (1900) 2 Ch. 731; 69 L.J. Ch. 841, in which case *Clemence, Ex parte, supra*, was not followed.

and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable (*c*). A carriage sent to a coach-maker to be repaired if left on the premises, after the repairs have been completed, for purposes foreign to the trade of a coach-maker, is distrainable, unless the coach-maker exercise some other trade thereon, and the carriage is left with him to be dealt with by him in the exercise of such trade; but if the trade of a commission agent for the sale of coaches and carriages is exercised as well as that of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption (*d*). It has been held that a carriage standing at livery is distrainable (*e*). Whenever a chattel, such as a threshing-machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if not in actual use at the time of the levying the distress (*f*). Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress (*g*).

Distress—Chattels mortgaged by tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and the landlord carried back to the demised premises part of the goods remaining unsold, and returned them to the mortgagor, it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been

(*c*) *Muspratt* v. *Gregory*, 3 M. & W. 677; 7 L.J. Ex. 385; *Joule* v. *Jackson*, 7 M. & W. 450; 10 L.J. Ex. 142.

(*d*) *Findon* v. *M'Laren*, 6 Q.B. 891; 14 L.J. Q.B. 183.

(*e*) *Francis* v. *Wyatt*, 3 Burr. 1498; 1 W.Bl. 483; *Parsons* v. *Gingell*, 4 C.B. 545.

(*f*) *Fenton* v. *Logan*, 3 M. & Sc. 82; 2 L.J. C.P. 102; *Gorton* v. *Falkner*, 4 T.R. 565.

(*g*) *Miles* v. *Furber*, L.R. 8 Q.B. 77; 42 L.J. Q.B. 41.

before they were taken away (*h*). If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than six months' rent (*i*), and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankruptcy Act was never intended to favour the mortgagee at the expense of the landlord, and applies only to the goods or effects of the bankrupt (*k*).

Distress—Things distrainable under licence to distrain.—If a debtor gives his creditor a licence to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises (*l*), and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a licence of this sort cannot be made to extend to and to bind those who are not parties to it (*m*). A licence to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another (*n*). The grantee of a rent-charge, with power of distress, may justify the taking corn, &c., in a stack or in trusses, under 2 Will. & M. sess. 1, c. 5 (*ante*, p. 785), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff, whose goods have been taken, held under a demise prior to the rent-charge, he ought to reply that fact (*o*).

Distress—Seizure of goods fraudulently removed.—By 11 Geo. 2, c. 19, s. 1, it is enacted (*p*), that if any tenant of any lands or tenements, upon the demise or holding whereof any rent is reserved, fraudulently or clandestinely conveys away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, the landlord, or any person by him for that purpose lawfully empowered, may, within thirty days next ensuing the carrying away of the goods, seize the same wherever they may be found, as a

(*h*) *Evans* v. *Wright*, 2 H. & N. 527; 27 L.J. Ex. 50.

(*i*) See 53 & 54 Vict. c. 71, s. 28.

(*k*) *Brocklehurst* v. *Lawe*, 7 E. & B. 185; 26 L.J. Q.B. 107; s. 129 of the old Act (12 & 13 Vict. c. 106), under which this case was decided, and s. 42 of the present Act (46 & 47 Vict. c. 52) are substantially the same. See also *Railton* v. *Wood*, 15 App.Cas. 363; 59 L.J. P.C. 84.

(*l*) As to after-acquired property, see *Reeve* v. *Whitmore*, 32 L.J. Ch. 497; 33 *ib.* 63.

(*m*) *Howes* v. *Ball*, 7 B. & C. 481; 6 L.J. (O.S.) K.B. 106; *Freeman* v. *Edwards*, 2 Exch. 739; 17 L.J. Ex. 258.

(*n*) *Brown* v. *Metrop. Counties Assur. Soc.*, 28 L.J. Q.B. 236; 1 E. & E. 838; *Davis & Co., In re*, 22 Q.B.D. 193.

(*o*) *Johnson* v. *Faulkner*, 2 Q.B. 936; 11 L.J. Q.B. 193; as to a distress for tithe rent-charge, see *Arnison, Ex parte*, L.R. 3 Ex. 57; 37 L.J. Ex. 57.

(*p*) See also *Addison on Torts*, 322 (ed. 8).

distress for such arrears of rent, and sell and dispose of them as if they had been actually distrained upon the demised premises (*q*); but sect. 2 provides that no landlord or lessor, or other person entitled to such arrears shall take or seize any such goods or chattels as a distress for the same which have been sold *bonâ fide* and for a valuable consideration, before such seizure made, to any person not privy to such fraud. Where the goods have been placed in any building or inclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the daytime break open the building and seize the goods; but, before breaking open a dwelling house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling house (*r*). The statute only applies where the goods, had they remained on the premises, could have been distrained (*s*).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute (*t*). If, therefore, goods are removed on quarter-day, they may be followed, though the rent is not in arrear, and there is no right to distrain until the day after (*u*). But if the rent is not due, or there is sufficient distress on the demised premises, independently of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods (*x*). The statute applies solely to the goods of a tenant, and not to those of a stranger (*y*); if, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant whose lodger he is, the landlord cannot follow them and distrain them (*z*). To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt (*a*),

(*q*) The goods must have been fraudulently removed before the termination of the tenancy: *Gray* v. *Stait*, 11 Q.B.D. 668; 52 L.J. Q.B. 412.

(*r*) As to the mode of preventing the fraudulent removal of goods within the Metropolitan Police district, see 10 Geo. 4, c. 44, s. 4; 2 & 3 Vict. c. 47, ss. 2, 67. As to pleas of justification of the seizure of goods under this statute, see *Williams* v. *Roberts*, 7 Exch. 629; 22 L.J. Ex. 61.

(*s*) See *Gray* v. *Stait*, *supra*.

(*t*) *Opperman* v. *Smith*, 4 D. & R. 33, 2 L.J. (O.S.) K.B. 108; *John* v. *Jenkins*, 1 Cr. & M. 227; 2 L.J. Ex. 83.

(*u*) *Dibble* v. *Bowater*, 2 E. & B. 564; 22 L.J. Q.B. 396.

(*x*) *Rand* v. *Vaughan*, 1 Sc. 670; 4 L.J. C.P. 239.

(*y*) *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q.B.D. 135.

(*z*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*a*) 11 Geo. 2, c. 19, s. 3.

or (if the goods do not exceed 50*l.* in value) by a summary proceeding before two justices (*b*), or a magistrate (*c*).

Distress—What amounts to distress for rent.—It is sufficient to constitute a distress if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains the things intended to be distrained for his rent (*d*). But a mere intention to distrain will not be sufficient if it is not carried into effect (*e*); nor will a mere notice by a landlord that he has distrained things which are not distrainable, unaccompanied by any seizure or removal of the goods, constitute any cause of action (*f*). If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent (*g*). Where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable (*h*).

Distress for more rent than due.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand but upon the amount due in fact, and that if he wishes to make the detainer unlawful he should tender the sum which is due, together with the costs of the distress (*i*).

(*b*) 11 Geo. 2, c. 19, s. 4; *Horsefall* v. *Davy*, 1 Stark. 169; *Bromley* v. *Holden*, M. & M. 175; *Bach* v. *Meats*, 5 M. & S. 200.

(*c*) 21 & 22 Vict. c. 73, s. 1.

(*d*) *Wood* v. *Nunn*, 2 Moo. & P. 30; 6 L.J. (O.S.) C.P. 198; *Cramer* v. *Mott*, L.R. 5 Q.B. 357; 32 L.J. Q.B. 172; *Swann* v. *Falmouth* (*Earl*), 8 B. & C. 456; 6 L.J. (O.S.) K.B. 374; *Thomas* v. *Harries*, 1 Sc. N.R. 524; 9 L.J. C.P. 308.

(*e*) *Spice* v. *Webb*, 2 Jur. 943.

(*f*) *Beck* v. *Denbigh*, 29 L.J. C.P. 273.

(*g*) *Green* v. *St. Kath. Dock Co.*, 19 L.J. Q.B. 53.

(*h*) *Hartley* v. *Moxham*, 3 Q.B. 701; 12 L.J. Q.B. 41; *Cotton* v. *Bull*, Easter Term, 1857, C.P.; *Cramer* v. *Mott*, *supra*.

(*i*) *Tancred* v. *Leyland*, 16 Q.B. 669; 20 L.J. Q.B. 316; *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125; *Stevenson* v

Distress—Repeated distresses for same rent.—A landlord cannot lawfully distrain twice for the same rent (*k*), unless the distress has been withdrawn at the instance of the tenant (*l*), or unless there has been some mistake as to the value of the things seized (*m*), or there was not sufficient distress on the premises, and the claim for rent is still unsatisfied (*n*); or unless the distress has been rendered abortive by the threats or misconduct of the tenant. But if there is a fair opportunity, and there is no lawful or legal cause why the landlord should not work out the payment of rent by reason of his first distress, his duty is to work it out, and he cannot distrain again (*o*). Where the former proceeding was a trespass by reason of the bailiff having broken open the front door, and the rent remained unsatisfied owing to the bailiff having left the premises and having been refused re-admittance, it was held that the former proceeding was void as a distress (*p*), and that the landlord might distrain again (*q*). If, after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again (*r*). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonoured when it arrives at maturity, the landlord may distrain again (*s*).

Distress—Impounding goods (*t*).—At common law the distrainor could not impound the distress upon the demised premises (*u*); but now by statute (*x*) the distrainor may impound or otherwise secure the distress in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing the distress. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Cattle are sufficiently impounded if they are

Newnham, 13 C.B. N.S. 285]; 22 L.J. C.P. 110; *French* v. *Phillips*, 1 H. & N. 564; 26 L.J. Ex. 82.

(*k*) See *Hutchins* v. *Chambers*, 1 Burr. 579.

(*l*) *Hutchins* v. *Chambers*, *supra*; *Bagge* v. *Mawby*, 8 Exch. 641; 22 L.J. Ex. 236; *Wollaston* v. *Stafford*, 15 C.B. 278.

(*m*) *Bagge* v. *Mawby*, *supra*.

(*n*) *Smith* v. *Goodwin*, 4 B. & Ad. 413; 2 L.J. K.B. 192; *Dawson* v. *Cropp*, 1 C.B. 961; 14 L.J. C.P. 281.

(*o*) *Per* Parke, B., *Bagge* v. *Mawby*, *supra*.

(*p*) On the authority of *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L.J. Q.B. 146.

(*q*) *Grunnell* v. *Welch*, (1905) 2 K.B. 650; aff., (1906) 2 K.B. 555; 74 L.J. K.B. 925.

(*r*) *Lee* v. *Cooke*, 3 H. & N. 203; 27 L.J. Exch. 337.

(*s*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 L.J. Ex. 291.

(*t*) As to pound-breach and rescue, see *Addison on Torts*, 336, 337 (ed. 8).

(*u*) Bro.Abr. Distress, 30; Vin.Abr. Distress, E. 4.

(*x*) 11 Geo. 2, c. 19, s. 10.

allowed to remain in the field where they are distrained, and the gates of the field are properly secured (*y*). It is not necessary that the goods should be locked up, or even placed together in order to constitute an impounding under 11 Geo. 2, c. 19; it seems to be sufficient if the landlord seizes and gives notice to the tenant of his intention to impound the goods (*z*). Where the landlord's bailiff walked round the demised premises (a wharf) and left a written notice that the goods thereon were distrained for rent and would be appraised and sold if not replevied within five days, this was treated by the court as a sufficient impounding (*a*). The person distraining must not remain longer on (*b*), nor exclude the tenant from the demised premises more than is reasonably necessary for effectually impounding the distress (*c*). If goods are all put into one room, and notice is given to the tenant that they are distrained and impounded, that is a good impounding; and so also if, instead of being placed in one room, they are, with the assent of the tenant, left unmoved in the house, and a man is put in possession (*d*). It is not necessary, when once the distress is impounded, for the distrainor, or anyone on his behalf, to remain in possession of them, because they are then in the custody of the law (*e*). It is the duty of the distrainor to find a fit and proper pound (*f*).

Formerly the distrainor, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them; but it was enacted by the statute of Marlbridge (52 Hen. 3, c. 4), and re-enacted by 3 Edw. 1, c. 16, that persons should not chase beasts distrained out of the shire where they were taken; and by 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where it is or shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where such distress was taken; and further that no cattle or other goods distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners shall be constrained to sue several replevies for the

(*y*) *Castleman* v. *Hicks*, Car. & M. 266.

(*z*) *Firth* v. *Purvis*, 5 T.R. 432; *Thomas* v. *Harries*, 1 M. & G. 695; 9 L.J. C.P. 308.

(*a*) *Swann* v. *Falmouth* (*Earl*), 8 B. & C. 456; 6 L.J. (O.S.) K.B. 374.

(*b*) See *Winterbourne* v. *Morgan*, 11 East, 395; *Ladd* v. *Thomas*, 12 Ad. & E. 117; 9 L.J. Q.B. 345, *per* Ld. Denman, C.J.

(*c*) *Woods* v. *Durrant*, 16 M. & W. 149; 16 L.J. Ex. 313.

(*d*) *Tennant* v. *Field*, 8 E. & B. 336; 27 L.J. Q.B. 33.

(*e*) *Jones* v. *Beirnstein*, (1900) 1 Q.B. 100; 69 L.J. Q.B. 1.

(*f*) *Wilder* v. *Speer*, 8 Ad. & E. 547; 7 L.J. Q.B. 249; *Bignell* v. *Clarke*, 5 H. & N. 485; 29 L.J. Ex. 257.

delivery of the distress so taken at one time; upon pain every person offending contrary to this Act shall forfeit to the party grieved for every such offence 100*s*. and treble damages. In the case of live-stock being impounded, the distrainor is bound, by statute (*g*) to provide the stock or cattle with food and water, and he is empowered to sell them in order to reimburse himself (*h*). If the distrainor uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel (*i*), tans hides, or uses or works beasts or cattle (*k*), he subjects himself to an action for damages at the suit of the owner thereof (*l*). Where the distress is being used in a manner which the law will not justify, the owner may interfere to prevent the abuse (*m*). If the pound is broken, and the goods are unlawfully taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third person for the purpose of retaking the goods, except it be on fresh pursuit (*n*).

Although a landlord can impound either upon or off the premises provided that in the latter case the distress is removed to a proper pound (*o*), yet there are two cases in which he has no choice, but must impound upon the premises. Those cases are (1) sheaves and cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with the rent (*p*); and (2) corn, grass, hops, roots, fruits, pulse or other product growing on the demised premises, which by statute are to be cut, gathered, made, cured, carried, and laid up, when ripe, in the barns or other proper place on the demised premises, if there be such a place; if not, the landlord or lessor may place them in any other barn or proper place hired or procured by him for the purpose, and as near as may be to the premises; after which they are, in a convenient time, to be appraised, sold, or otherwise disposed of towards satisfaction of the rent and charges, &c., the appraisement to be taken after the crops have been cut, gathered, cured and made, and not before; but in the event of payment of

(*g*) 12 & 13 Vict. c. 92, s. 15, and 17 & 18 Vict. c. 60, s. 1.

(*h*) *Layton* v. *Hurry*, 8 Q.B. 811; 15 L.J. Q.B. 244.

(*i*) *Dod* v. *Monger*. 6 Mod. 216.

(*k*) *Oxley* v. *Watts*, 1 T.R. 12; *Six Carpenters' Case*, 8 Co. 146, a.

(*l*) *Duncomb* v. *Reeve*, Cro.Eliz. 783; see also 11 Geo. 2, c. 19, s. 19.

(*m*) *Smith* v. *Wright*, 6 H. & N. 821; 30 L.J. Ex. 313.

(*n*) *Rich* v. *Woolley*, 5 M. & P. 675; 7 Bing. 651.

(*o*) As to where premises are not suitable for impounding, see *Smith* v. *Ashforth*, 29 L.J. Q.B. 259.

(*p*) 2 Will. & M. sess. 1, c. 5, s. 3.

the whole rent then in arrear, with the costs and charges of the distress, or upon lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same is to cease, and the crops and produce distrained are to be delivered up to the tenant (*q*).

Distress—Abandonment of distress.—Leaving possession of goods distrained does not necessarily amount to an abandonment of the distress (*r*). If, therefore, a bailiff or party in possession leaves the premises temporarily and with no intention of abandoning the distress, and on his return is refused readmission, he may break open the outer door of the house to recover possession of the distress (*s*).

Distress—Statutory power of sale.—By 2 Will. & M. c. 5, s. 2, amended by 35 & 36 Vict. c. 92, s. 13, where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same with sufficient security, &c., then, after such distress and notice, and after the expiration of the said five days, the person distraining "shall and may" (*t*), cause the goods and chattels so distrained to be appraised by two appraisers, and after such appraisement "shall and may lawfully sell (*u*) the goods so distrained for the best price (*x*) that can be gotten towards satisfaction of the rent" and charges, leaving the overplus (if any) in the hands of the sheriff, undersheriff, &c., for the owner's use. But now, by the Law of Distress Amendment Act, 1888 (*y*), the necessity for appraisement is abolished unless the tenant or owner require in writing an appraisement to be made, in which case he must pay the costs of it. By the same Act the period of five days for replevying is extended to a period of not more than fifteen days if the tenant or owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned thereby, but the person levying has power, with the consent in writing of the tenant or owner,

(*q*) 11 Geo. 2, c. 19, s. 8.

(*r*) *Swann* v. *Falmouth* (*Earl*), 8 B. & C. 456; 6 L.J. (O.S.) K.B. 374.

(*s*) *Bannister* v. *Hyde*, 29 L.J. Q.B. 141; 2 E. & E. 627; *Eldridge* v. *Stacey*, 15 C.B. N.S. 458; *Kerby* v. *Harding*, 6 Exch. 234; 20 L.J. Ex. 163.

(*t*) *Hudd* v. *Racenor*, 2 B. & B. 662; 2 J. B. Mo. 542.

(*u*) See *King* v. *England*, 33 L.J. Q.B. 145; 4 B. & S. 782, *post*, p. 805; *Sharp* v. *Fowle*, 12 Q.B.D. 385; 53 L.J. Q.B. 309.

(*x*) See *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772.

(*y*) 51 & 52 Vict. c. 21, s. 5.

to sell the goods at any time before the expiration of the extended period (*z*).

Distress—Tender of rent before sale.—If, after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for upon the equity of the statute, 2 Will. & M. sess. 1, c. 5, s. 2, which gives the tenant five days to replevy the things distrained, the tenant has the same time for tendering the rent and expenses, and an action is maintainable against a landlord who persists in selling after tender of the rent and costs within the time allowed for replevy (*a*). In the case of a distress of growing crops the tenant may tender the rent and expenses at any time before the crops are ripe (*b*). Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the cost of the distress up to the time of the tender, and the bailiff refuses to give up the goods and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages (*c*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful (*d*).

Distress—Parties to whom tender may be made.—A bailiff authorised to distrain for rent has power given him at the same time to receive the rent (*e*), and the landlord has no right to circumscribe the bailiff's authority in this respect (*f*), for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain (*g*); but it does not follow, that because the tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods (*h*).

Distress—Notice of distress is not essential at common law to the validity of the distress (*i*). It has been expressly laid

(*z*) 51 & 52 Vict. c. 21, s. 6.

(*a*) *Johnson* v. *Upham*, 21 L.J. Q.B. 252; 2 E. & E. 250, overruling, on this point, *Ladd* v. *Thomas*, 12 Ad. & E. 117; 9 L.J. Q.B. 345, and *Ellis* v. *Taylor*, 8 M. & W. 415; 10 L.J. Ex. 462. See also *Addison on Torts*, 340 (ed. 8).

(*b*) *Owen* v. *Leigh*, 3 B. & Ald. 470.

(*c*) *Loring* v. *Warburton*, 28 L.J. Q.B. 31; E. B. & E. 507; *Johnson* v. *Upham*, *supra*.

(*d*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125. See also *ante*, p. 796.

(*e*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L.J. Ex. 224.

(*f*) *Hatch* v. *Hale*, 15 Q.B. 10; 19 L.J. Q.B. 289.

(*g*) *Hatch* v. *Hale*, *supra*.

(*h*) *Boulton* v. *Reynolds*, 29 L.J. Q B. 11; 2 E. & E. 369.

(*i*) *Trent* v. *Hunt*, 9 Exch. 20; 22 L.J. Ex. 318; *Sims* v. *Tuffs*, 6 C. & P. 207.

down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (*k*); but 2 Will. & M. c. 5, s. 2, requires, as we have seen (*ante*, p. 800), notice of the distress to be given preparatory to a sale by the landlord, and 11 Geo. 2, c. 19, authorising the distress and sale of goods fraudulently removed (*ante*, p. 794), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (*ante*, p. 785), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days (or fifteen upon request (*l*)), under the statute of Will. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress, which must be in writing (*m*), should set forth the amount of rent distrained for, as well as the particular things taken (*n*). A written notice of distress is not invalidated by a statement that the rest is due to *A.*, whereas it is due to *B.*, provided *B* has authorised the distress (*o*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant (*p*).

Distress Sale.—If the tenant, after he has received notice of the distress, neglects for the period given, to be reckoned exclusively both of the day of distress and of the day of sale, to pay the rent, the lessor or distrainor may sell the goods for the best price (*q*) that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the

(*k*) 1 Roll.Abr. 647, Distress, pl. 1; *Tancred* v. *Leyland*, 16 Q.B. 669; 20 L.J. Q.B. 316.

(*l*) 51 & 52 Vict. c. 21, s. 6.

(*m*) *Wilson* v. *Nightingale*, 8 Q.B. 1034; 15 L.J. Q.B. 309.

(*n*) *Wakeman* v. *Lindsey*, 14 Q.B. 625; 19 L.J. Q.B. 166; *Kerby* v. *Harding*, 6 Exch. 234; 20 L.J. Ex. 163.

(*o*) *Trent* v. *Hunt*, *ante*, p. 801.

(*p*) *Bishop* v. *Bryant*, 6 C. & P. 484.

(*q*) See 2 Will. & M. sess. 1, c. 5, s. 2.

sale (*r*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay or straw must, nevertheless, sell it in the ordinary way for the best price; if he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling it at the best price (*s*).

Distress—Costs and expenses.—By 57 Geo. 3, c. 93, s. 1, no person making any distress for rent, where the sum demanded and due does not exceed 20*l.* shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold any more than the costs and charges then fixed by the schedule to that Act. These costs and charges are now regulated by the Distress for Rent Rules, 1888, rr. 15, 16, different scales being provided according as to whether the amount of rent demanded and due does or does not exceed 20*l.* In the latter case the charges are, for levying the distress, 3*s.*; for the man in possession, 4*s.* 6*d.* per day (to provide his own board in every case) (*t*); for appraisement, whether by one or more broker, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp; for advertisements, 10*s.*; for removal (at tenant's request), reasonable expenses, to be taxed in case of difference by the registrar; for commission, catalogues, sale and delivery of goods to the purchaser, 1*s.* in the pound on the net produce of the sale (*u*). If more costs and charges are levied than those allowed by the Act, the party aggrieved has a summary remedy before a justice of the peace for treble the amount of the charges, or he may bring an action for the recovery of them (*x*); but it is provided (s. 4) that no order or judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress whatsoever is to give a copy of his charges, and of all the costs and charges of the distress, signed by him, to the person or persons on whose goods and chattels any distress shall have been levied, although the amount of the rent demanded may exceed the sum

(*r*) *Robinson* v. *Waddington*, 18 L.J. Q.B. 250; the marginal note of this case, in 13 Q.B. 753, is incorrect.

(*s*) *Ridgway* v. *Stafford* (*Lord*), 6 Exch. 404; 20 L.J. Ex. 226; *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772; *ante*, p. 800.

(*t*) Even this charge may not under all circumstances be justifiable; see *Arnison, Ex parte*, L.R. 3 Ex. 56; 37 L.J. Ex. 57.

(*u*) As to charges for impounding goods distrained in public pound, see 1 & 2 Ph. & M. c. 12, s. 2; *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

(*x*) 57 Geo. 3, c. 93, s. 2, as amended by 47 & 48 Vict. c. 43, s. 4; and see *Robson* v. *Biggar*, (1907) 1 K.B. 690; 76 L.J. K.B. 248.

of 20*l.* (*y*). When the rent distrained for exceeds 20*l.*, the costs are now provided for by the Distress for Rent Rules, 1888, Append. II., Scale I. (*z*).

Distress—Effect of non-compliance with statutes authorising sale.—By sect. 19 of 11 Geo. 2, c. 19, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio;* but the party aggrieved by such unlawful act of irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more. The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. Where there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Where the damages are merely nominal the defendant is entitled to a verdict (*a*). The statute does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer door, and where, consequently, no valid distress has ever been effected (*b*).

Distress—Keeping distress without selling.—It has generally been considered that the words in the 2 Will. & M. c. 5, s. 2, "shall and may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to sell, if the tenant does not replevy within the due period, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention (*c*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (*ante*, p. 772), and he can only be made responsible for not selling

(*y*) 57 Geo. 3, c. 93, s. 6; see also Distress for Rent Rules, 1888, r. 18.

(*z*) These rules were made pursuant to 51 & 52 Vict. c. 21, s. 8, under which the Lord Chancellor has power from time to time to make rules for regulating the fees, charges, and expenses incidental to distresses, and for regulating the securities to be given by bailiffs.

(*a*) *Rodgers* v. *Parker*, 18 C.B. 112; 25 L.J. C.P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L.J. Ex. 246; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326; 2 L.J. Ex. 111.

(*b*) *Attack* v. *Bramwell*, 32 L.J. Q.B. 146; 3 B. & S. 520; see *Addison on Torts*, 340 (ed. 8).

(*c*) *West* v. *Nibbs*, 4 C.B. 186; *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125; *Rodgers* v. *Parker*, *supra*; see *Fell* v. *Whittaker*, L.R. 7 Q.B. 120; 41 L.J. Q.B. 78.

in an action founded upon the statute; but the landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent (*d*). To obtain a title as against a third person whose goods have been distrained, there must be an actual sale; a taking of the goods by the landlord at the appraised value is not sufficient (*e*). The landlord cannot himself become the purchaser of goods sold by him under a distress (*f*). When a landlord distrains and does not sell he cannot while he holds the distress bring an action for rent (*g*).

SECTION II.

THE LETTING OF CHATTELS.

Bailments for hire.—The term bailment denotes, in the common law, a delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the benefit of the owner, or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and is applied to contracts for the letting and hiring of chattels, as well as to contracts for the delivery of them to persons for safe custody or to workmen to be worked upon or dealt with in the course of their employment. The term is also equally applicable to contracts for the letting and hiring of realty, although it is not used in the common law to denote that class of contracts. In this class of contracts, the person who delivers the chattel for the purposes of the contract is called the bailor, and the party who receives it the bailee. If one man bails or delivers a chattel to another to be used for hire upon the express or implied understanding that the chattel is to be put into a serviceable state and made ready for immediate use by the hirer, there is no implied warranty or undertaking on the part of the bailor that the chattel is in any particular state or condition, or fit for any particular purpose. But, if he expressly or impliedly represents it to be fit for immediate use, or to be applicable to any particular purpose, he impliedly warrants the use for which he receives the hire.

(*d*) *Jones* v. *Sawkins*, 5 C.B. 142; 17 L.J. C.P. 92.

(*e*) *King* v. *England*, 33 L.J. Q.B. 145; 4 B. & S. 782.

(*f*) *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, (1904) 1 K.B. 820; 73 L.J. K.B. 457.

(*g*) *Lehain* v. *Philpott*, L.R. 10 Ex. 242; 44 L.J. Ex. 245.

If a man, for example, lets out the naked hull or the mere fabric of a vessel, upon the terms that the hirer is to man and equip her, and get her ready for sea, there is no implied warranty or undertaking on the part of the shipowner that the vessel is in any particular state and condition at the time of the making of the contract. But, if he mans and provisions and equips the vessel himself, and holds her out as fit for immediate use, there is an implied promise or undertaking on his part that she is seaworthy and fit for use, and properly found and provided with stores and provisions, seamen and officers, and all things needful to the due prosecution of the voyage (*h*). And, if a man lets out furniture for immediate use, there is an implied warranty on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it (*i*). The owner of furniture agreed to let it on hire at a monthly rent in consideration of the hirer agreeing to pay a sum of 35*l.* as the consideration for an option of purchase. The agreement provided that if the hirer did not duly perform it, the owners might re-take possession of the furniture; that the hirer might terminate the hiring by a week's notice and giving up the furniture; that if the agreement were duly performed by the hirer he might at any time during the continuance thereof purchase the furniture; and that the hirer should not be entitled to credit for the amount paid for the option or for rent except on purchase of the furniture. The hirer having made default in payment of some of the monthly instalments, the owners resumed possession of the furniture, and in a subsequent action brought by the hirer counterclaimed for the amount of the arrears of rent. It was held that the owner by so retaking possession had not abandoned his right to sue for the arrears of rent (*j*). If a man lets out a horse bridled and saddled, and prepared for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod (*k*), and free from such vices and defects as render it dangerous and unfit to ride.

(*h*) *Lyon* v. *Mells*, 5 East, 437; *Burges* v. *Wickham*, 33 L.J. Q.B. 17; 3 B. & S. 669; *Stanton* v. *Richardson*, L.R. 9 C.P. 390; 43 L.J. C.P. 230; *Steel* v. *State Line Steamship Co.*, 3 App.Cas. 72; *Tattersall* v. *National Steamship Co.*, 12 Q.B.D. 297; 53 L.J. Q.B. 332; *The Glenfruin*, 10 P.D. 103; 54 L.J. P. 49; *The Laertes*, 12 P.D. 187; 56 L.J. P. 108; *Gilroy* v. *Price*, (1893) A.C. 56; *Queensland National Bank* v. *P. & O. Co.*, (1898) 1 Q.B. 567; 67 L.J. Q.B. 402; *Maori King* v. *Hughes*, (1895) 2 Q.B. 550; 65 L.J. Q.B. 168; see *Addison on Torts*, p. 746 (ed. 8).

(*i*) *Sutton* v. *Temple*, 12 M. & W. 60; 13 L.J. Ex. 17.

(*j*) *Brooks* v. *Beirnstein*, (1909) 1 K.B. 98; 78 L.J. K.B. 243.

(*k*) *Blakemore* v. *Bristol & Exeter Ry.*, 8 E. & B. 1051; 27 L.J. Q.B. 167.

Duties and responsibilities of hirers of chattels.—If a coach-proprietor lets his coach and horses for a journey, and the coach is driven by the coachman, and is under the direction and management of the servants of the owner, the latter is bound to keep the horses properly shod, and the carriage in good travelling order; but, if the possession thereof is transferred to the hirer, and the carriage is driven and managed by the hirer's servants, this duty then falls upon the hirer, although the owner or letter of the chattel may, under certain circumstances, be obliged to repay to the hirer the money expended by him in repairs. Whenever a chattel delivered to a hirer to be used for hire has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident which threatens its destruction, and the effects of such partial injury may be obviated and the chattel preserved for future use by repairs, there is an implied authority from the owner to the hirer to undertake the necessary repairs, and incur all such expenses as a prudent man would, under the circumstances, incur for the preservation of his own property.

Use of chattels let to hire—Losses from negligence.—Every hirer of a chattel is bound to use the thing let in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property (*l*), and to return it to the bailor or owner at the time appointed for its return (or within a reasonable period after request, if no such time has been agreed upon), in as good condition as it was in at the time of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use, and by injuries caused by accidents which have happened without any fault or neglect on the part of the hirer. Where the hirer contracted to deliver up a barge at the conclusion of the hiring "in good working order with all her rigging, gear, and implements complete," it was held that this must be construed with reference to the condition of the barge (which was an old one) at the commencement of the hiring (*m*).

Losses from piracy, robbery, theft, disease, and accident.—If the thing let to hire perishes, or is destroyed by fire, or is stolen without any neglect on the part of the hirer, the latter will not be responsible for the loss (*n*); but in cases of stealing, a robbery by force must be proved, or, if there has been a

(*l*) *Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413; 60 L.J. Q.B. 676.

(*m*) *Shroder* v. *Ward*, 13 C.B. N.S. 410; 32 L.J. C.P. 150.

(*n*) *Williams* v. *Lloyd*, W.Jones, 179; *Taylor* v. *Caldwell*, 3 B. & S. 836; 32 L.J. Q.B. 164; see *Addison on Torts*, p. 747 (ed. 8).

secret theft, it must be shown by the hirer that he had taken all such precautions as are ordinarily taken by prudent men to protect their own property. If a ship hired for a particular voyage, and placed in the possession and under the control of the hirer, be captured by pirates, or be lost in a storm in the ordinary course of the voyage, the owner must bear the loss; but, if the hirer has deviated from the ordinary course, and sailed unnecessarily through dangerous channels, or into seas infested with pirates, and needlessly encountered risks not contemplated by the owner at the time of the hiring, and which would probably not have been run by him except for a greatly increased rate of remuneration, the hirer is liable for the loss. An owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto (*o*).

Determination of bailment.—If chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment; if he sells, or attempts to sell, the chattels, or to dispose of them in such a way as to put it out of his power to return them, the act operates like a disclaimer of tenancy (*ante*, p. 708), the bailment is at an end, and the possessory title reverts to the bailor, and entitles him to maintain an action for the value of the chattels (*p*).

Loans of money to be used for hire.—The lending of money for hire is ordinarily denominated a loan at interest, as distinguished from a *commodatum* or gratuitous loan, where the sum advanced only is paid back without any interest or fruits of increase. A loan of money to be used for hire is a loan for use and consumption, the identical thing lent not being intended to be returned, but its equivalent in value and kind. The absolute property, therefore, in the subject-matter of the loan passes together with the transfer of the possession to the hirer or borrower; and the latter becomes indebted to the lender in an equivalent in value and amount, with interest, which must be paid and rendered to the latter at the time agreed upon, or within a reasonable period after demand made, in case no time for its return has been limited. The liability of the hirer or borrower, consequently, to repay the equivalent amount is not discharged by the loss of the money from robbery, fire, or in-

(*o*) *Mears* v. *L. & S. W. Ry.*, 11 C.B. N.S. 850; 31 L.J. C.P. 220; and see *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L.J. Ex. 231; see *Addison on Torts*, p. 578 (ed. 8).

(*p*) *Fenn* v. *Bittleston*, 7 Exch. 159; 21 L.J. Ex. 41.

evitable accident. On a contract to lend money, no action will lie for the money; an action will only lie for breach of the contract; the measure of damages will be the loss sustained by the borrower by reason of the breach (*q*).

Moneylenders.—The rights of persons lending money at interest are dealt with by the Moneylenders Act, 1900 (*r*). The term "moneylender" is defined to include every person whose business is that of moneylending, or who advertises or holds himself out as carrying on that business; but does not include pawnbrokers, registered friendly, building or loan societies, any corporate body authorised by statute to lend money or any person *bonâ fide* carrying on banking or insurance business, or "any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money" (*s*). Sect. 2 compels moneylenders to register their names and to carry on business in their registered names (*ss*). If a moneylender enters into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or takes any security for money in the course of such business, without having registered himself as a moneylender, as required by sect. 2, sub-sect. 1 (a) of the Moneylenders Act, 1900, his contract is rendered illegal by sect. 2, sub-sect. 1 (c), and cannot be enforced (*t*). Not every man who lends money at interest carries on the business of moneylending within the meaning of the Moneylenders Act, 1900. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry provided that they are, from his point of view, eligible. But this does not mean that a moneylender can avoid the Act by limiting his *clientèle* to those whom he chooses to designate "friends." Each case must be decided on the particular facts (*u*).

Where any such moneylender takes proceedings for the enforcement of any agreement or security for money lent the court may re-open the transaction if it is satisfied that the

(*q*) *South African Territories* v. *Wallington*, (1897) 1 Q.B. 692; 66 L.J. Q.B. 551.

(*r*) 63 & 64 Vict. c. 51.

(*s*) Sect. 6.

(*ss*) *Kirkwood* v. *Gadd*, (1910) A.C. 422; 79 L.J. K.B. 815; *Staffordshire Fin. Co.* v. *Valentine*, (1910) 2 K.B. 233; 79 L.J. K.B. 680.

(*t*) *Bonnard* v. *Dott*, (1906) 1 Ch. 748; 75 L.J. Ch. 446; see also *Lodge* v. *National Union Investment Co.*, (1907) 1 Ch. 300; 76 L.J. Ch. 187; *Chapman* v. *Michaelson*, (1909) 1 Ch. 238; 78 L.J. Ch. 272; *Gadd* v. *Provincial Union Bank* (*No.* 1), (1909) 2 K.B. 353; 78 L.J. K.B. 815; *Stirling* v. *Silburn*, (1910) 1 K.B. 67; 79 L.J. K.B. 336. As to carrying on business at registered place, see *Jackson* v. *Price*, (1910) 1 K.B. 143; 79 L.J. K.B. 130; *Hopkins* v. *Hills*, (1910) 2 K.B. 29; 79 L.J. K.B. 825; *Sadler* v. *Whiteman*, (1910) A.C. 514; 79 L.J. K.B. 1050.

(*u*) *Litchfield* v. *Dreyfus*, (1906) 1 K.B. 584; 75 L.J. K.B. 447.

interest charged is excessive and that the transaction is harsh and unconscionable, and may relieve the person sued from the payment of any amount in excess of the sum which the court may adjudge to be fairly due. The like powers may be exercised on an application for a proof by a moneylender in any bankruptcy proceedings (*x*). The jurisdiction conferred by the Moneylenders Act, 1900, is a new jurisdiction conferred on all the courts, and is not confined to cases in which courts of equity would have intervened before the Act. Excessive interest may of itself show that a transaction is "harsh and unconscionable" within the meaning of the Act. A bargain in which the agent of the moneylender receives commissions from both sides and is a co-adventurer with the moneylender is fraudulent apart from the Moneylenders Act, 1900 (*y*). A misstatement made by a moneylender to a borrower during negotiations is a fact to be borne in mind in determining whether the transaction is harsh and unconscionable (*z*). The court, when asked to re-open a moneylending transaction under sect. 1 of the Moneylenders Act, 1900, on the ground of excessive interest charged by the lender, is entitled to consider, amongst "all the circumstances," the fact that the borrower thoroughly understood the transactions, and without any misrepresentation or pressure, other than the mere request to pay so much interest, voluntarily agreed to pay it; and when the court finds these to be the facts it ought to hold that the interest which the borrower agreed to pay is reasonable and not excessive within the meaning of the Act. In considering the "risk" incurred by the moneylender in making an advance, it is not the real risk as ascertained after the event which has to be looked at, but how the matter presented itself to the moneylender at the time he made the advance with the experience he would have of borrowers (*a*).

Liabilities of borrower—Care to be taken of things borrowed —Negligence and misconduct of borrower. The borrower is obliged to render back the identical thing lent in as good a condition as it was in when borrowed, subject only to the deterioration resulting from inherent defects or produced by ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required (*b*). "The borrower is bound," observes Holt, C.J., "to the strictest care and diligence to keep the goods so as to restore them back again

(*x*) 63 & 64 Vict. c. 51, s. 1.

(*y*) *Samuel* v. *Newbold*, (1906) A.C. 461; 75 L.J. Ch. 705.

(*z*) *Victorian Daylesford Syndicate* v. *Dott*, (1905) 2 Ch. 624; 74 L.J. Ch. 673.

(*a*) *Carrington*s, *Ltd.* v. *Smith*, (1906) 1 K.B. 79; 75 L.J. K.B. 49.

(*b*) *Handford* v. *Palmer*, 5 Moore, 74.

to the lender, because the bailee has a benefit by the use of them, so that, if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse to go westward, and the bailee go northward, if any accident happen to the horse on the northern journey, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than as he was lent, that accident would not have happened to him" (*c*). If a horse is lent for the performance of an ordinary journey, and the borrower leaves the high road and travels unnecessarily through by-paths or dangerous roads, and the horse falls and is injured, he will be responsible to the lender; but, if the horse is lent for the purpose of hunting, then the borrower may expose it to all the ordinary risks of the chase, which must have been contemplated by the lender.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servants and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground, and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postilion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (*d*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden; if it is hired to go to Richmond, he has no right to go with it to York; and if, during such misuser, a loss occurs, the hirer will be responsible therefor. If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail him-

(*c*) *Coggs* v. *Bernard*, 2 Raym. 915; Bract. lib. 3, ch. 2, s. 1, pp. 99, 100.

(*d*) Jones on Bailments, 88 (ed. 4).

self of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss (*e*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its food, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner (*f*).

The gratuitously permitting a person to use a shed, by himself or his servant for a particular purpose, is a mere revocable licence, and has no analogy to a bailment of personal property; and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not liable for the negligence of his servant not within the scope of his employment (*g*).

Losses from ordinary casualties.—The measure of care and diligence to be exercised for the protection and preservation of a thing bailed by way of *commodatum*, whilst it remains in the possession of the borrower, is that amount of care, prudence, and foresight which the most vigilant and careful of men exercise for the preservation and protection of their own property. The foundation for this increased liability on the part of the borrower, in comparison with the hirer of a chattel, arises from the fact that the lender himself derives no benefit from the contract, but in making the bailment performs a gratuitous act of kindness dictated by his confidence in the bailee. The borrower cannot be made responsible for inevitable accidents, or casualties which could not have been foreseen, and which no human prudence could have guarded against; but he will be answerable for the "least neglect." If the borrower of a horse puts the horse in the stable, and the horse is stolen from thence, the borrower will not be answerable for him. But, if the borrower or his servant leave the stable-door open at night, and thieves take the opportunity of that and steal the horse, he will be chargeable for the loss; for the neglect to lock the door may have encouraged the thieves, and been the occasion of the robbery (*h*).

Misuser by borrower—Want of skill.—If the borrower takes

(*e*) *Deane* v. *Keate*, 3 Campb. 4.

(*f*) *Handford* v. *Palmer*, 5 Moore, 74; *Bray* v. *Mayne*, 1 Gow, N.P.C. 1.

(*g*) *Williams* v. *Jones*, 33 L.J. Ex. 297; 3 H. & C. 256; see *Addison on Torts*, pp. 706, 707 (ed. 8).

(*h*) *Coggs* v. *Bernard*, 2 Raym. 916; Bract. lib. 3, ch. 2, p. 99; Doctor and Student, Dial. 2, ch. 38.

the horse off the high road against the will of the lender, and rides him into wet and slippery ground, and the horse slips and is injured, the borrower must make good the loss. It has been said that every lender of a horse for riding impliedly bargains, at the time he makes the loan, for the exercise on the part of the borrower of competent skill in riding and the management of a horse (*i*); but, if the bailor chooses, without making any previous inquiry, to entrust a fiery and high-spirited horse to a stranger of whose skill in horsemanship he knows nothing, he has no right to expect the management and dexterity of an experienced rider. Neither, if he lends valuable property to a notorious drunkard or a notoriously wild and reckless character, has he any right to expect the care and attention of a very vigilant and painstaking person (*k*). The use of the loan, moreover, is strictly personal to the borrower, founded on the confidence reposed in him, and does not, in general, warrant a user by his servants. Therefore if A. lends his horse to B. to ride to a particular place, B. cannot give licences to another to ride, but if he hires the horse he may let another ride it (*l*).

Restoration of thing borrowed or its equivalent—Loss by robbery, fire, or inevitable accident.—In the case of a loan by way of MUTUUM, the borrower is bound to restore, at the time agreed upon or within a reasonable period after request, an article of the same kind and quality as the one originally lent to him. If, by the agreement of the parties, an article of a different character is to be returned, the contract is not a *mutuum*, but an exchange or sale (*m*). As the right of property in the thing bailed is transferred to the bailee by a bailment by way of *mutuum*, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire, or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed (*n*). When the loan is made by way of COMMODATUM, the borrower must return the specific thing lent within a reasonable period after request, and if he neglects so to do, he is responsible for all accidents that afterwards happen to it. He has no right to detain the thing borrowed for any antecedent debt due to him. "The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a

(*i*) Jones on Bailments, 65 (ed. 4); *Wilson* v. *Brett*, 11 M. & W. 115.
(*k*) Bract. lib. 3, tit. 2, s. 1, 99, b.
(*l*) *Bringloe* v. *Morrice*, 1 Mod. 210.
(*m*) *South Australian Insurance Co.* v *Randall*, L.R. 3 P.C. 101.
(*n*) Doct. & Stud. Dial. 2, ch. 38; Bract. 99, a, b.

debt can be implied from the grant of a mere favour." Neither can the borrower set up a right to detain the chattel for the payment of necessary expenses incurred by him in the keeping and preserving it (*o*).

Adverse claimants.—Eviction by title paramount, post, p. 848.

Implied obligations and duties of lender.—There is an implied undertaking on the part of the lender to the borrower of a chattel not to conceal from the borrower secret defects in the chattel known to the lender, which may make the use of the chattel perilous to the borrower. Thus, if one man lends a gun to another, and the lender knows at the time he lends the gun that it is unsafe and dangerous to use, and neglects to disclose the fact to the borrower, he will be responsible in damages to the latter if the gun bursts and injures him (*p*). But a gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from a defect not known to the lender (*q*).

Loans of money to one of several partners.—Money lent to one partner for his own expenses while engaged in the partnership business is a partnership debt (*r*). But, if the partner professes to borrow money for the firm, and misapplies it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover the amount from the other partners (*s*). And, if the creditor lending the money advances it at the request of one of the partners, for the known private purposes and private accommodation of the latter, and not for the trading purposes of the co-partnership, such creditor cannot make the firm responsible for the repayment of the money (*t*). But, where a member of a partnership was in the habit of drawing bills in his own name upon the firm, and getting them discounted, and applying the proceeds to the general purposes of the partnership, and the firm regularly accepted and paid the bills so drawn until it became bankrupt, it was held that the members of the firm must be taken to have given their co-partner authority to raise money for the use of the firm upon the bills in question, and that the money advanced by way of

(*o*) *Turner* v. *Ford*, 15 M. & W. 212; 15 L.J. Ex. 215.

(*p*) *Blakemore* v. *Bristol & Exeter Ry.*, 8 E. & B. 1051; 27 L.J. Q.B. 167; *Coughlin* v. *Gillison*, (1899) 1 Q.B. 145; 68 L.J. Q.B. 147.

(*q*) *MacCarthy* v. *Young*, 6 H. & N. 329; 30 L.J. Ex. 227.

(*r*) *Rothwell* v. *Humphreys*, 1 Esp. 405; and see now 53 & 54 Vict. c. 39, s. 5, *ante*, p. 359.

(*s*) *Loyd* v. *Freshfield*, 9 D. & R. 19.

(*t*) *Bishop* v. *Jersey* (*Countess*), 23 L.J. Ch. 483; 2 Drew. 143; *Emly* v. *Lye*, 15 East, 11; *Smith* v. *Craven*, 1 Cr. & J. 500; 9 L.J. (O.S.) Ex. 174; *Bevan* v. *Lewis*, 1 Sim. 376.

discount upon them might be treated as a loan to the partnership (*u*). There is no implication of law from the mere existence of a trade partnership, that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (*x*).

Loans to registered companies.—A company shall not commence any business or exercise any borrowing powers unless shares held subject to the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription (*y*). If the directors of a registered joint-stock company are empowered to borrow money, the power to be exercised in accordance with certain prescribed formalities, and the directors borrow money without complying with the formalities, this is a matter between them and the shareholders, and does not deprive the lender of his rights against the company (*z*), for he has a right to presume that the formalities have been gone through (*a*); but if they have no such powers, the lender should have informed himself of the fact, and he cannot recover from the company (*b*). Although the managers of the company are raising money for purposes unauthorized by the deed of settlement or articles of association, yet, if the shareholders, with full knowledge of these transactions, take no steps to ascertain whether the capital has been properly increased or not, but reap the benefit derived from the increase, they cannot be afterwards heard to say that the money was not advanced for the general use and purposes of the partnership (*c*). Debentures issued by a company under a general power of borrowing, in part discharge of existing debts (*d*), or debts of another for which the company is ultimately liable (*e*) are valid.

Damages in actions for not replacing stock.—In an action for not replacing stock lent on a given day, the measure of damages is the value of the stock in the market on the day on which it ought to have been replaced, or at the time of trial, at the option of the plaintiff (*f*). Where, however, a stock mortgage was made

(*u*) *Denton* v. *Rodie*, 3 Campb. 493; *Bolitho, Ex parte*, Buck, 100; and see now 53 & 54 Vict. c. 39, s. 6, *ante*, pp. 359, 370.

(*x*) *Alliance Bank* v. *Kearsley*, L.R. 6 C.P. 433; 40 L.J. C.P. 249.

(*y*) The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (1); *M'Dougall* v. *Jersey Imp. Hotel Co.*, 34 L.J. Ch. 28; 2 H. & M. 528.

(*z*) *Agar* v. *Athenæum Life Assur. Co.*, 3 C.B. N.S. 725; 27 L.J. C.P. 95; *Royal British Bank* v. *Turquand*, 6 E. & B. 332; 25 L.J. Q.B. 317; *Fountaine* v. *Carmarthen Ry.*, L.R. 5 Eq. 316; 37 L.J. Ch. 429; *Romford Canal Co., In re*, 24 Ch.D. 85; 52 L.J. Ch. 729.

(*a*) *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; 65 L.J. Ch. 536.

(*b*) *Irvin* v. *Union Bank of Australia*, 2 App.Cas. 366; 46 L.J. P.C. 87.

(*c*) *Magdalena St. Nav. Co., In re*, 29 L.J. Ch. 667; Johns. 690; *Elect. Tel. Co., In re*, 30 Beav. 225; *Troup's Case*, 29 Beav. 353.

(*d*) *Inns of Court Hotel Co., In re*, L.R. 6 Eq. 82; 37 L.J. Ch. 692.

(*e*) *Seligman* v. *Prince*, (1895) 2 Ch. 617; 64 L.J. Ch. 745.

(*f*) *Shepherd* v. *Johnson*, 2 East, 211;

for a term of years, for securing the re-transfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan, and, the mortgage having been allowed to run after the end of the term, the stock fell in price, it was held that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on replacing the specific amount of stock originally sold (*g*). If dividends are to be paid in the intermediate time, interest may be given upon the value of the capital stock (*h*).

M'Arthur v. *Seaforth* (*Lord*), 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. 318; *Owen* v. *Routh*, 14 C.B. 327; 23 L.J. C.P. 105; see *Michael* v. *Hart*, (1902) 1 K.B. 482; 71 L.J. K.B. 265.

(*g*) *Blyth* v. *Carpenter*, L.R. 2 Eq. 501; 35 L.J. Ch. 823.

(*h*) *Dwyer* v. *Gurry*, 7 Taunt. 14.

CHAPTER III.

CONTRACTS OF SECURITY.

SECTION I.

GENERAL PRINCIPLES.

The contract of mortgage, founded upon our common law doctrine of conditions, is a contract whereby a debtor grants or conveys an estate or interest in land, or transfers goods and chattels to his creditor, subject to a proviso that, if the debt is discharged by a day named, the grant or transfer shall be void, and the debtor shall be again entitled to his lands or his goods, and shall hold them as if the grant or transfer had never been made (*a*). There are two elements in the contract: a personal obligation for a debt, and an estate or goods transferred by way of pledge or security for such debt. For every other purpose the estate is the estate of the mortgagor, and when the debt is paid all the mortgagee's right and interest in the estate ceases. If the mortgagee has chosen to take possession, he is accountable for the profits, which are applicable, in the first instance, to pay the principal and interest of his debt, and, as soon as the mortgagee is paid, he becomes a mere naked trustee, holding the legal estate for the benefit of the mortgagor, the *cestui que trust* (*b*).

It has been considered advisable to omit from the present edition the general law relating to mortgages of realty, as the subject is too large to be capable of adequate treatment in this work, and the reader is referred to special treatises on the subject.

The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be held as a security for the payment of a debt or the performance of some engagement,

(*a*) *Per* Lindley, M.R., in *Santley* v. *Wilde*, (1899) 2 Ch. 474; 68 L.J. Ch. 686. Cp. the definition of mortgage in the Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 86.

(*b*) *Per* Plummer, V.-C., *Quarrel* v. *Beckford*, 1 Mad. 278.

and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement has been fulfilled. The thing deposited as a security is called a pawn or pledge; the party making the deposit, the pawnor or pledgor; and the person who receives it into his possession, the pawnee or pledgee. The contract is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual delivery of the thing intended to be charged, to the creditor, and from the contract of mortgage by the absence of a transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust (*c*). A *lien*, on the other hand, is merely a personal right to retain goods, and gives no right of property to the person entitled to it, and continues only so long as the holder keeps possession, either by himself or his servant; there is, therefore, no right to sell or otherwise dispose of the subject-matter of a lien (*d*).

SECTION II.

MORTGAGE, ETC., OF CHATTELS.

Mortgages of goods and chattels.—A mortgage of goods and chattels may be made not only by deed, but also by simple contract (*e*). But where the mortgage falls within the definition of "bill of sale" (*f*) in the Bills of Sale Act, 1878 (*g*), it must be substantially in accordance with the form in the Schedule to the Bills of Sale Act, 1882 (*h*). And with regard to mortgages and charges created by joint stock companies the requirements

(*c*) *Ryall* v. *Rowles*, 1 Ves. Sen. 348, 358; *Bristol and West of England Bank* v. *Mid. Ry.*, (1891) 2 Q.B. 653; 61 L.J. Q.B. 115.

(*d*) Gibbs, C.J., *Pothonier* v. *Dawson*, Holt, N.P. 385; *Donald* v. *Suckling*, L.R. 1 Q.B. 585, 606; 35 L.J. Q.B. 232.

(*e*) *Flory* v. *Denny*, 7 Exch. 581; 21 L.J. Ex. 223; *Maughan* v. *Sharpe*, 17 C.B. N.S. 443; 34 L.J. C.P. 19.

(*f*) The rights and liabilities of parties to bills of sale will be found fully described in *Addison on Torts*, pp. 520—543 (ed. 8).

(*g*) 41 & 42 Vict. c. 31, s. 4.

(*h*) 45 & 46 Vict. c. 43; *Thomas* v. *Kelly*, 13 App.Cas. 506; 57 L.J. Q.B. 330; *Simmons* v. *Woodward*, (1892) A.C. 100; 61 L.J. Ch. 252; *De Braam* v. *Ford*, (1900) 1 Ch. 142; 69 L.J. Ch. 82; *Davies* v. *Jenkins*, (1900) 1 Q.B. 133; 69 L.J. Q.B. 187; *Swanley Coal Co.* v. *Denton*, (1906) 2 K.B. 873; 75 L.J. K.B. 1009. Note that transactions permitting the taking of immediate possession are not within the Bills of Sale Acts: *Charlesworth* v. *Mills*, (1892) A.C. 231; 61 L.J. Q.B. 830; *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *North Central Wagon Co.*, 13 App.Cas. 554; 58 L.J. Ch. 219; nor are pledges of goods even where the rights of parties are laid down in an accompanying memorandum: *Wilkinson* v. *Gerard Frères*, 7 T.L.R. 266; *Hardwick, In re, Hubbard, Ex parte*, 17 Q.B.D. 690; 55 L.J. Q.B. 490.

of sections 93—102 of the Companies Act, 1908 (*i*), must be complied with. If, by the terms of a bill of sale or assignment by way of mortgage of chattels, the mortgagor is to hold and enjoy the chattels as the mere servant or agent of the mortgagee, or at the will of the mortgagee, the latter is entitled to the possession whenever he thinks fit to call for it, and may seize and carry away and sell the chattels (*k*). It is unnecessary that the advance of the money and the delivery of the possession should be contemporaneous; it is sufficient if the goods be delivered within a reasonable time of the advance in pursuance of the contract of pledge (*l*). If the mortgage debt is to be paid on demand, and the mortgagor is to possess the mortgaged property until default has been made in payment, the mortgagee has no right of possession until demand has been made (*m*). If the mortgage debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired, so that, if he takes possession, he will subject himself to an action (*n*). But, if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession, *e.g.*, if he attempts to sell them, the bailment is determined, the possessory title reverts to the mortgagee, and he may immediately commence an action for delivery of the goods or their value (*o*). Where the title-deeds of land have been deposited, the equitable mortgagee is entitled to foreclosure, but this remedy is not available to a pledgee of personal chattels, who is only entitled to an order for sale (*p*).

If goods are assigned to the mortgagee upon trust to permit the mortgagor to hold and enjoy them until default has been made in payment of the mortgage-debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession incumbered with the trust as well as the right of property, and may maintain an action against anyone who wrongfully converts them (*q*). A proviso in a mortgage of chattels that,

(*i*) 8 Edw. 7, c. 69.

(*k*) *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54.

(*l*) *Hilton* v. *Tucker*, 39 Ch.D. 669; 57 L.J. Ch. 973.

(*m*) *Bradley* v. *Copley*, 1 C.B. 685, 699; 14 L.J. C.P. 222.

(*n*) *Brierly* v. *Kendall*, 17 Q.B. 937; 21 L.J. Q.B. 161.

(*o*) *Fenn* v. *Bittleston*, 7 Exch. 152; 21 L.J. Ex. 41.

(*p*) *Carter* v. *Wake*, 4 Ch.D. 605; 46 L.J. Ch. 841. As to the nature of an equitable mortgage by deposit of title deeds, see *Gilligan* v. *National Bank*, (1901) 2 Ir.R. 513.

(*q*) *White* v. *Morris*, 11 C.B. 1015; 21 L.J. C.P. 185.

after default made in payment of the mortgage-debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy, the mortgaged chattels, and to sell and dispose of them, and that, until default, it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner, whether in or out of possession (*r*).

A mortgage of goods and chattels and movables (excepting ships) will, in general, be found to be a doubtful and inadequate security for the payment of money; for, the mortgagor being left in the possession of the goods, and continuing the apparent owner of them, will be able to defeat the title of the mortgagee in a variety of ways. He may sell the goods in market overt to a *bonâ fide* purchaser, without notice of the mortgage, and so divest the mortgagee of his right of property; and if the mortgagor becomes bankrupt, the chattels may become lost to the mortgagee by reason of their having been left in the possession of the mortgagor as reputed owner (*s*).

Pledges of goods and chattels—What may be given in pledge.—By the common law, all kinds of goods and chattels, title-deeds, and securities for money, promissory notes and bills of exchange, letters of allotment and scrip, certificates of shares, and even money itself when marked or inclosed in a bag, purse, or parcel, so as to be capable of identification, may be pledged (*t*).

Who may pledge.—One man cannot, as a general rule, convey to another a right over property which he does not himself possess. If a servant takes his master's jewels and pledges them, the pledge cannot alter the ownership, or give the pledgee any right to detain the jewels as against the owner (*u*). But, if a man obtains goods under colour of a contract intended to transfer the property in them to him, and then pledges the goods, the pledgee will have a lien upon them to the amount of his advances. For example, if a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a cheque on a bank where he has no funds, and then pledges the article with a party who advances

(*r*) *Gale* v. *Burnell*, 7 Q.B. 850; 14 L.J. Q.B. 340.

(*s*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322; 26 L.J. Bankr. 61.

(*t*) *Isaack* v. *Clark*, 2 Bulstr. 306; *Ross* v. *Moses*, 1 C.B. 227. As to title deeds, see *Barton* v. *Gainer*, 3 H. & N. 387; *Swanley Coal Co.* v. *Denton*, (1906) 2 K.B. 873; 75 L.J. K.B. 1009.

(*u*) 34 Hen. 6, fol. 25, pl. 33; *Hartop* v. *Hoare*, 3 Atk. 44; 2 Str. 1187.

money upon it without any knowledge of the fraud, the pledgee will have a lien on the article in respect of his advances as against the vendor who has been defrauded (*x*); but, if the property has not passed—if, for instance, the article has been stolen, or possession thereof has been obtained by false pretences—and it has then been pledged, the pledgee will have no lien upon it as against the owner. If a person acquires possession of a delivery order, dock warrant, or any documentary evidence of title to goods on the strength of a false and fraudulent representation, and obtains delivery of the goods, or a transfer into his name, or a warrant for delivery to his order, and then pledges the goods or warrant, the pledgee will have no title as against the owner, who has been defrauded (*y*). If the pawnor has only a limited interest in the subject-matter of the pledge, he can only pawn to the extent of such interest, and, when that interest expires, the pawnee must surrender the pledge to the party who succeeds to the legal ownership. Therefore, where a quantity of plate was settled upon a widow for life, and she pawned it and then died, it was held that the pawnee had no right to detain the pledge as against the remainderman, although he had no notice of the widow's limited interest when he advanced the money (*z*). If the vendor of an estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property in the title-deeds is so vested in the purchaser, that the vendor obtaining possession of them and pawning them confers on the pawnee no right to detain them after tender of the residue of the purchase-money (*a*).

Implied warranty of title by pledgor.—Every person who pledges personal property impliedly undertakes that the property pledged is his own; and, if it turns out not to be so, the pledgee may restore it to the lawful owner coming forward and claiming it, and may set up *jus tertii* in answer to an action by the pledgor for the recovery of the pledge (*b*). On the other hand,

(*x*) *Parker* v. *Patrick*, 5 T.R. 175; *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 166.

(*y*) *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L.J. Ex. 83; discussed by Ld. Halsbury in *Henderson* v. *Williams*, (1895) 1 Q.B. 521, 525; 64 L.J. Q. B. 308; *Cole* v. *North Western Bank*, L.R. 10 C.P. 354, 373; 44 L.J. C.P. 233; and see also Factors Act, 1889, 52 & 53 Vict. c. 45, s. 9; and Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 25.

(*z*) *Hoare* v. *Parker*, 2 T.R. 376.

(*a*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(*b*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209; *Jones* v. *Peppercorne*, 28 L.J. Ch. 158; Johns. 430; *Biddle* v. *Bond*, 34 L.J. Q.B. 137; 6 B. & S. 225; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187; but if the bailee always knew of the adverse claim, and has dealt with the goods in a way creating an estoppel, he cannot afterwards set up such adverse claim as against the bailor: *Davies, Ex parte, Sadler, In re*, 19 Ch.D. 86. As to pledge of negotiable instruments, see *Baker* v. *Nottingham Banking Co.*, 60 L.J. Q.B. 42.

every person who receives goods and chattels into his possession by way of pledge, impliedly undertakes to return them to the pawnor as soon as the object of the pledge has been accomplished, unless it be shown that the pledgor had no right to pledge them, and the owner has intervened and claimed them. Nothing contained in the Factors Act, 1889, is to prevent the owner of goods from recovering them from an agent or his trustee in bankruptcy, or from having the right to redeem such goods or documents of title, at any time before they have been sold, upon satisfying the claims thereon, or from recovering from any person with whom the goods have been pledged by the agent any balance of the produce of the sale of the goods less the amount of his lien (*c*). If the pledge has been received as security for the due payment of a debt or the performance of a contract, it must be returned by the pawnee as soon as the debt is discharged or the contract has been fulfilled, unless it has been lost or destroyed by accident, without any default or misconduct or want of proper care on the part of such pawnee.

By the Factors Act, 1889, where a mercantile agent (*d*) is with the consent of the owner (*e*) in the possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him in the ordinary course of business (*f*) of a mercantile agent, shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not, at the time, notice that the person making the disposition has not authority to make the same (*g*). Subject to this proviso, a disposition of goods by a mercantile agent, after the consent of the owner to his possession of them is withdrawn, is valid (*h*).

Where a mercantile agent has obtained possession of any documents of title to goods, by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall be deemed to be with the consent of the owner (*i*). The consent of the

(*c*) 52 & 53 Vict. c. 45, s. 12.

(*d*) See sect. 1 for definition of the terms "mercantile agent," "possession," "goods," "pledge," and "person."

(*e*) Where possession has been acquired by a trick, it is not with consent of the owner; see *Hardman* v. *Booth*, 1 H. & C. 803; 32 L.J. Ex. 105; *Cole* v. *North Western Bank*, L.R. 10 C.P. 354; 44 L.J. C.P. 233; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, (1899) 1 Q.B. 643; 68 L.J. Q.B. 515; *Oppenheimer* v. *Frazer & Wyatt*, (1907) 2 K.B. 50, 61; 76 L.J. K.B. 806.

(*f*) As to meaning of "ordinary course of business," see *Biggs* v. *Evans*, (1894) 1 Q.B. 88.

(*g*) 52 & 53 Vict. c. 45, s. 2 (1).

(*h*) Sect. 2 (2).

(*i*) Sect. 2 (3).

owner is to be presumed in the absence of evidence to the contrary (*k*). The authority given by sect. 2 is a general authority, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them (*l*).

A pledge of the documents of title to goods is to be deemed to be a pledge of the goods (*m*). Where a mercantile agent pledges goods as a security for a debt or liability due from him to the pledgee, the latter shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*n*).

Where a person pledges goods entrusted to him for the purpose of sale only, he is a mercantile agent "acting in the ordinary course of business of a mercantile agent," within sect. 1 (1), and the pledgee is protected by sect. 2 (1) from an action by the owner to recover the value of the goods (*o*). But where a fraudulent sale is made to joint purchasers, one of whom does not act in good faith, none of such joint purchasers is protected by the sub-section (*p*).

Any valuable consideration—including a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security—is sufficient for the validity of a disposition of the goods under the Act; but where the goods are pledged by a mercantile agent, in consideration of the delivery or transfer of other goods, or of documents of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods greater than the value of the goods, documents, or security so given in exchange (*q*).

An agreement with a mercantile agent through his clerk or other person, authorised in the ordinary course of business to make contracts of sale or pledge on his behalf, is for the purposes of the Act to be deemed to be an agreement with the agent (*r*).

Where the owner of goods has given possession of them to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee has no notice that such person is not owner of the goods, the consignee is, in respect of any advances to such person, to

(*k*) 52 & 53 Vict. c. 45, s. 2 (4). As to circumstances negativing presumption of consent, see cases, *supra*, note (*e*).

(*l*) *Oppenheimer* v. *Attenborough*, (1908) 1 K.B. 221; 77 L.J. K.B. 209.

(*m*) Sect. 3. This section, like sects. 2—7, only applies to pledges by mercantile agents: *Inglis* v. *Robertson*, (1898) A.C. 616; 67 L.J. P.C. 108.

(*n*) Sect. 4.

(*o*) *Weiner* v. *Harris*, (1910) 1 K.B. 285; 79 L.J. K.B. 342, overruling *Hastings* v. *Pearson*, (1893) 1 Q.B. 62; 62 L.J. Q.B. 75.

(*p*) *Oppenheimer* v. *Fraser & Wyatt*, (1907) 2 K.B. 50; 76 L.J. K.B. 806.

(*q*) Sect. 5.

(*r*) Sect. 6.

have the same lien on the goods as if he were the owner (*s*); but nothing in the section is to limit or affect the validity of any sale, pledge, or disposition by a mercantile agent (*t*).

Where a person having sold goods continues or is in possession of them, or of the documents of title to them, the delivery or transfer by him, or by a mercantile agent acting for him, of such goods or documents, under any sale, pledge, or other disposition or agreement for the same, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to do so (*u*). Where a person having bought or agreed to buy goods obtains, with the consent of the vendor, the possession of the goods or of the documents of title to them, the delivery or transfer by such vendee, or by a mercantile agent acting for him, of the goods or documents under any sale, pledge, or other disposition, or any agreement for the same, to any person receiving them in good faith and without notice of any lien or right of the original vendor, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title, with the consent of the owner (*v*). The expression "a person having agreed to buy goods" does not include a person who has an option to buy, the owner being bound to sell if the option is exercised. So where the owner of a piano let it on hire, the hirer agreeing that he should pay monthly instalments and might terminate the agreement by delivering up the piano, but that the piano should be his on payment of all the instalments, and until then the piano should be the property of the owner, it was held that the hirer had only an option to buy, and did not come within sect. 9 of the Factors Act, 1889 (*x*). A hire-and-purchase agreement under which the hirer has no power to determine the agreement by returning the goods is an agreement to buy within the section (*y*). The section protects an auctioneer who, in good faith and without notice of any lien of the original seller, receives and sells goods delivered to him by a person who had obtained them under a hire-and-purchase agreement providing for pay-

(*s*) 52 & 53 Vict. c. 45, s. 7 (1)

(*t*) Sect. 7 (2).

(*u*) Sect. 8. This section is reproduced in sect. 25 (1) of the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, *ante*, p. 595.

(*v*) Sect. 9. This section has no application where the pledgor nas obtained the documents of title from the warehouse-keeper by virtue of the pledgor's ownership of the goods: *Inglis* v. *Robertson*, (1898) A.C. 616; 67 L.J. P.C. 108.

(*x*) *Helby* v. *Matthews*, (1895) A.C. 471; 64 L.J. Q.B. 465, distinguishing *Lee* v. *Butler*, (1893) 2 Q.B. 318; 62 L.J. Q.B. 591.

(*y*) *Hull Ropeworks Co.* v. *Adams*, 65 L.J. Q.B. 114.

ment by instalments which had not been paid (*z*). For this section to apply, it seems unnecessary that there should be a memorandum of the contract of sale, so as to satisfy the requirements of sect. 4 of the Sale of Goods Act, 1893 (*a*).

Where a document of title to goods has been lawfully transferred to a person as buyer or owner of the goods, and he transfers it to a person who takes it in good faith, and for valuable consideration, such transfer shall have the same effect in defeating the vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading (*b*).

The transfer of a document may be either by indorsement or in some cases by delivery (*c*).

Pledgor's right of redemption.—A thing may be pledged for a certain period, or it may be pledged indefinitely, no time being fixed for its redemption, or for the happening of the event which is to give the pledgor a right to have it back. In the first case the pledgee cannot demand payment of the debt, nor can the pledgor lawfully demand the restoration of the pledge, until the time appointed has expired. In the second case the pledgor is entitled to redeem at any time, by tendering to the pledgee the amount due to him, and the pledgee may compel the pledgor to redeem, or be foreclosed and lose his right of redemption altogether. If the debtor pays the debt due, or tenders it to the creditor, and demands the pledge, and the creditor refuses to deliver it up, the debtor may maintain an action for its recovery, unless his right to redeem has been barred by judgment of foreclosure, or has been forfeited under an express clause of forfeiture in the original contract, or unless the pledge has been sold by the creditor pursuant to a power of sale reserved to him (*d*).

Sale of pledgor's right of property and right of redemption.—As the ownership and general right of property in the pledge remain vested in the pledgor, the latter may sell the pledge subject to the lien of the pledgee, and substitute the purchaser in his place, so as to entitle the latter to redeem (*e*). If several chattels are pawned for one sum, separate sales may be made of them to different purchasers; but the pawnee will not be bound to part with any of the chattels until his whole debt is paid. Subject to the claim of the pawnee, the pawnor has the same

(*z*) *Shenston* v. *Hilton*, (1894) 2 Q.B. 452; 63 L.J. Q.B. 584.

(*a*) 56 & 57 Vict. c. 71; *Hugill* v. *Masker*, 22 Q.B.D. 364; 58 L.J. Q.B. 171, decided on the similar provisions of 40 & 41 Vict. c. 39, s. 4 (repealed).

(*b*) 52 & 53 Vict. c. 45, s. 10.

(*c*) Sect. 11.

(*d*) *Ratcliffe* v. *Davies*, Cro.Jac. 245; Yelv. 178; 1 Bulst. 29, 31; *Kemp* v. *Westbrook*, 1 Ves. Sen. 278.

(*e*) *Franklin* v. *Neate*, 13 M. & W 481; 14 L.J. Ex. 59.

right over each chattel separately which he had before the pawn was made.

Forfeiture of pledge.—Common law does not follow the later Roman and Continental law in treating agreements for the forfeiture of pledges as null and void, as being contrary to public policy. The court, however, will relieve against the forfeiture in the case of pledges of land; but it will not, in general, interfere in the case of pledges of movables (*f*), unless the value of the pledge greatly exceeds the amount of the debt which it was intended to secure.

Foreclosure of right of redemption—Pledgee's power of sale.—It would appear to be an implied term of every contract of pledge that the thing deposited shall be available for the liquidation of the debt secured by it, in case the pledgor is unable or unwilling to pay such debt (*g*). The pawnee is said by Lord Coke (*h*) to have a "property in and not a custody only" of the article pawned; that is, the pawn is a security to the pawnee, that he shall be repaid his debt and to compel the pawnor to pay him (*i*). Lord Hardwicke is reported to have said that a decree of foreclosure is not necessary, in pledges of personal chattels, to bar the pledgor's right of redemption, and enable the pledgee to sell (*k*); but, so long as the ownership and right of property in the pledge have not been vested in the pledgee, the latter cannot sell more than his own claim or lien upon the pledge, and can only transfer the pledge burthened with the pledgor's right of redemption, unless a power of sale has been expressly or impliedly reserved to him by contract (*l*). In order to make himself the owner of the pledge, the pledgee must bar the pledgor's right of redemption by a decree of foreclosure (*m*). "A right of lien gives no right to sell the goods:" but, if it is reasonably to be inferred, from the nature of the transaction between the parties, that the contract was to this effect, "If I (the borrower) re-pay the money, you must re-deliver the goods; but, if I fail to repay it, you may use the security I have left in your hands to re-pay yourself," the pledgee will then be entitled to sell, on default in re-payment at the time appointed, or, if no time be fixed, then after a reasonable notice to the pledgor of his intention, and to satisfy the debt out of the proceeds of such sale (*n*). If notice is given to the pledgor

(*f*) *Lockwood* v. *Ewer*, 9 Mod. 278.
(*g*) Story on Bailments, s. 311.
(*h*) Co.Litt. 89 a; *Southcote's Case*, 4 Rep. 83 b.
(*i*) *Per* Holt, C.J., *Coggs* v. *Bernard*, 2 Ld. Raym. 916, 917.
(*k*) *Lockwood* v. *Ewer*, 9 Mod. 279.
(*l*) *Mickletlwaite* v. *Merrill*, 19 L.T. 61.
(*m*) *Wayne* v. *Hanham*, 9 Hare, 62; 20 L.J. Ch. 530.
(*n*) *Pothonier* v. *Dawson*, Holt, N.P. 383, 385; Willes, J., *Martin* v. *Reid*, 11 C.B. N.S. 730; 31 L.J. C.P. 126; *Pigot*

that, unless the pledge is redeemed, and the debt due thereon paid by a given day (a reasonable time for redemption being allowed), the pledge will be sold by public auction, and the proceeds of the sale applied in liquidation of the debt, and the pledgor neglects to redeem, and pays no attention to the notice, and the sale then takes place, the pledgor may fairly be deemed to have authorised the sale, or to be an assenting party thereto (*o*).

Accounts between pledgor and pledgee.—Whenever the pledge has been sold by the pledgee, he is liable to be called upon to account for the proceeds of the sale, and to pay over to the pledgor any surplus that may be found to exist after deducting the debt, costs, and expenses. The possession of the pledge does not suspend the right of the pledgee to proceed personally against the pledgor for the recovery of the debt in respect of which the pledge was taken, as it is only a collateral security (*p*).

Custody and safe keeping of pledge.—Every person who receives goods into his possession by way of pledge impliedly undertakes to take the same care of them that a prudent man ordinarily takes of his own property. His liability, in this respect, is analogous to that of the hirer of chattels for use (*ante*, p. 805), the contract being, like the contract of letting and hiring, a contract for the mutual benefit of both parties. The pawnee or pledgee, consequently, is not responsible for the loss of the goods by robbery or accident, if he has taken reasonable care of them (*q*); and he may, notwithstanding the loss and his consequent inability to return the deposit, sue for the recovery of his debt. But, if the goods have been stolen under circumstances manifesting a want of reasonable care for their safety, he will of course be responsible for the loss. It is for the pawnee to prove the loss by robbery or accident, and to show that he was free from blame (*r*).

Use of things pledged.—"If the pawn be something that will be the worse for wear, as clothes, the pawnee cannot use it; but if it will not be the worse for wear, as jewels, the pawnee may use them; but then it must be at his peril, for, if he is robbed in wearing them, he is answerable. Also, if the pawn be of such a nature that the keeping is a charge to the pawnee,

v. *Cubley*, 15 C.B. N.S. 701; 33 L.J. C.P. 134; *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579; 71 L.J. Ch. 328.

(*o*) *Wilson* v. *Tooker*, 5 Bro. P.C. 193.

(*p*) *Lawton* v. *Newland*, 2 Stark. 72; *South Sea Co.* v. *Duncomb*, 2 Str. 919; Holt, 461; *Anon.*, 12 Mod. 564; *Scott* v. *Parker*, 1 Q.B. 809; 10 L.J. Q.B. 244.

(*q*) *Syred* v. *Carruthers*, E. B. & E. 469; 27 L.J. M.C. 273.

(*r*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; 4 L.J. K.B. 29.

as if it be a cow or horse, the pawnee may milk the cow or ride the horse; and this is in recompense of the keeping. If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them at all events; because the pawnee, by detaining them after tender of the money" (the time of payment having arrived, or no time being fixed), "is a wrongdoer, and it is a wrongful detainer of the goods; and a man that keeps goods by wrong must be answerable for them at all events" (*s*). If a pawnee re-pawns or sells, before any default in payment by the original pawnor, the latter cannot sue the sub-pawnee or vendee to recover the pledge without tendering the amount for which the pledge was originally made (*t*).

As the right of property in the pledge remains in the pledgor until foreclosure, forfeiture, or sale, the pledgor may maintain an action against a stranger who unlawfully possesses himself of the goods; but, if there is any injury or conversion by a stranger for which an action will lie on the part of both the pledgor and pledgee, a recovery by one ousts the right to recover of the other; for there cannot be a double satisfaction (*u*). If the pledgor has sold his interest in the pawn to a third party, the latter will be the proper person to sue for damages resulting from injury to the pawn from the default or negligence of the pawnee, as the owner for the time being is the proper plaintiff (*x*). But a pawnbroker's interest in a redeemable pledge may be seized in execution by the sheriff under a *fi. fa.* (*y*).

Statutory rights and liabilities of pawnbrokers.—The rights and liabilities of pawnbrokers are regulated by the Pawnbrokers Act, 1872 (*z*). The Act, however, does not apply to loans of above ten pounds (*a*).

Who are to be deemed pawnbrokers.—Every person who keeps a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in any goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding 10*l.*, with or under any agreement or understanding, express or implied, or

(*s*) *Coggs* v. *Bernard*, 2 Ld. Raym. 912.

(*t*) *Johnson* v. *Stear*, 15 C.B. N.S. 330; 33 L.J. C.P. 130; *Johnson* v. *Lanc. & Y. Ry.*, 3 C.P.D. 499; *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232; *Halliday* v. *Holgate*, L.R. 3 Ex. 299; 37 L.J. Ex. 174. As to sale by pawnee, see 56 & 57 Vict. c. 71, s. 21.

(*u*) Bac.Abr. Trover, C.; *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*x*) *Franklin* v. *Neate*, 13 M. & W. 486; 14 L.J. Ex. 59.

(*y*) *Rollason*, *In re*, 34 Ch.D. 495; 56 L.J. Ch. 768.

(*z*) 35 & 36 Vict. c. 93.

(*a*) Sect. 10.

to be from the nature and character of the dealing reasonably inferred, that such goods or chattels may be afterwards redeemed or repurchased on any terms whatever, is to be deemed to be a pawnbroker within the meaning of the Act (*b*). Every pawnbroker's name must be placed over the door of his place of business (*c*); wherefore a secret partnership in the business of a pawnbroker is illegal and void (*d*).

Sale of unredeemed pledges.—Pawnbrokers' sales are regulated by the provisions of the Pawnbrokers Act. If, at any time before the sale has actually taken place, the pledgor tenders the principal, interest, and expenses incurred, he has a right to have back the things pledged, and the pawnbroker cannot lawfully proceed with the sale (*e*). A special contract pawn ticket, given in the form prescribed by the Act, does not exclude the common law right of the pawnbroker to recover the balance due to him if the article pawned is sold for less than the amount of the debt (*f*).

Warranties on sales of unredeemed pledges.—We have already seen that, in the case of sales by pawnbrokers of unredeemed pledges expressly sold as such, the pawnbroker only warrants the subject-matter of the sale to be a pledge, the time for the redemption of which has expired. He sells merely his own title and interest in the pledge; and it is the duty of a purchaser to investigate that title (*g*); and, if he is evicted by reason of the want of title in the pledgor to make the pledge, he has no remedy over against the pawnbroker, unless the latter expressly warranted the title. The indemnity given by sect. 25 to a pawnbroker who delivers a pledge to the person producing the pawn ticket applies only as between the pawnor or owner who has authorised the pledging of the goods, but does not affect the common law rights of an owner of goods pledged against the owner's will (*h*).

Imperfect hypothecation—Licences to seize in case of non-payment of debt.—The common law does not recognise hypothecation of chattels or movables in the general and extended signification of the term, as conferring a right to have a debt paid out of property of which the creditor has not the possession; for, if parties who had bought things in a public market, or in the ordinary way of trade, of persons who had the possession

(*b*) 35 & 36 Vict. c. 93, s. 6.
(*c*) Sect. 13.
(*d*) *Armstrong* v. *Lewis*, 2 Cr. & M. 274, 297; 3 L.J. Ex. 359; *Armstrong* v. *Armstrong*, 3 Myl. & K. 45; 3 L.J. Ch. 101; *Gordon* v. *Howden*, 12 Cl. & Fin. 237; *Fraser* v. *Hill*, 1 Macq. 392.
(*e*) *Walter* v. *Smith*, 5 B. & Ald. 441.
(*f*) *Jones* v. *Marshall*, 24 Q.B.D. 269; 59 L.J. Q.B. 123.
(*g*) *Ante*, p. 565.
(*h*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex.D. 37; 49 L.J. Ex. 224.

and visible ownership of them, were liable, after they had paid the purchase-money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called by Continental jurists imperfect hypothecation, *i.e.*, a debtor may, by deed under seal, grant to his creditor a right to seize and sell a specified chattel, or all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the non-payment thereof at an appointed period. Such a power must be clearly and distinctly conferred before a court of justice can be expected to recognise it (*i*). The creditor, however, has no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear (*k*). A power of this description may be made to extend to all the after-acquired chattels of the debtor, as well as to the goods and chattels of which he was possessed at the time of the creation of such power. Where the owner of a cow, being indebted to the defendant for agistment, and being desirous of contracting a further debt for straw, &c., agreed with the defendant that the cow should be security for the debt, and that the defendant should be at liberty, upon a certain contingency, to take the cow wherever he could find her, and hold her till he was paid, and, on the happening of the contingency, the defendant seized the cow, it was held that he had a right so to do, and that he was entitled to detain the cow against the owner until he received payment of his debt (*l*). The right of detainer gives no right of sale, although it is exercised at great expense (*m*); but, if a debtor gives to his creditor a licence to enter upon his land and seize his cattle and crops and sell them in satisfaction and discharge of the debt, the licensee will be justified as against the licensor in seizing and selling under the licence (*n*). But the operation of a licence of this description cannot be extended beyond the immediate parties to it; and, therefore, as soon as the rights of third parties intervene, the power or authority becomes nugatory and

(*i*) *Turner* v. *Haji Goolam Mahomed Azam*, (1904) A.C. 826, 837; 74 L.J. P.C. 17.

(*k*) *Chidell* v. *Galsworthy*, 6 C.B. N.S. 471.

(*l*) *Richards* v. *Symons*, 8 Q.B. 90; 15 L.J. Q.B. 35.

(*m*) *Thames Iron Works Co.* v. *Patent Derrick Co.*, 29 L.J. Ch. 714; 1 Jo. & H. 93.

(*n*) *Carr* v. *Allatt*, 27 L.J. Ex. 385.

useless. Thus, where a vendor entered into a written agreement for the sale of a coach on credit, upon the terms that, if the price was not paid pursuant to the agreement, he "should have and hold a claim upon the coach;" and the purchaser died, and, the money not being paid, the vendor got possession of the coach and detained it as a security for the debt; it was held that, although he would have been justified in doing so as between himself and the purchaser, yet, the latter being dead, he had no right to detain the coach as against the purchaser's personal representative (*o*), or against a trustee in bankruptcy (*p*). Neither can the licence be assigned or granted over to another so as to enable the assignee to distrain upon the licensor (*q*); nor can it prevail against the claim of a judgment creditor, so long as parties claiming under it have not perfected their title by taking possession of the property before it is seized in execution by the sheriff. A legal interest in the property, *bonâ fide* acquired before possession taken by the person claiming under the licence, will prevail over the claim of the latter (*r*). A promise to pay money when the debtor receives a debt due to him from a third person does not amount to an equitable charge on the debt (*s*).

Revocation of licence by act of bankruptcy.—A licence to seize and sell chattels in satisfaction and discharge of a debt gives no title to any specific chattels; but, when executed by the creditor taking possession of property under the licence, it clothes the licensee with the ownership of such property (*t*). If, therefore, after a debtor has granted his creditor a licence of this description, he commits an act of bankruptcy, and a receiving order is made against him, the licence will be annulled as regards his trustee (*u*).

Mortgages of ships and shares in ships.—It was at one time held that the Court of Chancery would give no effect to a contract to assign a ship as security for money due not registered in accordance with the Merchant Shipping Acts (*x*). But by

(*o*) *Howes* v. *Ball*, 7 B. & C. 481, 484; 6 L.J. (O.S.) K.B. 106.

(*p*) *Carr* v. *Acraman*, 11 Exch. 566; 25 L.J. Ex. 90.

(*q*) *Brown* v. *Metropolitan Counties Assur. Soc.*, 1 E. & E. 838; 28 L.J. Q.B. 236; *Davis & Co., In re, Rawlings, Ex parte*, 22 Q.B.D. 193.

(*r*) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore*, 33 L.J. Ch. 63; and see *Holroyd* v. *Marshall*, 10 H.L.C. 191; 33 L.J. Ch. 193.

(*s*) *Field* v. *Megaw*, L.R. 4 C.P. 660.

(*t*) *Congreve* v. *Evetts*, 10 Exch. 308; 23 L.J. Ex. 273.

(*u*) *Carr* v. *Acraman*, *supra*; *Baker* v. *Gray*, 17 C.B. 462; 25 L.J. C.P. 161; *Cole* v. *Kernot*, L.R. 7 Q.B. 534; 41 L.J. Q.B. 221.

(*x*) *Liverpool Borough Bank* v. *Turner*, 30 L.J. Ch. 379; see *Chasteauneuf* v. *Capeyron*, 7 App.Cas. 127; 51 L.J. P.C. 37. A British ship seems to be a ship intended to be the property of a British owner: *Union Bank of London* v. *Lenanton*, 3 C.P.D. 243; 47 L.J. C.P. 409.

sect. 57 of the Merchant Shipping Act, 1894 (*y*), the expression "beneficial interest," whenever used in the Act, includes interests arising under contract and other equitable interests; and the intention of the Act is declared to be that, without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions therein contained relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as in respect of any other personal property (*z*). A legal mortgage of a ship has, however, priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge (*a*). The mortgagee is not to be deemed to be the owner of the ship or share (*b*), nor the mortgagor to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt (*c*). The mortgagor in possession may employ and charter the ship and enter into all contracts touching the disposition of the ship which may be necessary to enable him to get the full value and the full benefit of his property; and the court will restrain the mortgagee from interfering with his contracts (*d*). But, while the mortgagor's dealings with regard to the ship will be valid and effectual, provided that they do not materially impair the security of the mortgagee, if his dealings are of such a character as to be inconsistent with the sufficiency of the security, the mortgagee may take possession although there may not have been any actual default on the part of the mortgagor under the mortgage and although the mortgagee may not have commenced any formal proceedings (*e*). The mortgagee has power absolutely to dispose of the mortgaged ship or share, and to give effectual

(*y*) 57 & 58 Vict. c. 60.

(*z*) See *Ward* v. *Beck*, 32 L.J. C.P. 113; 13 C.B. N.S. 668; and *Hughes* v. *Sutherland*, 7 Q.B.D. 160; 50 L.J. Q.B. 567.

(*a*) *Black* v. *Williams*, (1895) 1 Ch. 408; 64 L.J. Ch. 137; *Barclay & Co.* v. *Poole*, (1907) 2 Ch. 284; 76 L.J. Ch. 488.

(*b*) *European, &c. Mail Co.* v. *Royal Mail Packet Co.*, 4 K. & J. 676; *Dickinson* v. *Kitchen*, 8 E. & B. 789; *Marriott* v. *Anchor Reversionary Co.*, 30 L.J. Ch. 571; 3 De G. F. & J. 177.

(*c*) Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 34.

(*d*) *Collins* v. *Lamport*, 34 L.J. Ch. 196; *The Celtic King*, (1894) P. 175; 63 L.J. P. 37; *The Heather Bell*, (1901) P. 272; 70 L.J. P. 57.

(*e*) *The Manor*, (1907) P. 339; *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, (1905) 1 K.B. 815; 74 L.J. K.B. 577 (in the latter of which cases, ships were chartered to carry contraband of war without being insured against war risks).

receipts for the purchase-money; but, when there are several mortgages, no subsequent mortgagee can, except under an order of court, sell such ship or share without the concurrence of every prior mortgagee. An unsatisfied registered mortgage of a ship sold abroad may be enforced in any competent court of His Majesty's dominions if the ship comes within the jurisdiction of such court (*f*). A registered mortgage of a ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have the ship in his possession and disposition, and be reputed owner thereof. Provision is made for the transfer of mortgages, and for the transmission of the interest of mortgagees by death, bankruptcy, insolvency or marriage (*g*). Invalid or void transfers placed on the register may be expunged by order of the court in the exercise of its inherent jurisdiction (*h*). A mortgage of a ship passes to the mortgagee articles on board the ship necessary for her navigation or for the prosecution of the adventure on which she was engaged at the time of the mortgage (*i*). The guardian of a registered infant owner of a ship has no power under sect. 55, sub-sect. 1, of the Merchant Shipping Act, 1894 (*k*), to sell or mortgage the ship on behalf of the infant (*l*).

A mortgagee who takes possession of a ship, or gives the charterer notice of his mortgage, and demands the freight before the freight becomes payable, is entitled, as against the mortgagor and his assigns, to receive it (*m*); but until the mortgagee takes possession or does some equivalent act, the mortgagor is entitled to the freight previously earned, and is not accountable to the mortgagee for what he receives (*n*). When the mortgage is of the entirety of the vessel, the mortgagee may take exclusive possession; when it is of shares only, he cannot take possession so as to prevent the other part-owners from also taking possession. A mortgagee of shares in a ship may, without formally taking possession, give notice of his interest, and require payment to himself of his share of the freight (*o*). Until possession

(*f*) Merchant Shipping Act, 1906, 6 Edw. 7, c. 48, s. 52.

(*g*) 57 & 58 Vict. c. 60, ss. 31—46.

(*h*) *Brond* v. *Broomhall*, (1906) 1 K.B. 571; 75 L.J. K.B. 548.

(*i*) *Coltman* v. *Chamberlain*, 25 Q.B.D. 328; 59 L.J. Q.B. 563.

(*k*) 57 & 58 Vict. c. 60, s. 55 (1), which replaces sect. 99 of the Act of 1854.

(*l*) *Michael* v. *Fripp*, L.R. 7 Eq. 95; 38 L.J. Ch. 29.

(*m*) *Rusden* v. *Pope*, L.R. 3 Ex. 269; 37 L.J. Ex. 137; *Brown* v. *Tanner*, L.R. 3 Ch. 597; 37 L.J. Ch. 923; *Wilson* v. *Wilson*, L.R. 14 Eq. 32; 41 L.J. Ch. 423.

(*n*) *Keith* v. *Burrows*, 2 App.Cas. 636; 46 L.J. C.P. 801; *Anderson* v. *Butler's Wharf Co.*, 48 L.J. Ch. 824, 828; *Shillito* v. *Biggart*, (1903) 1 K.B. 683; 72 L.J. K.B. 294.

(*o*) *Cato* v. *Irving*, 21 L.J. Ch. 675; 5 De G. & Sm. 210; *Gardner* v. *Cazenove*,

is taken by the mortgagee, the mortgagor remains *dominus* of the ship with regard to everything connected with its employment (*p*). A mortgagee of a ship is entitled to payment in priority to materialmen not in such actual possession at the time of supplying the materials as to give them a lien (*q*). A subsequent mortgage, duly registered, of a ship has priority over a claim for necessaries (*r*). The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout, not only what is due on his first mortgage, but also the amount of any subsequent charge he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (*s*). The effect of an omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent registered mortgagee or transferee; but such omission is no answer to a claim by the first mortgagee for freight, as against a purchaser of the cargo without notice of the mortgagee's title (*t*). If the mortgagor of a ship attaches the goods to the ship in such a way as to make them part of the ship's equipment, then such act, if followed by the mortgagee taking possession, will constitute a "delivery" of the goods by the hirer under a "disposition" to the mortgagee within sect. 9 (*u*).

Maritime lien—Bottomry.—The contract of hypothecation of ships known to the civil law, and enforced in our Courts of Admiralty, is a contract whereby the captain of a vessel in a foreign port, not having any credit in the port where the vessel is lying, is enabled to obtain money for the repair and equipment of the vessel, and for supplies and sea stores for the prosecution of the voyage (*x*), by creating a charge or lien upon the vessel itself in favour of the lender, so that, if the vessel is sold or mortgaged by the owners, it will pass burdened with the charge or debt into the hands of the purchaser or mortgagee.

1 H. & N. 423; 26 L.J. Ex. 17; *Willis* v. *Palmer*, 7 C.B. N.S. 340; 29 L.J. C.P. 194; *Rusden* v. *Pope*, L.R. 3 Ex. 269; 37 L.J. Ex. 137.

(*p*) *Per* Cairns, L.C., *Keith* v. *Burrows*, 2 App.Cas. 636, 645; 46 L.J. C.P. 801.

(*q*) *The Scio*, L.R. 1 A. & E. 353.

(*r*) *The Pacific*, 2 Br. & L. 243; 33 L.J. Adm. 120; *The Two Ellens*, L.R. 4 P.C. 161; 41 L.J. Adm. 33.

(*s*) *Liverpool Marine Credit Co.* v. *Wilson*, L.R. 7 Ch. 507; 41 L.J. Ch. 798.

(*t*) *Keith* v. *Burrows*, 1 C.P.D. 722; 45 L.J. C.P. 876, reversed on appeal upon another point; 2 C.P.D. 163; 46 L.J. P.C. 452; affirmed, 2 App.Cas. 636; 46 L.J. C.P. 801.

(*u*) *Hull Ropeworks Co.* v. *Adams*, 65 L.J. Q.B. 114.

(*x*) *The Huntley*, 1 Lush. 24; *The Edmond*, 30 L.J. Adm. 128; but disbursements for charges for which the consignee of the cargo is liable are not the subject of bottomry: *Ib.*

The charge or lien created by a contract of this description is called a maritime lien. Wherever a maritime lien exists, it gives a right or claim upon a vessel capable of being enforced by legal process. This right travels with the vessel, and may be the subject of a proceeding *in rem* in the Court of Admiralty (*y*). No such right can be acquired but by express agreement; and a ship-master can only make such an agreement if he act within the scope of his authority (*z*). The contract by which a maritime lien is generally created by English ship-masters is termed a contract of bottomry, from the keel or bottom of the vessel being generally expressly hypothecated, or charged with the payment of the debt, and being used figuratively in the contract to denote the whole ship. It is essential to the validity of this species of hypothecation that the sea risk should be incurred by the lender, that is to say, that the debt should be incurred, and charged upon the vessel, upon the understanding that, if the vessel is lost, the lender loses his money, but, if it arrives safe at the port of destination, it shall stand charged with the payment of the debt (*a*). The master has no authority to hypothecate the vessel in any other manner (*b*); and the Court of Admiralty has no jurisdiction to enforce any other contract (*c*). As a remuneration for this risk, the creditor has always been entitled to take and charge upon the vessel any rate of interest or remuneration for the loan or debt that the parties might agree upon, termed maritime interest (*d*). The only events which will discharge a bottomry bond are payment and an absolute total loss. A constructive total loss of the ship does not discharge the bond (*e*).

Power of ship-master to hypothecate.—The extent of the authority of the master of a vessel to bind the owners either of the ship or cargo, is derived from, and governed by, the law of

(*y*) *Harmer* v. *Bell*, 7 Moore, P.C. 267; *Menetone* v. *Gibbons*, 3 T.R. 267; *Ladbrooke* v. *Crickett*, 2 T.R. 649.

(*z*) It has been held that the Admiralty Court Act, 1840, 3 & 4 Vict. c. 65, s. 6, does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port: *The Henrich Björn*, 11 App.Cas. 270; 55 L.J. P. 80; nor in respect of mere towage apart from salvage: *Westrup* v. *Gt. Yarmouth Co.*, 43 Ch.D. 241; 59 L.J. Ch. 111; nor in respect of brokerage on a charter-party: *The Marianne*, (1891) P. 180; 60 L.J. P. 39; nor does the Admiralty Court Act, 1861, 24 Vict. c. 10, s. 10, give the master a maritime lien for disbursements: *The Sara*, 14 App.Cas. 209; 58 L.J. P. 57; though by the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 167, he has the same remedies and rights with regard to these as he has for the recovery of his wages: see *post*, p. 966.

(*a*) As to what amounts to a valid bottomry bond, see *The Haabet*, (1899) P. 295; 66 L.J. P. 121.

(*b*) *Stainbank* v. *Fenning*, 11 C.B. 51; 20 L.J. C.P. 226.

(*c*) *The Royal Arch*, Swabey, 269, 281; *The Indomitable*, Swabey, 446; 5 Jur. N.S. 632; *The Ida*, L.R. 3 A. & E. 542; 41 L.J. Adm. 85.

(*d*) *Joy* v. *Kent*, Hardr. 418.

(*e*) *Thomson* v. *Royal Exchange Assur. Co.*, 1 M. & S. 30; *Broomfield* v. *Southern Insurance Co.*, L.R. 5 Ex. 192; 39 L.J. Ex. 186.

the flag (*f*). By our law the ship-master has no right to create a lien upon the vessel, until he has made every reasonable endeavour to obtain supplies, repairs, or money, upon his own personal credit or that of the owners (*g*). It is not until all other means of obtaining necessaries fail that he has authority to hypothecate the ship, and to give maritime interest, which is in effect defeating the object of the adventure, and transferring to the creditor much of the profits of the voyage (*h*). If the master at a foreign port is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies (*i*); and, where practicable, he must do so before he can create a lien on the vessel or cargo (*k*). It is no excuse for not communicating with the owner under such circumstances, that he is insolvent, unless he has been judicially declared so, and the ownership of the vessel has vested in his trustee in bankruptcy, in which case notice should be given to the trustee (*l*). If the ship-master borrows money for his own purposes or for those of the consignee of the cargo (*m*), as distinguished from those of the ship-owners, his contract will fail to create a lien upon the vessel (*n*). Repairs executed, or advances made, on personal credit cannot afterwards be converted into a bottomry transaction. There are, however, cases of extreme urgency, where the master is dead, and the merchant advances money intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of his intention, in which case the bond may be upheld, though no agreement for it was originally made; but they are cases of exception to the general principle. The master ought, in general, to be distinctly apprised of the intention of a lender of the money to require a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or to try at least to take other means to avoid the necessity, to advise with the owners of the ship and cargo, if it be practicable, or, if not, at least to consult with persons on the spot.

But, although when a ship-master orders repairs and supplies on credit given to him personally, those who gave the credit cannot take a bottomry bond, yet a merchant, a stranger to

(*f*) *The Karnak*, L.R. 2 P.C. 505; 38 L.J. Adm. 57.

(*g*) *Heathorne* v. *Darling*, 1 Moore, P.C.C. 5; *The Nelson*, 1 Hagg. 176; *La Ysabel*, 1 Dodson, 273; *The Orelia*, 3 Hag. 84; *The Dunregan Castle*, *ib.* 331.

(*h*) *The Pontida*, 9 P.D. 177; 53 L.J. P. 78.

(*i*) *Wallace* v. *Fieldin*, 7 Moore, P.C.C. 398; *Duranty* v. *Hart*, 2 Moo. P.C. N.S. 289; 33 L.J. Adm. 116; *The Olivier*, Lush. 484; *The Hamburg*, 32 L.J. Adm. 161.

(*k*) *Kleinwort & Co.* v. *Cassa Maritima of Genoa*, 2 App.Cas. 156.

(*l*) *The Panama*, L.R. 3 P.C. 199; 39 L.J. Adm. 37.

(*m*) *The Edmond*, 30 L.J. Adm. 128.

(*n*) *The Reliance*, 3 Hag. 66.

the transaction, or even an agent, if he has not made himself responsible, may advance money on bottomry to liquidate those demands (*o*); and a bottomry bond may, it seems, be given at the same time with, and as a collateral security for, bills of exchange for repairs and necessaries for the voyage, in this sense that, if the bills of exchange are honoured, the bottomry bond is discharged (*p*).

If, after a bond hypothecating the vessel has been entered into, the vessel becomes damaged, and puts into a foreign port for shelter, it cannot be sold by the master so as to extinguish the maritime lien; and, as the doctrine of constructive total loss does not apply to bottomry bonds, if the ship is found unseaworthy and sold, the bondholder will be entitled to a first charge on the proceeds (*q*). In the case of British ships, the certificate of registry is (*r*) the chief evidence of title; and all bottomry bonds and hypothecations ought to be, and generally are, indorsed upon it; and no man should purchase a British ship, even in a foreign port, without seeing the certificate. It is the duty of purchasers of British ships in foreign ports to make strict inquiries and be especially careful to guard themselves against liens which adhere to the ship; and they cannot be safe in cases of sale by the master, unless recourse is had to a court of justice, and a decree is obtained for the sale of the vessel (*s*). A British consul in a foreign port is entitled, under certain circumstances of urgent necessity, when the master is dead, to hypothecate a vessel and cargo through the medium of a bottomry bond (*t*).

Lien on vessels causing damage.—The owner of a vessel damaged at sea by collision with another vessel has a lien upon the vessel causing the damage, which may be enforced in the Court of Admiralty by a proceeding *in rem* against the vessel, so that, if the vessel causing the damage is carried to a distant port, and sold to a *bonâ fide* purchaser without notice of the lien, the vessel may nevertheless be attached in the hands of such *bonâ fide* purchaser and sold to satisfy the damage. But this lien may be lost by negligence or delay, where the rights of third parties are thereby compromised (*u*). A maritime lien is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*,

(*o*) *The Wave*, 15 Jur. 518; *The Augusta*, 1 Dodson, 283; *The Laurel*, 33 L.J. Adm. 17; Br. & L. 191.

(*p*) *Stainbank* v. *Shepard*, 22 L.J. Ex. 341; 13 C.B. 418; *The Emancipation*, 1 Wm.Rob. 124.

(*q*) *The Great Pacific*, L.R. 2 P.C. 516; 38 L.J. Adm. 45.

(*r*) See *Addison on Torts*, p. 621 (ed. 8).

(*s*) *The Catharine*, 15 Jur. 231.

(*t*) *The Cynthia*, 16 Jur. 748.

(*u*) *The Europa*, 2 Moo. P.C. N.S. 1; 32 L.J. Adm. 189.

relates back to the period when it first attached (*x*). But no bottomry bondholder or mortgagee can be a competitor with a successful suitor in a cause of damage in the Admiralty Court. The lien of the latter will prevail over both the mortgage and the bottomry bond, unless the bottomry bond has been granted after the damage has been done.

Priority of maritime liens.—Where there were two bottomry bonds attaching on the vessel causing the damage, one entered into before, and the other after, the collision, it was held that the lien for the damage must be preferred to the lien of the first bondholder, but that it did not extend to the increased value of the vessel resulting from repairs effected at the cost of the second bondholder (*y*). Where several bottomry bonds have been given by the master at different periods during the voyage, those of the latest date have the priority of payment, on the supposition that the last bond operates for the protection of the prior interests (*z*). A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the ship (*a*).

Hypothecation of cargo and merchandise.—The master of a ship may, under the pressure of extreme necessity, and where he is unable to communicate with the owner (*b*), hypothecate the cargo as well as the ship, to enable him to raise funds to prosecute the voyage and deliver the goods at the port of destination. He is clothed with an implied authority to take whatever steps ought to be taken to protect the cargo from impending destruction (*c*). But he can do no more than the owners themselves could if actually present; and he cannot sell against their will (*d*). He may create and continue a charge upon the cargo in favour of the lender of the money so long as such cargo remains in his possession; but he has no power to hypothecate it so as to enable the creditor to follow it after it has been sold or transferred (*e*). Where a ship, freight, and cargo were all hypothecated by one bottomry bond at a foreign port for necessary repairs, and the plaintiff's goods formed part of the cargo so hypothecated, and the ship and freight realised less than the sum borrowed, so that the goods became liable for the deficiency,

(*x*) *Harmer* v. *Bell*, 7 Moore, P.C. 267, 285; *The Elin*, 8 P.D. 129; 52 L.J. P. 55.

(*y*) *The Aline*, 1 W.Rob. 111, 120.

(*z*) *The Betsy*, 1 Dodson, 289; *The Rhadamanthe*, *ib.* 201.

(*a*) *The Duke of Bedford*, 2 Hag. 294.

(*b*) *Australasian Steam Navigation Co.* v. *Morse*, L.R. 4 P.C. 222.

(*c*) *The Gratitudine*, 3 Rob. 240; *The Soblomstem*, L.R. 1 A. & E. 293, 299; 36 L.J. Adm. 5.

(*d*) *Australasian Steam Navigation Co.* v. *Morse*, *supra*; *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Ex. 566.

(*e*) *Busk* v. *Fearon*, 4 East, 319.

it was held that the plaintiff might maintain an action against the shipowner for the recovery of the money he had been obliged to pay to release his cargo; also that the shipowner could not abandon the ship and freight, and refuse to ratify the act of the master, because the costs and expenses exceeded the value of the ship, when repaired, and the freight; and that "a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair, or otherwise, is not bound to inquire into the expediency of incurring the expense of these repairs with reference to the interest of the owner" (*f*). By the French law, on the contrary, the shipowner in a similar case may abandon the ship and freight, and, if he does so, will not be liable to the shipper for money paid to release the cargo (*g*).

Illegal pledges.—By the Merchant Shipping Act, 1894 (*h*), any pledge of the certificate of registry of a ship is made illegal and void; and, therefore, if a sole owner and captain pledges the certificate for good consideration, he may nevertheless re-demand the document for the purposes of navigation, and may maintain an action against the pledgee if it is not delivered up on request (*i*).

Mortgage of fixtures.—This may be made through the medium of any instrument of conveyance in writing, and need not be by deed (*k*). If certain fixtures are enumerated in a mortgage-deed, and there is then a clause embracing all fixtures upon the premises, fixtures of all kinds will pass to the mortgagee (*l*). If the mortgagor makes default in payment of the mortgage debt at the time appointed, the mortgagee may proceed to sell, without taking proceedings to foreclose, and may apply the proceeds of the sale in liquidation of the mortgage debt, interest and costs (*m*). But he will be ordered to account for and pay over any surplus that may remain (*n*). If he does not think fit to

(*f*) *Duncan* v. *Benson*, 1 Exch. 537, 554; 17 L.J. Ex. 238; affirmed, 3 Exch. 644; 18 L.J. Ex. 169.

(*g*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; but as to when French law applies, see *Greer* v. *Poole*, 5 Q.B.D. 272; 49 L.J. Q.B. 463.

(*h*) 57 & 58 Vict. c. 60, s. 15.

(*i*) *Wiley* v. *Crawford*, 1 B. & S. 253; 30 L.J. Q.B. 319. See also *Addison on Torts*, p. 621 (ed. 8).

(*k*) *Thompson* v. *Pettitt*, 10 Q.B. 101; 16 L.J. Q.B. 162. By the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, s. 4, personal chattels include fixtures when separately assigned or charged; cp. the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, s. 6; as to when fixtures are deemed to be separately assigned or charged, see ss. 5 and 7.

(*l*) *Haley* v. *Hammersley*, 30 L.J. Ch. 771; 3 De G. F. & J. 587; *Southport and West Lancashire Banking Co.* v. *Thompson*, 37 Ch.D. 64; 57 L.J. Ch. 114; cp. *Lambourn* v. *McLellan*, (1903) 2 Ch. 268; 72 L.J. Ch. 617.

(*m*) *Wilson* v. *Tooker*, 5 Bro. P.C. 193; *Lockwood* v. *Ewer*, 2 Atk. 303; *Kemp* v. *Westbrook*, 1 Ves.Sen. 278.

(*n*) *Harrison* v. *Hart*, 1 Comyns, 393.

sell, he can obtain a decree of foreclosure, and bar the equity of redemption, and make the property his own (*o*).

Right to fixtures as between mortgagor and mortgagee.—A mortgagor in possession may become tenant at will to the mortgagee, or tenant at sufferance; but he is not, in general, tenant for any term. The cases, therefore, respecting the right to disannex and remove fixtures as between landlord and tenant, have no application to the case of mortgagor and mortgagee. A mortgage made by the owner of the inheritance will, in general, pass all the fixtures thereon, though they are not named in the deed, and although they are trade fixtures which have been annexed to the freehold for the more convenient using of them and not to improve the inheritance, and are capable of being removed without any appreciable damage to the freehold (*p*). They pass to the mortgagee as part and parcel of the inheritance; and the mortgagor does not, by becoming tenant to the mortgagee, acquire any right to remove any portion of them, although they would be removable in ordinary cases as between landlord and tenant (*q*). Trade fixtures, affixed to mortgaged freehold premises after the mortgage, by the mortgagor and partner, occupying the premises for the purpose of their trade, pass to the mortgagee (*r*). But this is not so when the fixtures belong to a tenant of the mortgagor (*s*). In the absence of express stipulation to the contrary, a mortgagee of business premises, by leaving the mortgagor in possession, impliedly authorizes him to carry on his business and to do everything which is usual and proper for that purpose, including the erection and removal of trade fixtures, but the right of removal ceases when the mortgagee takes possession (*t*).

(*o*) *Wayne* v. *Hanham*, 9 Hare, 62; 20 L.J. Ch. 530

(*p*) *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; *Cumberland Union Banking Co.* v. *Maryport Hematite Co.*, (1892) 1 Ch. 415; 61 L.J. Ch. 335; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114; *Reynolds* v. *Ashby*, (1904) A.C. 466; 73 L.J. K.B. 946; cp *Lyon* v. *London, City and Midland Bank*, (1903) 2 K.B. 135; 72 L.J. K.B. 465. As to things not strictly fixtures substituted to improve the inheritance, see *Monti* v. *Barnes*, (1901) 1 K.B. 205; 70 L.J. K.B. 225.

(*q*) *Walmsley* v. *Milne*, 7 C.B. N.S. 115; 29 L.J. C.P. 97; *Mather* v. *Fraser*, 2 K. & J. 536; 25 L.J. Ch. 361; *Haley* v. *Hammersley*, 30 L.J. Ch. 771; 3 De G. F. & J. 587; *Reynolds* v. *Ashby*, *supra*.

(*r*) *Cotton, Ex parte*, 2 M. D. & D. 725; *Cullwick* v. *Swindell*, L.R. 3 Eq. 249; 36 L.J. Ch. 173; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Sheffield Building Society* v. *Harrison*, 15 Q.B.D. 358; 54 L.J. Q.B. 15.

(*s*) *Sanders* v. *Davis*, 15 Q.B.D. 218; 54 L.J. Q.B. 576.

(*t*) *Gough* v. *Wood & Co.*, (1894) 1 Q.B. 713; 63 L.J. Q.B. 564; *Thomas* v. *Jennings*, 66 L.J. Q.B. 5; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114; *Ellis* v. *Glover and Hobson*, (1908) 1 K.B. 388; 77 L.J. K.B. 251. As to an equitable mortgagee's rights to fixtures being subject to a hire-purchase agreement, see *Allen & Sons, In re*, (1907) 1 Ch. 575; 76 L.J. Ch. 362.

SECTION III.

MORTGAGE, ETC., OF INCORPOREALS.

Mortgages of shares and stock.—These may be effected by the execution by the mortgagor of an ordinary deed of transfer conveying the shares to the mortgagee in consideration of the payment of the mortgage-money, as in the case of an absolute sale, taking at the same time a separate deed from the mortgagee, admitting that the transfer, though absolute on the face of it, was in reality made by way of mortgage, and undertaking to re-transfer the shares by a given day on repayment by the transferor of the mortgage-money. If the transfer is on the face of it made conditional by way of mortgage, and not in the ordinary form of transfer given by the statute incorporating the company, the company will refuse to register it, as they cannot, as we shall see, place on the register transfers complicated with trusts and conditions (*u*). Foreclosure, and not sale, is the remedy of an equitable mortgagee of shares (*x*).

If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments (*y*), he cannot compel his mortgagor to indemnify him, unless he comes to redeem the shares (*z*).

It is not uncommon that an equitable mortgage of shares is effected by deposit with the mortgagee of the certificates accompanied by blank transfers. In such a transaction the mortgagee is impliedly authorised to fill up the blank left for the name of the transferee and get himself registered by way of realising the security (*a*). Where transfer must be by deed, however, a blank transfer so filled up will merely pass an equitable interest unless it has been re-delivered after being filled up (*b*).

A fraudulent transfer by the mortgagee will be ineffectual as against the owner after the transferees have had notice of the true ownership (*c*).

Mortgages of stock and shares void by reason of reputed

(*u*) *Reg.* v. *General Cemetery Co.*, 6 E. & B. 415 ; 25 L.J. Q.B. 342.

(*x*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314 ; 70 L.J. Ch. 562 ; cp. *Redmayne* v. *Forster*, L.R. 2 Eq. 467 ; 35 L.J. Ch. 847.

(*y*) See *Bloomenthal* v. *Ford*, (1897) A.C. 156 ; 66 L.J. Ch. 253.

(*z*) Smith's Man. of Eq. 303 (ed. 15).

(*a*) *In re Tahiti Cotton Co., Ex parte Sargent*, L.R. 17 Eq. 273 ; 43 L.J. Ch. 425 ; *Hooper* v. *Herts*, (1906) 1 Ch. 549 ; 75 L.J. Ch. 253.

(*b*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200 ; *Tees Bottle Co., In re*, 33 L.T. 834.

(*c*) *Ortigosa* v. *Brown*, 47 L.J. Ch. 168.

ownership.—If money is advanced on the security of a transfer of shares made by way of mortgage, and the transfer is not registered in the register of shareholders of the company, so that the mortgagor still appears on the register as the holder of the shares, the shares will be in his order and disposition, and, in case of his bankruptcy, will pass to his trustee; but, if the transfer cannot be made without the production of the mortgagor's certificates of proprietorship, and these certificates have been placed in the hands of the mortgagee so as to give the latter an equitable lien upon them, then, as the mortgagor has no power to transfer, the shares are not in his order and disposition (*d*).

Lien upon shares and stock.—Certificates of proprietorship of shares frequently have a notice upon them, warning that no transfer of the shares can be effected without the production of the certificates; and the companies will refuse to register transfer-deeds, unless the certificates of proprietorship of the transferor have previously been deposited at the transfer office. If, therefore, a shareholder borrows money on the security of shares, and deposits his certificates in the hands of the lender, accompanied by an agreement, in writing, to transfer the shares to the lender, or to his nominee, in case of the non-payment of the money by the time appointed, there will be a good charge upon the shares (*e*); but, to perfect the equitable title, notice of the deposit of the certificates must be given to the company, to prevent the shareholder from transferring his shares or obtaining fresh certificates by perjury or fraud, and if shares are equitably assigned or are left standing in the name of a bankrupt shareholder, they will pass to his trustee under the order and disposition clause unless notice has been given as aforesaid (*f*).

The fact that the company is not bound to take notice of any trust will not render nugatory a notice to them of the deposit of the certificates by way of security for a loan, and will not prevent a deposit of the certificates of proprietorship by way of security for a loan from constituting a valid charge upon the shares (*g*).

Where a sister advanced her brother 1,800*l*. on the security of a deposit of mining shares belonging to the brother, and received

(*d*) *Harrison, Ex parte*, 3 Dea. 196.

(*e*) *Richardson, Ex parte*, 3 Dea. 496, 503; *Littledale, Ex parte*, 6 De G. M. & G. 730; *Stewart, Ex parte*, 34 L.J. Ch. 6.

(*f*) *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q.B.D. 424; 54 L.J. Q.B. 177; affirmed, 11 A.C. 20; 55 L.J. Q.B. 169.

(*g*) *Stewart. Ex parte, supra*, explaining and qualifying *Boulton, Ex parte*, 1 De G. & J. 163; 26 L.J. Bankr. 45.

the certificates of the shares, together with an undertaking, signed by the brother, to complete the transfer of the shares when required, and placed the certificates and the undertaking in an inclosure which she sealed with her seal, and then deposited in an iron safe belonging to her brother for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had certainly the custody of the packet, but could not lawfully have broken the seal to get at the contents (*h*).

(*h*) *Richardson, Ex parte*, 3 Dea. 503.

CHAPTER IV.

CONTRACTS FOR SERVICES.

SECTION I.

WORK AND LABOUR.

Deposit or simple bailment may be defined to be a delivery or bailment of goods in trust to be kept for the bailor and re-delivered on demand. It is of the very essence of a deposit that it be gratuitous; for, if anything is to be paid for the care and custody of the article, it immediately becomes a contract for the letting and hiring of labour and services and care to be employed upon the chattel. Where shares were deposited with bankers by a customer under such circumstances as would have entitled the bankers to a lien upon them for their general banking account, it was held that they were bailees for reward (*a*).

Requisites of deposit—Executory and executed promises.—To constitute a deposit, the subject-matter of the bailment must be either actually or constructively delivered to the bailee, or it must be in his possession or under his control at the time he undertakes the charge of it. But a man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. Thus, if a tradesman anxious to sell his wares and merchandise sends them to my house without any previous communication with me, and without having obtained my previous consent, and they are taken in by my servant, in my absence, or without my knowledge, I do not by reason thereof become the depositary of the goods, and clothe myself with the care of them (*b*).

Liabilities of depositary—Negligent keeping—Ordinary casualties.—A bailee or depositary is not in general liable as an

(*a*) *Johnston's Claim*, L.R. 6 Ch. 212; 40 L.J. Ch. 286.

(*b*) *Lethbridge* v. *Phillips*, 2 Stark. 544; *Howard* v. *Harris*, 1 C. & E. 253.

insurer, but is only bound to take that care of things accepted by him to keep, which a reasonably prudent man takes of his own property of a like description (*c*). He will be liable to make compensation to the owner, if the goods are stolen, damaged, or lost by reason of negligence in the keeping of them; but he is not responsible for slight neglect or ordinary casualties (*d*). But if he is guilty of negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor (*e*). Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to show circumstances negativing negligence on his part (*f*). If a man takes charge of money, and leaves it upon a shelf, or in an open drawer in a place of public resort, when he might have placed it under lock and key, this is evidence of negligence. If a package or a box, sealed or locked, be deposited, and the depositary is not made acquainted with the contents, he is bound only to take that care of the article which its general appearance seems to require; and in case it should be lost or destroyed through neglect, he will only be liable to the extent of the apparent value of the article, without reference to the contents; but, if he is made acquainted with the contents—if he is told that the box contains gold or jewels, glass or china, of great value—he is then bound to exercise a degree of care proportioned to the proper keeping of such articles; and, if he then exposes the box in unsafe places, or subjects it to improper treatment, and the contents are damaged or destroyed, he must make compensation to the owner to the full extent of the injury sustained (*g*). Where property is deposited with bankers gratuitously, they are only liable for gross negligence (*h*). An executor stands in the position of a gratuitous bailee in respect of the assets (*i*).

Carelessness on part of depositor in selecting person notoriously unfit to be trusted.—The law, however, expects a depositor to exercise a reasonable amount of vigilance in the protection of his own interests; and, if he will blindly deposit goods in the hands of a person of weak intellect, or a child, or a minor

(*c*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25; *Bullen* v. *Swan Electric Engineering Co.*, 23 T.L.R. 258.

(*d*) *Coggs* v. *Bernard*, 2 Raym. 913; *Lane* v. *Cotton*, 1 *ib.* 655; *Southcote's Case*, 4 Co. 83, b; *Jones* v. *Lewis*, 2 Ves. Sen. 240; *Taylor* v. *Caldwell*, 32 L.J. Q.B. 164; 3 B. & S. 826; *ante*, p. 762.

(*e*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; 4 L.J. K.B. 29.

(*f*) *Phipps* v. *New Claridge's Hotel, Ltd.*, 22 T.L.R. 49.

(*g*) *Bonion's Case*, Pasch. 8 Edw. 2; Mayn. Year Book, 275; Fitz.Abr. Detinue, 59.

(*h*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25.

(*i*) *Job* v. *Job*, 6 Ch.D. 562.

without experience, or a notoriously idle and careless, or drunken fellow, he cannot expect the same care from them as from a prudent and cautious housekeeper. If the goods are injured or lost by the gross negligence of such depositaries, he must bear the consequence of his own rashness and folly, and put up with the loss (*k*).

Theft by servant of depositary.—If a servant steps out of the course of his employment to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger (*l*). If the carefully-selected servant of the depositary negligently leaves the door of a house or warehouse open, and thieves avail themselves of the opportunity thus afforded them to enter the house and steal the deposit, it appears that the depositary is not responsible for the theft (*m*). It is laid down by Holt, C.J., that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master" (*n*). If, therefore, a servant "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act" (*o*). It is the custom of bankers to receive and keep for the accommodation of their customers boxes of plate and jewels, wills, deeds, and securities; and, as no charge is made for the keeping of these things, they are, as we have seen, gratuitous deposits. The bankers, therefore, are not bound to exercise more than ordinary care of the deposits entrusted to them, and the negligence for which alone they are liable is the want of that ordinary diligence which a reasonably prudent man takes of his own property of the like description; and, if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant (*p*).

Use and enjoyment by depositary of subject-matter of deposit.—A depositary has no right to make use of the deposit for his

(*k*) *Coggs* v. *Bernard*, 2 Raym. 914, 915.

(*l*) Doct. & Stud. ch. 42; *Gayford* v. *Nicholls*, 9 Exch. 702; 23 L.J. Ex. 205.

(*m*) *Dansey* v. *Richardson*, 3 E. & B. 144, 169; 23 L.J. Q.B. 217; *ante*, p. 762, and *post*, p. 900. The Court was divided on this point, but the views of Campbell, C.J., and Coleridge, J. were approved in *Scarborough* v. *Cosgrove*, (1905) 2 K.B. 805; 74 L.J. K.B. 892; see further *Addison on Torts* (ed. 8), 725, 748.

(*n*) *Middleton* v. *Fowler*, 1 Salk. 282.

(*o*) Ld. Kenyon, *M'Manus* v. *Crickett*, 1 East, 107; *Reedie* v. *L. & N. W. Ry.*, 4 Exch. 244; 20 L.J. Ex. 65; *Peachey* v. *Rowland*, 13 C.B. 182; 22 L.J. C.P. 81.

(*p*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. C.P. 25, *ante*, p. 845.

own benefit and advantage; if he does so, and the thing is lost or injured, or deteriorated in value, through such user, the depositary must make good the loss (*q*). If, however, the subject-matter of the bailment is a living animal, such as a hound or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise. Where corn was deposited by a farmer with a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim at any time an equal quantity of wheat of similar quality, or, in lieu thereof, the market price of such quantity, it was held that this was a sale and not a bailment (*r*).

Transfer of deposit to stranger—Remedy of depositor.—If a depositary commits a breach of trust, and sells or wastes the deposit, the depositor may maintain an action against the purchaser for the recovery of the value of the deposit if the latter neglects to yield it up on demand (*s*), unless the thing has been purchased in market overt (*t*). Where a depositary has wrongfully sold the goods deposited with him, the bailor may sue him immediately for the conversion. If he does not discover the conversion until after the lapse of six years, he is, nevertheless, entitled to sue the depositary for refusing to deliver up the goods, and the Statute of Limitations will run only from the refusal to deliver on request, and not from the sale (*u*).

Restoration of deposit.—The depositary is bound to deliver up the deposit to the owner on demand, although the latter may be an entire stranger to him. A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property or between him or some agent authorised by the owner (*x*). The bailee has no better title than the bailor; and, consequently, if a person entitled to the property as against the bailor claims it, the bailee must give it up to him (*y*). No action can be brought for the return of the deposit until a demand

(*q*) See *Sanderson* v. *Collins*, 89 L.T. 42; and *The Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413; 60 L.J. Q.B. 676.

(*r*) *South Australian Ins. Co.* v. *Randell*, L.R. 3 C.P. 101.

(*s*) *Cooper* v. *Willomatt*, 1 C.B. 672; 14 L.J. C.P. 219; *Fenn* v. *Bittlestone*, 7 Exch. 152; 21 L.J. Ex. 41; *White* v. *Spettigue*, 13 M. & W. 603; 14 L.J. Ex. 99.

(*t*) *Addison on Torts*, p. 515 (ed. 8).

(*u*) *Wilkinson* v. *Verity*, L.R. 6 C.P. 206; 40 L.J. C.P. 141. See *Miller* v. *Dell*, (1891) 1 Q.B. 468; 60 L.J. Q.B. 404; 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5; *Loeschman* v. *Machin*, 2 Stark. 311.

(*x*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*y*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L.J. Q.B. 137; *Batut* v. *Hartley*, L.R. 7 Q.B. 594; 41 L.J. Q.B. 273; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187. See, however, *Davies, Ex parte*, 19 Ch.D. 86; *post*, p. 954.

has been made, and the period of limitations does not begin to run until the demand has been made (*z*).

Joint and several deposits.—Where goods and chattels are deposited in the hands of a bailee by the concurring will of several joint owners, one of them has no right to demand them back without the authority of all the joint depositors. If some of them ask the bailee to return the property, and others desire him to keep it, the bailee is not liable to an action at the suit of those who require him to return it (*a*). If the bailee is bound by his contract to deliver the goods to the two jointly, his refusal to deliver them on the demand of one party alone is not a conversion, nor is his detention from such one party an unlawful detainer. But, if an action is brought by several joint bailors against the bailee for non-delivery of the goods, it is a good defence to the action that the goods have been delivered up to one of them (*b*). And, wherever several joint owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*c*).

Transfers of subject-matter of bailment—Adverse claimants.—When chattels have been bailed, to be holden by the bailee at the disposal of the bailor, a question often arises as to the nature and extent of the liabilities of the bailee to persons who claim to be the owners of the chattels by sale or mortgage from the bailor. If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorised by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and, in case of the refusal of the latter to deliver them to him, may maintain an action for their recovery, the bill of sale or mortgage signed by the bailor being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee.

Eviction by title paramount.—A bailee can never be in a better position than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title

(*z*) *Tidd, In re*, (1893) 3 Ch. 154 ; 62 L.J. Ch. 915.

(*a*) *Atwood* v. *Ernest*, 22 L.J. C.P. 225 ; 13 C.B. 889 ; *May* v. *Harvey*, 13 East, 197.

(*b*) *Burke* v. *Bryant*, *Addison on Torts*, p. 609 (ed. 8) ; *Brandon* v. *Scott*, 7 E. & B. 237 ; 26 L.J. Q.B. 163 ; *Watson* v. *Evans*, 1 H. & C. 662 ; 32 L.J. Ex. 137.

(*c*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 851 ; 22 L.J. Ex. 355 ; *Broadbent* v. *Ledward*, 11 Ad. & E. 209.

than he has (*d*). So, where a bailor mortgages a chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the latter may refuse to give the chattel up to the bailor (*e*).

Stakes in hands of stakeholders to abide event of lawful game, or money deposited upon condition.—If money has been deposited in the hands of a stakeholder to abide the event of a lawful game or race, and then to be paid over to the winner, the stakeholder holds the money as agent of the winner, and is bound on demand to pay it over to him (*f*). But, if the party is not strictly a stakeholder holding money in that character, but receives it as agent for a known principal, he is accountable only to the latter for the money (*g*). As soon as the stakeholder has received the deposit, he is bound to hold it to abide the event, and must not pay it over to either party until the condition upon which it was made payable or returnable has been accomplished. Thus, where an auctioneer has received a deposit from the purchaser of an estate, to be paid over to the vendor if a good title to the property is made out by the latter, and, in default thereof, to be returned to the intended purchaser, the latter has no right to demand back the deposit, and the auctioneer is not justified in returning it, without the consent of the vendor. But, if the vendor is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the contracting parties, the auctioneer then holds the deposit for the use, and at the disposal, of the party from whom he received it, and is bound to return it on the request of the latter (*h*). So long as the contract between the parties interested in the deposit remains open, and the event is undetermined, the right to the deposit remains in suspension, and each of the parties has an equal interest in the due fulfilment of the trust by the stakeholder. Stewards of a horse-race do not stand in the position of arbitrators between the persons who have horses in the race; and it is not necessary that they should meet together and come to a joint decision as to which

(*d*) *Wilson* v. *Anderton*, 1 B. & Ad 457; 9 L.J. (O.S.) K.B. 48; *Shelbury* v. *Scotsford*, Yelv. 23; *Biddle* v. *Bond*, 34 L.J. Q.B. 137; 6 B. & S. 225; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187; *Ranson* v. *Platt* (1911), 1 K.B. 499; 80 L.J. K.B. 250. See, however, *Davies*, *Ex parte*, 19 Ch.D. 86, *post*, p. 954.

(*e*) *European, &c. Mail Co.* v. *Royal Mail Packet Co.*, 30 L.J. C.P. 247.

(*f*) *Applegarth* v. *Colley*, 10 M. & W. 723, 733; 11 L.J. Ex. 350.

(*g*) *Bamford* v. *Shuttleworth*, 11 Ad. & E. 926; *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7; *Marryat* v. *Broderick*, 2 M. & W. 372; 6 L.J. Ex. 113; *Emery* v. *Richards*, 14 M. & W. 728; 15 L.J. Ex. 49; *Eltham* v. *Kingsman*, 1 B. & Ald. 683.

(*h*) *Burrough* v. *Skinner*, 5 Burr. 2639; *Edwards* v. *Hodding* 5 Taunt. 815; *Gray* v. *Gutteridge*, 1 Moo. & R. 614; *Duncan* v. *Cafe*, 2 M. & W. 246; 6 L.J. Ex. 81.

horse has won, to enable the winner to recover the stakes (*i*). If the deposit has been made to abide the event of a wager, or for the purpose of carrying into effect an unlawful transaction, the depositor may at any time before the event has happened or the deposit has been paid over, demand it back and maintain an action for its recovery (*k*).

Power of depositary to compel rival claimants to establish their title by interpleader.—If the event, when it does transpire, is not of a decisive character, and both parties set up a title to the deposit, the depositary may compel them to interplead, and so establish the right. This may be done when the depositary claims no interest in the deposit, and is not colluding with either party (*l*). A stakeholder may also pay money into court under the Trustee Act, 1893 (*m*).

Liabilities of depositary holding possession wrongfully.—If the depositary is in default in neglecting to return the chattel on demand, he is responsible for all injuries that may afterwards happen to it. He must restore it, moreover, with all its increase and profits.

Liabilities resulting from the taking possession of goods by finding.—A man may clothe himself with the liabilities of a depositary by finding and taking possession of the lost property of another as well as by receiving property direct from the hands of the owner (*n*). "Although a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner: yet, when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods. And the least degree of care known to our law, that is, slight diligence, may well be required by him, being that which is applied to gratuitous acts of kindness" (*o*).

Liabilities of depositor—Lien of depositary.—No depositary is ever permitted in this country to set up a right of lien upon the chattel for the mere expenses he has incurred in keeping and preserving it.

Deposits of money with one of several partners.—A receipt

(*i*) *Parr* v. *Winteringham*, 1 E. & E. 394; 28 L.J. Q.B. 123.

(*k*) *Ante*, p. 104; *Holmes* v. *Sixsmith*, 7 Exch. 802; 21 L.J. Ex. 312; *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398. See also *ante*, p. 123.

(*l*) *Crawshay* v. *Thornton*, 7 Sim. 398; 4 L.J. Ch. 177; *Pearson* v. *Cardon*, 2 Russ. & M. 606; *Tanner* v. *European Bank*, L.R. 1 Ex. 261; 35 L.J. Ex. 151; *Nelson* v. *Baxter*, 23 L.J. Ch. 705; 2 H. & M. 334; *Attenborough* v. *St. Katharine's Dock*, 3 C.P.D. 450; 47 L.J. C.P. 763; Ord. LVII. r. 3. See *Laing* v. *Zeden*, L.R. 9 Ch. 736; 43 L.J. Ch. 626.

(*m*) 56 & 57 Vict. c. 53, s. 42; *United Kingdom Life Assurance Co., In re*, 34 L.J. Ch. 554; 34 Beav. 493.

(*n*) Dial. 2, ch. 38; *Story on Bailments*, 85.

(*o*) *Story on Bailments*, 87; *Isaack* v. *Clark*, 2 Bulst. 312. As to recovering the halves of bank notes, see *Smith* v. *Mundy*, 29 L.J. Q.B. 172.

of money by one partner on account of the firm, in the ordinary course of the business of the co-partnership, is the receipt of the co-partnership at large; and all the partners are individually responsible for the proper application of the money deposited (*p*).

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act (*q*).

The firm is liable to make good the loss in the following cases—namely: (a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm (*r*). Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either sect. 10 or sect. 11 of the Partnership Act, 1890 (*s*).

If one of several partners in trade obtains money in the ordinary course of dealing of the co-partnership, but by means of false and fraudulent representations, and converts the money, when received, to his own use in fraud of his partners, the partnership is nevertheless responsible for the moneys so received in the name of the firm; and an innocent partner may, consequently, be as much bound by such fraudulent acts and transactions as if he himself had personally been a party to them (*t*). But, if the fraud has not been committed in the course of the partnership dealings, but in the private and separate transactions of the single partner himself with third

(*p*) *Dundonald (Earl)* v. *Masterman*, L.R. 7 Eq. 504; 38 L.J. Ch. 350; *St. Aubyn* v. *Smart*, L.R. 3 Ch. 646; *Willet* v. *Chambers*, Cowp. 814; *Harman* v. *Johnson*, 2 E. & B. 61; 22 L.J.Q.B. 297; *Plumer* v. *Gregory*, L.R. 18 Eq. 621; 43 L.J. Ch. 803; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch.D. 394; 46 L.J. Ch. 661; *Cleather* v. *Twisden*, 28 Ch.D. 340; 54 L.J. Ch. 408; *Rhodes* v. *Moules*, (1895) 1 Ch. 236; 64 L.J. Ch. 122; and see *post*, p. 862. See now sect. 5 of the Partnership Act, 1890, *ante*, p. 359.

(*q*) 53 & 54 Vict. c. 39, s. 10. See *Moore* v. *Knight*, (1891) 1 Ch. 547; 60 L.J. Ch. 271.

(*r*) *Ib.*, s. 11. Under clause (*a*), the receipt and misapplication of the money, &c. must be by the same partner. Under clause (*b*), the firm, having once become responsible is liable for misapplication by any of its members. See *Blair* v. *Bromley*, 2 Ph. 354; 16 L.J. Ch. 105, 495; *St. Aubyn* v. *Smart*, L.R. 3 Ch. 646; and *Plumer* v. *Gregory*, L.R. 18 Eq. 621, 627; 43 L.J. Ch. 803.

(*s*) *Ib.*, s. 12; *Atkinson* v. *Mackreth*, L.R. 2 Eq. 570; 35 L.J. Ch. 624.

(*t*) *Rapp* v. *Latham*, 2 B. & Ald. 795; *Stone* v. *Marsh*, 6 B. & C. 551; 5 L.J. (O.S.) K.B. 201; *Keating* v. *Marsh*, 1 Mont. & Ayr. 582.

parties, the innocent partner cannot be made responsible to those who have been defrauded in the course of such transactions. Thus, if a partner, who holds money in his hands as a trustee for third parties, brings that money into the partnership account, and employs it in the business as his own money, the other partners cannot be made responsible for the repayment of the money so employed in the business, unless they knew at the time that the money was trust money, and not the property of their co-partner (*u*). But, if money is deposited in the hands of one of several partners of a banking firm at the bank, to be held temporarily by the bank, and subsequently applied in the purchase of some particular security, and the partner absconds with the money, the firm is responsible for the repayment of the amount, although they had given no authority to their partner to receive money for investment, and the transaction, so far as it related to the application of the money when received, was not in the ordinary course of business (*x*).

Deposits of money with bankers.—Money deposited in the hands of bankers in the ordinary course of business is money lent to the banker by the depositor, with a superadded obligation that it is to be repaid when called for by cheque. If interest is to be paid by the banker, the transaction amounts to a letting and hiring of the money or a loan at interest; if no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan; and in this last case, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan and of the debt, the statute of limitations will be a bar to its recovery by action (*y*). In ordinary cases of deposits of money with bankers the transaction amounts to a *mutuum* or loan for use and consumption, it being understood that the banker is to have the use of the money in return for his consent to take charge of it (*z*). Money, when paid into a bank, ceases altogether to be the money of the depositor. The banker is not answerable to the principal if he puts it in jeopardy by engaging in hazardous speculations; but he is, of course, answerable for an equivalent amount to

(*u*) *Heaton, Ex parte*, Buck. 386; *Smith* v. *Jameson*, 5 T.R. 601.

(*x*) *Thompson* v. *Bell*, 10 Exch. 10; 23 L.J. Ex. 321; *La Marquise de Ribeyre* v. *Barclay*, 23 Beav. 125; 26 L.J. Ch. 747.

(*y*) *Pott* v. *Clegg*, 16 M. & W. 321; 16 L.J. Ex. 210; *Howard* v. *Danbury*, 2 C.B. 803, 806; *Bridgman* v. *Gill*, 24 Beav. 302. Proof of a deposit with a banker, and payment of interest by him, is evidence of money lent: *Sutton* v. *Toomer*, 7 B. & C. 416; 6 L.J. (O.S.) K.B. 49.

(*z*) Alderson, B., *Robarts* v. *Tucker*, 16 C.B. 575; 20 L.J. Q.B. 270; *Pott* v. *Clegg*, *supra*; *Sims* v. *Bond*, 5 B. & Ad. 389.

be paid to his customer when demanded, the relation between them being that of debtor and creditor (*a*).

Deposit of bills, notes, and securities in hands of bankers.—But bills deposited in the hands of a banker remain the property of the customer (*b*) unless there be a special agreement transferring the property in them to the banker, so that, upon the death or failure of the banker, the customer has a right to the bills so long as they remain *in specie* (*c*); but the banker has a lien upon them, if the customer has overdrawn his account (*post*, p. 860). Where a customer paid a bank-note into the bank after the ordinary hours of business, and the bankers, having previously resolved to stop payment, did not carry the amount of the note to the customer's account, but placed it aside in a separate place of deposit, taking care not to mix it with the general assets of the house, it was held that the note still remained the property of the customer (*d*). If bank-notes deposited by a customer turn out to be worthless paper, by reason of the insolvency of the bank which issued the notes, the loss falls upon the customer, if there has been no laches on the part of the banker with whom the notes were deposited. If the banker gives a receipt for the notes as cash, he is not precluded by such receipt from subsequently showing that what he received was not cash, but spurious paper (*e*).

Receipt of cheques by bankers on account of customers.—When a cheque is paid into a bank to be placed to the account of a customer, the banker is bound to use due diligence in getting the cheque paid, and must give prompt notice to his customer in case it is not paid; and, if he omits to do either of these things, he makes the cheque his own, and must bear the loss, if loss there be. Where the plaintiff received a cheque drawn upon his own bankers, and took it to their bank, and handed it to a clerk, with directions to place it to his account, and the clerk received the cheque without any observation, and the bankers, finding that the drawer of the cheque had overdrawn his account and was keeping out of the way, gave the plaintiff notice on the following day that the cheque would not be honoured by them, and that the amount of it would not be placed to his credit, it was held that the bankers were not

(*a*) *Foley* v. *Hill*, 2 H.L. Cas. 28; *Derbyshire, In re, Webb* v. *Derbyshire*, (1906) 1 Ch. 135; 75 L.J. Ch. 95; *post*, p. 858.

(*b*) See *Dawson* v. *Isle*, (1906) 1 Ch. 633; 75 L.J. Ch. 338.

(*c*) *Thompson* v. *Giles*, 2 B. & C. 422; 2 L.J. (O.S.) K.B. 48. As to the effect of drawer's bank certifying cheques, see *Gaden* v. *Newfoundland Savings Bank*, (1899) A.C. 281; 68 L.J. P.C. 57.

(*d*) *Sadler* v. *Belcher*, 2 Moo. & R. 489; *post*, p. 855.

(*e*) *Timmins* v. *Gibbins*, 18 Q.B. 722; 21 L.J. Q.B. 403.

precluded, by their having received the cheque without comment in the first instance, from subsequently refusing to credit the plaintiff with the amount; but that, if the plaintiff, at the time he deposited the cheque, had asked the bankers whether they would pay it, he would have been entitled to an answer, and that the bankers would have been bound by such answer (*f*). It is often impossible to ascertain till the close of the day at the clearing-house what sums of money may be paid in to each particular account, and what are the drafts upon it; and bankers, therefore, may receive cheques drawn upon them by their customers, and may reserve to themselves the right of honouring them, or not honouring them, according to the result of the day's transactions at the clearing-house. Where bankers, at the time of receiving a cheque drawn upon them by one customer and presented by another, stated that they were not then in funds, but that they would keep the cheque in the hope of being furnished with money to pay it in the course of the day, it was held that they were bound to appropriate the first money they received from the drawer, in satisfaction and discharge of such cheque (*g*).

Duty of bankers to honour drafts of customers—Payment of cheques.—It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque, or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person he pleases. He may do so by written instrument or verbal direction; but the banker is entitled to require some written evidence of the order for the transfer (*h*). The banker is bound by law to honour the cheques and drafts of his customers, provided they are presented within banking hours, and provided he has in his hands sufficient funds for the purpose belonging to the customer (*i*); and, if he refuses, he is liable to an action by the customer for substantial damages, without proof of actual damage; for it is a discredit to the customer to have his cheque refused payment (*k*). The acceptance by a customer of a bill of exchange payable at his bankers is tantamount to an order

(*f*) *Boyd* v. *Emmerson*, 2 Ad. & E. 184, 202; 4 L.J. Q.B. 43.

(*g*) *Kilsby* v. *Williams*, 5 B. & Ald. 819.

(*h*) *Watts* v. *Christie*, 11 Beav. 546; 18 L.J. Ch. 173.

(*i*) *Agra, &c. Bank* v. *Hoffman*, 34 L.J. Ch. 285.

(*k*) *Marzetti* v. *Williams*, 1 B. & Ad. 424; 9 L.J. (O.S.) K.B. 42; *Rolin* v. *Steward*, 14 C.B. 595; 23 L.J. C.P. 148; *Boyd* v. *Emmerson*, *supra*; *Whitaker* v. *Bank of England*, 1 C. M. & R. 744; 4 L.J. Ex. 57; *Cumming* v. *Shand*, 5 H. & N. 95; 29 L.J. Ex. 129; *Shillibeer* v. *Glyn*, 2 M. & W. 143; 6 L.J. Ex. 21; *Wheatley* v. *Low*, Cro.Jac. 667; *Loe's Case*, Palm. 281. As to orders on bankers operating by way of novation and substitution, see *ante*, p. 180.

from him to his banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it, *i.e.*, to a person who becomes the holder by a genuine indorsement, or, if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, to the person who seems to be the holder (*l*). If bankers have indorsed a bill of exchange accepted by a customer, and the bill is presented to them when it arrives at maturity, and they pay it on the day it becomes due, the bankers so paying may reserve to themselves the right to examine into the state of the accounts between them and the acceptor, their customer, and determine whether they honour the bill for the acceptor, or take it up on their own account as indorsers (*m*). As to determination of authority of bankers, see sect. 75 of the Bills of Exchange Act, 1882, *post*, p. 1291.

Joint accounts and joint deposits with bankers.—Where money is paid into a bank to the joint account of several persons *nominatim*, it cannot be drawn out by one of them alone; for the bankers are not discharged from liability by payment to one of the depositors without the authority of the others (*n*). But, when one dies, the money may be drawn out by the survivor. Such is the case with money deposited in a bank in the joint names of husband and wife (*o*).

Deposits and accounts with bankers in names of trustees, agents, and receivers.—In a banking account of the ordinary kind between a banker and his customers it is not competent to any third party to interpose and to say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. All cheques and money paid into the bank by the customer are, as between the banker and the customer, the cheques and money of the customer, whoever may be the real owner of them. If the owner of the cash allows his agent to deal with it as his own, and pay it into the bank in his own name, he has no power over it after it has reached the banker's hands. On the other hand, it is not competent to the banker, after he has placed the money to the credit of a customer, to deny the title of the latter to the money, and to set up a *jus tertii*, or to revoke the credit (*p*). If several joint owners of a sum of money allow one of them to

(*l*) *Kymer* v. *Laurie*, 18 L.J. Q.B. 218; *Robarts* v. *Tucker*, 16 Q.B. 578; 20 L.J. Q.B. 270; *post*, p. 858.

(*m*) *Pollard* v. *Ogden*, 2 E. & B. 459; 22 L.J. Q.B. 439.

(*n*) *Innes* v. *Stephenson*, 1 Moo. & R. 147; *Sims* v. *Brittain*, 4 B. & Ad. 375.

(*o*) *Williams* v. *Davies*, 33 L.J. P. & M. 127; 3 Swa. & T. 437.

(*p*) *Tassell* v. *Cooper*, 9 C.B. 533.

deal with their money and place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual dealing with him, and the latter cannot impose upon the banker as many contracts as there are owners of the money (*q*).

Separate accounts opened by same person in different capacities.—Generally, as between banker and customer, the banker looks only to the customer in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw the banker is to honour, and is not to inquire what the moneys are that are paid into that account, or for what purpose they are drawn out. But, when the customer opens two separate accounts, the one being a private account of his own, and the other an account as trustee or receiver of the moneys of a known third party, the bankers are bound to take notice that the moneys placed to the last-named account are not the moneys of their customer, and they cannot make an arrangement with the latter for an appropriation of the balance in their hands on the fiduciary account to liquidate a balance due to them from their customer upon his own private account. They have no right to combine with the receiver for the appropriation of his principal's money to discharge the private debt due to them from the receiver; for no person dealing with another, and knowing him to have in his hands or under his control money belonging to a third person, can deal with the individual holding that money for his own private benefit, when the effect of the transaction is that a fraud is necessarily committed upon such third party (*r*).

Loss of trust-money in hands of bankers.—If an agent or trustee who has received a sum of money for the use of his principal or beneficiary pays the money into a bank in the name of the principal or beneficiary, and places it to the account of the latter, the amount then remains in the bank at the risk of the principal; and if the banker fails the principal must bear the loss. But, if the agent or trustee pays in the money to his own account and his own credit, this is a user of the money for which he will be responsible. If he had an implied authority to use the money, and has so exercised it, then he stands, as before mentioned, in the position of a borrower for use and

(*q*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Pinto* v. *Santos*, 5 Taunt. 447.

(*r*) *Bodenham* v. *Hoskins*, 21 L.J. Ch. 864; 16 Jur. 721; affirmed, 2 De G. M. & G. 903; *Bridgman* v. *Gill*, 24 Beav. 302; *Kingston, Ex parte*, L.R. 6 Ch. 632; 40 L.J. Bankr. 91; *per* Blackburn, J., *Bailey* v. *Finch*, L.R. 7 Q.B. 42; 41 L.J. Q.B. 83; *Morier, Ex parte*, 12 Ch.D. 491; 49 L.J. Bankr. 9; *Coleman* v. *Bucks and Oxon Union Bank*, (1897) 2 Ch. 243; 66 L.J. Ch. 564.

consumption. In either case he is bound to make good the loss (*s*).

Payment of forged cheques, drafts, and orders on bankers—Negligence of banker and of customer.—See Bills of Exchange, *post*, Ch. VI. If bankers pay a cheque under circumstances of suspicion which ought to have put them on their guard and induced them to make inquiry before paying it, they cannot debit the customer with the amount, if the cheque was never uttered or put into circulation by the customer. Thus, where the customer, finding that he had drawn a cheque for a wrong sum, tore it into four pieces and threw them away, and these four pieces were picked up, and neatly pasted together, and presented at the bank by a stranger for payment, but the rents and the pasting of the paper were quite visible, and the face of the cheque was soiled and dirty, and the cashier, nevertheless, paid it without demur or inquiry, it was held that the bankers had been guilty of a neglect of duty, and could not, under the circumstances, debit their customer with the payment (*t*). But, if the tearing is done in such a way that it is reasonable to presume it to have been done for the purpose of transmitting the cheque through the post, there will then be no neglect of duty on the part of those who pay the cheque in ignorance of its having been torn up with the intention of cancelling it (*u*). If money is drawn out of the bank by means of a forged order purporting to have been made by the customer, the banker must sustain the loss. Where a cheque drawn by a customer on his banker for a sum of money described in the body of the cheque in words and figures was afterwards altered by the holder, who substituted in a different handwriting a larger sum than that mentioned in the cheque, in such a manner that no one, in the ordinary course of business, would have observed it, and the banker paid the larger sum to the holder, it was held that he could not lawfully debit the customer with the over-payment (*x*). But, if the banker has been defrauded through the carelessness or negligence of the customer in drawing the cheque, the loss must be borne by the customer. Where the customer signed several blank cheques and left them in the hands of his wife to

(*s*) *Robinson* v. *Ward*, R. & M. 276 ; *Wren* v. *Kirton*, 11 Ves. 377 ; *Rocke* v. *Hart*, *ib.* 61 ; *Massey* v. *Banner*, 4 Mad. 418, 419 ; 1 Jac. & Walk. 241.

(*t*) *Scholey* v. *Ramsbottom*, 2 Campb. 485.

(*u*) *Ingham* v. *Primrose*, 28 L.J. C.P. 294 ; 7 C.B. N.S. 82.

(*x*) *Hall* v. *Fuller*, 5 B. & C. 750 ; 4 L.J. (O.S.) K.B. 297 ; *Scholfield* v. *Londesborough* (*Earl*), *post*, p. 858 ; as to advances by bankers, at the request of their customers on forged securities, see *Woods* v. *Thiedemann*, 1 H. & C. 478 ; or on securities fraudulently obtained, *Carew's Act*, *In re*, 30 Beav. 274 ; 31 L.J. Ch. 214 ; 31 Beav. 39. See *Vagliano* v. *Bank of England*, (1891) A.C. 107 ; 60 L.J. Q.B. 145 ; *post*, pp. 897, 1244.

be filled up, and she handed a cheque to a clerk to be filled up for 50*l.* 2*s.* 3*d.*, and the clerk filled up the cheque for the specified amount, and showed it to the wife, but the "fifty" was commenced in the middle of the line, so that the words "three hundred and" could easily be written before it, and space was left at the bottom of the cheque for the insertion of the figure 3 between the £ and the figures 50, and the clerk on his way to the bank altered the cheque to 350*l.*, and got that amount from the bankers and absconded, it was held that the customer must bear the loss, as it had been occasioned by his own negligence and the negligence of his agent in dealing with the blank cheque (*y*). Negligence in dealing with a cheque or draft must, in order to amount to an estoppel, be negligence in the transaction itself and the proximate cause of leading the third party into mistake, and must be a breach of some duty owing to such third party or to the public at large (*z*). But where a bill of exchange for 500*l.* was presented for acceptance with a stamp of much larger than the necessary amount, and with spaces left which enabled the drawer after acceptance to turn it into a bill for 3,500*l.*, it was held that the acceptor was not liable to a *bonâ fide* holder for value for more than the 500*l.* (*a*).

Forged indorsements.—If a bill of exchange has been accepted by a customer payable to order at his bankers, the acceptance of the bill is an authority to the bankers to pay the bill only to a person who becomes the holder by a genuine indorsement from such customer. If bankers wish to avoid the responsibility of deciding on the genuineness of the indorsement, they must require their customer to make his bills payable at his own offices, and to honour the bills by giving a cheque on them; for they cannot debit a customer with a payment made to a party who claims through a forged indorsement and so cannot give a valid discharge for the bill, unless there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or a subsequent admission on the part of the customer of the genuineness of the indorsement inducing the bankers to alter their position, so as to preclude the customer from showing it to be forged (*b*). But, by 16 & 17 Vict. c. 59, s. 19, as extended

(*y*) *Young* v. *Grote*, 4 Bing. 253; 5 L.J. (O.S.) C.P. 165.

(*z*) *Arnold* v. *Cheque Bank*, 1 C.P.D. 578; 45 L.J. C.P. 562; *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L.J. Q.B. 713; *Merchants of the Staple* v. *Bank of England*, 21 Q.B.D. 160; 57 L.J. Q.B. 418.

(*a*) *Scholfield* v. *Londesborough* (*Earl*), (1896) A.C. 514; 65 L.J. Q.B. 593.

(*b*) *Robarts* v. *Tucker*, 16 Q.B. 578; 20 L.J. Q.B. 270; sect. 24 of 45 & 46 Vict. c. 61, *post*, p. 1259, and *Addison on Torts*, 628 (ed. 8).

by 35 & 36 Vict. c. 44, s. 11, any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement or any subsequent indorsement was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorser thereof. But this enactment does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement (*c*): see also sects. 30 and 60 of Bills of Exchange Act, *post*, pp. 1257, 1259. An indorsement of a cheque "per proc." or "as agent" is an indorsement by the payee within the statute, although the indorser has no authority to indorse (*d*).

Cheques paid by mistake.—If a banker pays the cheque of a customer, supposing that he has funds, and afterwards finds that the customer has overdrawn his account, and that he has no funds, the banker cannot recover the money from the party who presented the cheque (*e*); but, if the cheque was not drawn on the banker, and the latter does not pay the cheque as a banker honouring the draft of his customer, but in the same way as if he were giving change for a bank-note, all parties believing the cheque to be genuine, he can recover back the money he has paid, if the cheque turns out to be forged and worthless (*f*).

Payment of cheques at branch banks.—The different branch banks of a banking company are, as regards their separate customers, separate companies, so that a customer who keeps an account with one branch has no right to draw cheques upon, and have them cashed by, another branch. They are also separate and distinct for many other purposes (*g*). But in principle they are agencies of one principal banking firm, although regarded as distinct for special purposes (*h*). Where a customer had an account with two branches of a bank, it was held that in the absence of any special agreement with their customer the bank had a right to consider the two accounts as

(*c*) *Ogden* v. *Benas*, L.R. 9 C.P. 513; 43 L.J. C.P. 259; *Bobbett* v. *Pinkett*, 1 Ex.D. 368; 45 L.J. Ex. 555.

(*d*) *Charles* v. *Blackwell*, 2 C.P.D. 151; 46 L.J. C.P. 368.

(*e*) *Chambers* v. *Miller*, 13 C.B. N.S. 125; 32 L.J. C.P. 30; *London Chartered Bank of Australia* v. *McMillan*, (1892) A.C. 292; 61 L.J. P.C. 444.

(*f*) *Woodland* v. *Fear*, 7 E. & B. 522; 26 L.J. Q.B. 202.

(*g*) *Woodland* v. *Fear*, *supra*; *Clode* v. *Bayley*, 12 M. & W. 51; 13 L.J. Ex. 17.

(*h*) *Prince* v. *Oriental Bank Corporation*, 3 App.Cas. 325; 47 L.J. P.C. 42.

one, and to refuse the customer's cheque when, on adding the two accounts together, the balance was against him (*i*).

Crossed cheques.—As to crossed cheques, see *post*, Ch. VI.

Lien of bankers.—Bankers have a lien upon all the securities of their customers in their hands for advances in the ordinary course of business, unless such securities have been received under special arrangement inconsistent with the exercise of the right (*k*), or for some special purpose (*l*). But they have no lien on boxes and their contents deposited with them for convenience and safe custody merely (*m*).

Damages for non-payment of cheques by bankers.—Substantial damages may be recovered against a banker, for dishonouring an acceptance and cheques of a customer, there being sufficient assets in his hands at the time to meet them (*n*).

Mandate or gratuitous commission—Non-feazance and misfeazance.—It has been said, in reference to gratuitous undertakings to perform work, that, if the promisor does not proceed on the work, no action will lie against him for the non-feazance; but, "if he proceeds on the employment, he makes himself liable for any misfeazance in the course of that work." But, when a man promises to perform work upon, or to do something with, the chattel of another, and the chattel is bailed to him for the purpose expressed, his acceptance of the possession of the chattel in execution of his engagement is an "entering on the work and employment;" and if, after having accepted such possession and taken the chattel away with him, he neglects to do that which he promises to perform, this neglect is a misfeazance, for which he shall be responsible (*o*). Where a sum of money was bailed to a party upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant place, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the mandatary was responsible for the non-fulfilment of his engagement (*p*). If a party undertakes to procure an insurance for another, and proceeds to carry his undertaking into effect by

(*i*) *Garnett* v. *M'Kewan*, L.R. 8 Ex. 10; 42 L.J. Ex. 1.

(*k*) *Jones* v. *Peppercorn*, 28 L.J. Ch. 158; Johns. 430; *Meadows, In re*, 28 L.J. Ch. 891; 26 Beav. 588; *City Bank, Ex parte*, 3 L.T. 792; *European Bank, In re*, L.R. 8 Ch. 41.

(*l*) *Brandao* v. *Barnett*, 12 Cl. & Fin. 787; *Wilde* v. *Radford*, 33 L.J. Ch. 51; *London Chartered Bank of Australia* v. *White*, 4 App.Cas. 413; 48 L.J. P.C. 75; *Bowes, In re*, 33 Ch.D. 586; 56 L.J. Ch. 143; *London and Globe Finance Corporation, In re*, (1902) 2 Ch. 416; 71 L.J. Ch. 893.

(*m*) *Leese* v. *Martin*, L.R. 17 Eq. 224; 43 L.J. Ch. 193.

(*n*) *Rolin* v. *Steward*, 14 C.B. 595; 23 L.J. C.P. 148.

(*o*) Holt, C.J., *Coggs* v. *Bernard*, 2 Raym. 919, 920; *Elsee* v. *Gatward*, 5 T.R. 149; *Balfe* v. *West*, 22 L.J. C.P. 175; 13 C.B. 466.

(*p*) *Shillibeer* v. *Glyn*, 2 M. & W. 143; 6 L.J. Ex. 21.

getting a policy underwritten, but deals so negligently with the policy that the benefit of the insurance is totally lost to the party for whom he promised to effect it, he is liable to an action (*q*).

Bailment of money and chattels to be carried gratuitously—Loss or damage from negligence.—A bailee who has undertaken gratuitously to convey money or goods from one place to another, and has entered upon the trust by accepting possession of the money or the goods, is bound to exercise the same care and diligence in the execution of the task as a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property; and he is consequently only liable for gross negligence (*r*). *Primâ facie* a gratuitous carrier of goods for another, who keeps them with the same care that he keeps his own of the same description, is not guilty of gross negligence; but this presumption may be repelled by evidence of actual negligence, or of conduct, which, though applied to his own goods as well as to those of the bailor, would be deemed negligence in a man of ordinary prudence. In considering what is gross negligence, the nature and value of the property delivered to a carrier to be carried gratuitously must be considered (*s*). "For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment" (*t*).

Bailments of chattels to be mended or repaired gratuitously—Employment of unskilful persons.—If a chattel is bailed to a workman in some particular craft, upon the faith of an undertaking made by the bailee to mend it gratuitously for the benefit of the mandator, the mandatary must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of the work through a want of that skill which every workman in his particular craft is bound to possess (*post*, p. 889).

(*q*) *Wallace* v. *Tellfair*, cited *Wilkinson* v. *Coverdale*, 1 Esp. 76.

(*r*) *Coggs* v. *Bernard*, 1 Smith's L.C. p. 173 (ed. 11).

(*s*) *Angell on Carriers*, pp. 29—31 (ed. 5).

(*t*) *Beal* v. *South Devon Ry.*, 3 H. & C. 337, at p. 341.

But, if a person, known to be unskilled in the particular work he gratuitously undertakes, does the work at the solicitation of a friend with such ability as he possesses, he stands excused, although it is unskilfully done: for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity (*u*).

In respect of the custody and safe keeping of the chattel, the mandatary is clothed with the ordinary liabilities and responsibilities of a depositary.

Bailment of money for investment.—If money is bailed to a man upon the faith of a promise or assurance made by him to place it out at interest, or to purchase an annuity with it for the benefit of the bailor, the mandatary who accepts the money impliedly promises to be careful in the fulfilment of his undertaking, and to exercise ordinary care in the selection of a safe investment; and, if the money is lost by his neglect, an action will lie against him for the loss (*x*). But the mandatary is not responsible (if he does not exercise any trade or profession denoting that he has peculiar skill in money matters) for the exercise of more than ordinary care; and he is not liable for the failure of the investment, if he has used such knowledge as he possessed, and has acted with honesty of purpose in the transaction (*y*). But a solicitor, whose profession and employment naturally leads him to have some knowledge of securities for money and pecuniary investments, is responsible for the exercise of a reasonable amount of professional skill in the selection of a safe investment, although he acts gratuitously (*z*). His profession implies skill, and invites confidence: and an omission of that skill is imputable to him as gross negligence (*a*).

Bailments of living animals—Negligent management.—If the subject-matter of the bailment consists of living animals, such as horses, oxen, cattle or sheep, the mandatary is bound to furnish them with suitable food, and to give them a reasonable amount of exercise and fresh air. If a man takes charge of cattle or sheep, and afterwards takes no heed of them, but lets them stray away on a common, and get drowned or lost, this is a breach of trust, and he is responsible for the loss (*b*). If he turns a horse, of which he has consented gratuitously to take

(*u*) *Shiells* v. *Blackburne*, 1 H. Bl. 159; *Moore* v. *Mourgue*, 1 Cowp. 479.

(*x*) *Coggs* v. *Bernard*, 2 Raym. 910; *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464.

(*y*) *Dartnall* v. *Howard*, 4 B. & C. 345, 350; 3 L.J. (O.S.) K.B. 246.

(*z*) *Donaldson* v. *Haldane*, 7 Cl. & Fin. 762; *Bourne* v. *Diggles*, 2 Chitt. 311; *Craig* v. *Watson*, 8 Beav. 427; *Smith* v. *Pococke*, 23 L.J. Ch. 545; 2 Drew. 197.

(*a*) *Shiells* v. *Blackburne*, *supra*. See also *ante*, pp. 808, 813.

(*b*) Hil. Term, 2 Hen. 7, 9, b; *Coggs* v. *Bernard*, 2 Raym. 913.

charge, into a dangerous pasture after dark, and the horse falls into a pit or well, or into the shaft of a mine, this is a gross neglect and breach of trust, and he shall be responsible for the loss (*c*).

What is, and what is not, gross negligence amounting to a breach of trust is often a mixed question of law and fact, but more generally a pure question of fact. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject-matter of the bailment, and the degree of care it seems to require (*d*). Where a man proved to be conversant with, and skilled in, horses was commissioned to ride a horse to a neighbouring village, for the purpose of showing it for sale, and on his arrival he rode the horse into the race-ground, which was wet and slippery, and the horse slipped and fell several times, and at last in falling broke one of its knees, it was held that the bailee had been guilty of a culpable neglect and breach of trust, and was answerable for the damage (*e*). If a farrier undertakes to treat a living animal for some disorder gratuitously, he is nevertheless bound to exercise the ordinary knowledge and skill of his profession, and will be responsible for injuries resulting from his neglect to do so (*f*).

Bailments of perishable commodities.—If the subject-matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labour and vigilance for its preservation as would ordinarily be bestowed by a prudent owner. If the mandatary of a valuable painting lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of negligence (*g*) for which he is liable to an action.

Use of subject-matter of mandate.—A mandatary has no implied right to make use of the subject-matter of the bailment for his own gain and advantage unless such a right is expressly given (*h*); if he does so, and it is lost, or in any way injured or deteriorated in value by reason of the user, he must, in common with a depositary, make good the loss. When money is handed by one man to another for safe custody, with permission to use it in his business, the depositary stands in a fiduciary position, and the transaction must be distinguished from a loan

(*c*) *Rooth* v. *Wilson*, 1 B. & Ald. 61, 62.
(*d*) *Story on Bailments*, 9, 10.
(*e*) *Wilson* v. *Brett*, 11 M. & W. 113; 12 L.J. Ex. 264.
(*f*) *Shiells* v. *Blackburne*, 1 H.Bl. 162.
(*g*) *Mytton* v. *Cock*, 2 Str. 1099.
(*h*) *Tidd, In re. Tidd* v. *Overell.* (1893) 3 Ch. 154; 62 L.J. Ch. 915.

or debt (*i*). Where goods are sent voluntarily, and without request, by one person to another, no duty is cast on the recipient with respect to them (*k*).

Theft and negligence by servants of bailee.—If the bailee has not been guilty of any negligence and the goods are stolen he is not liable to an action for negligence. The *onus probandi* of negligence lies on the plaintiff. The bailee has a right to prosecute the thief (*l*). A bailee in possession may recover against a stranger for loss of bailed goods by negligence, although he would have had a good answer to an action by the bailor for damages for loss of the goods bailed (*m*). A bailee is not liable for injury to the subject-matter of the bailment, when such injury immediately results from an act of his servant not in the course of his employment (*n*).

Payment of expenses.—If the mandatary must necessarily incur expense in the execution of the commission entrusted to him, he is clothed with an implied authority from the mandator to defray such expenses (*o*); but no lien is permitted to be claimed by one upon the property of another for the expenses attendant upon the execution of a gratuitous commission.

Warehousing of chattels for reward.—When chattels are delivered to a warehouseman or storekeeper to be taken care of or kept for hire, the contract is a contract for the letting and hiring or for care and custody. Where a livery-stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, he is bound to take reasonable care that the building in which it is placed is in a proper state, so that the carriage may be reasonably safe in it; but there is no implied warranty on his part that the building is absolutely safe, and the fact that the building has been erected for him on his own ground makes no difference in his liability (*p*). A depositor of goods for safe custody, who, by himself or his servants, has an opportunity of observing certain defects in the storehouse, cannot be taken to have agreed that any risk of injury to his goods which may be occasioned by those defects shall be borne by him, and not by the bailee for hire (*q*).

(*i*) Bac.Abr. Bailment, D.; *Clark* v. *Gilbert*, 2 Bing. N.C. 343; 5 L.J. C.P. 61.

(*k*) *Howard* v. *Harris*, 1 C. & E. 253.

(*l*) *Finucane* v. *Small*, 1 Esp. 315, at pp. 316, 317; *Butt* v. *G. W. Ry.*, 11 C.B. 140, at p. 151; 20 L.J. C.P. 241; *Rex* v. *Wilkinson*, Russ. & Ry. 470.

(*m*) *The Winkfield*, (1902) P. 42; 71 L.J. P. 21; overruling *Claridge* v. *S. Staffs. Tram. Co.*, (1892) 1 Q.B. 422; 61 L.J. Q.B. 503.

(*n*) *Sanderson* v. *Collins*, (1904) 1 K.B. 628; 73 L.J. K.B. 358; *Cheshire* v. *Bailey*, (1905) 1 K.B. 237; 74 L.J. K.B. 176.

(*o*) *Story on Bailments*, s. 197.

(*p*) *Searle* v. *Laverick*, L.R. 9 Q.B. 122; 43 L.J. Q.B. 43.

(*q*) *Brabant* v. *King*, (1895) A.C. 632; 64 L.J. P.C. 161.

Negligent keeping of goods by warehousemen, and depositaries for hire.—All persons to whom goods are delivered to be kept for hire and reward, and who are paid expressly for their care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care which the most prudent and careful of men exercise for the protection of their own property. If the goods are injured by mice or rats, the warehouseman will be responsible for the damage (*r*), although he keeps cats to destroy vermin (*s*). In an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, it is no answer for him to say that he has lost it (*t*); the mere fact of the loss is *primâ facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing entrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner (*u*).

Loss of chattels by wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods entrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel (*x*). If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf (*y*).

Passenger's luggage deposited in cloak-rooms.—In the absence of any condition limiting their liability, railway companies are ordinary warehousemen of luggage deposited with them. But a railway company are not bound to receive luggage into their warehouse upon the ordinary liability of warehousemen, and

(*r*) *White* v. *Humphrey*, 11 Q.B. 44.

(*s*) *Laveroni* v. *Drury*, 8 Exch. 166; 22 L.J. Ex. 2; see *Kay* v. *Wheeler*, L.R. 2 C.P. 302; 36 L.J. C.P. 180.

(*t*) *Cairns* v. *Robins*, 8 M. & W. 258; 10 L.J. Ex. 452; *Reeve* v. *Palmer*, 28 L.J. C.P. 168; 5 C.B. N.S. 91; *Goodman* v. *Boycott*, 2 B. & S. 1; 31 L.J. Q.B. 69.

(*u*) *Dover* v. *Mills*, 5 C. & P. 175.

(*x*) *Leigh* v. *Smith*, 1 C. & P. 638, 641; 2 Esp. 695.

(*y*) *Cobban* v. *Downe*, 5 Esp. 41; *Story on Bailments*, 293; *Jones on Bailments*, 97.

they usually further limit their liability by conditions printed on the ticket given to the depositor at the time. There is no rule or presumption of law that a person is bound by the conditions contained in a document thus delivered to him; but it is a question of fact in each case whether they have been brought to his notice (*z*). "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions" (*a*). A condition upon a cloak-room ticket that a railway company "will not be responsible for articles left by passengers at the station unless the same be duly registered . . . ." and "will not be responsible for any package exceeding the value of 10*l.*" absolves the company from liability for any damage to an article which exceeds the value of 10*l.*; the condition means that the company will undertake no responsibility for any article over the value of 10*l.* but that such article is taken in at the risk of the owner and not at that of the company (*b*). A cloak-room is a reasonable facility in the furtherance of railway traffic, and a railway company has a lien for its charges on goods deposited therein upon the same principle as it has for its charges of transit (*c*).

Loss of cattle—Liabilities of agisters of cattle.—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been prevented by the exercise of great care. Very slight evidence of

(*z*) *Henderson* v. *Stevenson*, L.R. 2 H.L. (Sc.) 470; *Van Toll* v. *S. E. Ry. Co.*, 31 L.J. C.P. 241; 12 C.B. N.S. 75.

(*a*) *Per* Mellish, L.J., in *Parker* v. *S. E. Ry.*, 2 C.P.D. p. 423; 46 L.J. C.P. 768; *Harris* v. *G. W. Ry.*, 1 Q.B.D. 515; 45 L.J. Q.B. 729; *Burke* v. *S. E. Ry.*, 5 C.P.D. 1; 49 L.J. C.P. 107; *Richardson, Spence & Co.* v. *Rowntree*, (1894) A.C. 217; 63 L.J. Q.B. 283. See also, *Marriott* v. *Yeoward Brothers*, (1909) 2 K.B. 987; 79 L.J. K.B. 114. Where the plaintiff delivered to the keeper of a repository for the sale on commission of carriages a carriage to be sold, and took a receipt for it which contained an explicit reference to the conditions exhibited on the premises, but which he did not read, it was held that he was bound by the conditions: *Watkins* v. *Rymill*, 10 Q.B.D. 178; 52 L.J. Q.B. 121.

(*b*) *Pratt* v. *S. E. Ry.*, (1897) 1 Q. B. 718; 66 L.J. Q.B. 418.

(*c*) *Singer Manufacturing Co.* v. *L. & S. W. Ry.*, (1894) 1 Q.B. 833; 63 L.J. Q.B. 411.

neglect has been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for reward. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally left open, and of the fences being in parts out of order, but it did not appear directly that the horse had strayed through any defect in the fences, or through any of the gates being left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse (*d*). If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal, by reason thereof, is lost or injured, this is a degree of neglect for which he is undoubtedly responsible (*e*).

Distinction between contracts for work and services and contracts of sale.—There is a great analogy between contracts for working up materials and the contract of sale; for, if the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is in general a contract of sale; while, on the other hand, if the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour. In the case of works of art the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and, whenever the skill and labour are of the highest description, and the materials of small comparative value, the contract is a contract for work, labour and materials, and not a contract of sale (*f*). A contract, for example, for the printing of a book is a contract for the letting and hiring of work and services, although the printer supplies both the paper and the ink, and not a contract of sale (*g*). The test is that "if the contract is intended to result in transferring for a price from A. to B. an article in which B. had no previous property," then it would be a contract for the sale of a chattel and not a contract for work and labour, *e.g.*, a contract by a dentist to make a set of artificial teeth, to fit the mouth of the employer (*h*).

(*d*) *Broadwater* v. *Blot*, Holt, N.P. 547; *Smith* v. *Cook*, 1 Q.B.D. 79; 45 L.J. Q.B. 122.

(*e*) *Mosley* v. *Fosset*, 1 Roll.Abr. 4; *Halestrap* v. *Gregory*, (1895) 1 Q.B. 561; 64 L.J. Q.B. 415. See *Addison on Torts*, pp. 52, 747 (ed. 8).

(*f*) See, however, the remarks of Crompton, J., and Blackburn, J., in *Lee* v. *Griffin*, 1 B. & S. 278; 30 L.J. Q.B. 252.

(*g*) *Clay* v. *Yates*, 1 H. & N. 73; 25 L.J. Ex. 237.

(*h*) *Lee* v. *Griffin*, *supra*.

Executory and executed contracts for work.—Contracts for work and services, like all other contracts of letting and hiring, are perfected by the bare consent of the parties, so that, as soon as the mutual promises are exchanged, the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labour to the employer or letter of the work (*i*). If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer, and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work, and the other to provide it and pay for its execution, there is, as we have before seen, no binding contract at all, unless the engagement is under seal (*ante*, p. 14). The workman in such a case is not bound to enter upon his task; nor is the other party bound to provide the work and pay the hire. But when the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work, nor the employer to employ him. The law generally implies a promise from the employer to pay a reasonable compensation for services rendered, unless it appears that the services were to be gratuitous, or that the workmen relied for payment upon a particular fund, and not upon the personal responsibility of the employer (*k*). When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract (*l*).

Work and services in preserving lost chattel, and restoring it to owner.—Doubts have at different times been expressed as to whether a person who has voluntarily bestowed his own labour and services, and incurred expense, in the recovery and restoration of a lost chattel to the owner, is entitled to an action to recover compensation and remuneration therefor (*m*). In the case of the recovery and restoration of shipwrecked property he is clearly entitled to such a compensation; and there seems to

(*i*) *Lara* v. *General Apothecaries' Co.* 26 L.J. Ex. 225.

(*k*) *Ante*, p. 452; *Poucher* v. *Norman*, 3 B. & C. 744; 3 L.J. (O.S.) K.B. 115; Parke, B., *Higgins* v. *Hopkins*, 3 Exch. 166; 18 L.J. Ex. 113; *Hingeston* v. *Kelly*, 18 L.J. Ex. 360; *Alexander* v. *Worman*, 6 H. & N. 130; 30 L.J. Ex. 198.

(*l*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 641; 32 L.J. C.P. 244.

(*m*) *Lampleigh* v. *Brathwait*, 1 Smith's L.C. 141 (ed. 11).

be no valid reason for confining this right of reward to cases of salvage from shipwreck.

Salvage services.—In order to encourage persons to lend their aid for the protection of property and life (*n*) from shipwreck, the law gives to the parties by whose assistance the property or lives have been saved, a claim to a reasonable compensation for their services, and a right to retain the property until they have received it (*o*). This compensation is called salvage, a term derived from the French word *salver*, or *sauver*, to save. The amount of salvage payable in the case of the recovery of property lost by shipwreck or abandoned at sea (*p*) depends upon the value of the thing saved, the degree of danger of loss, and the amount of labour and skill employed in saving it (*q*). Some maritime codes have proportioned the amount to the value of the thing saved; but this is obviously unjust; and our own law, therefore, merely directs as a general principle that a reasonable compensation shall be made (*r*). If the salvors are guilty of misconduct, and occasion injury to the ship and cargo by rescuing the vessel from one danger only to run her into another, the claim for salvage will be lost (*s*). But, if success is finally obtained, no mere error of judgment in the manner of procuring it, and no misconduct short of that which is wilful and may be considered criminal on the part of the salvors, will work an entire forfeiture of the salvage. Mistake or misconduct, not wilful, but diminishing the value of the property salved or occasioning expense to the owners, will, however, be considered in estimating the amount of compensation to be awarded (*t*). There can be no claim to salvage where the efforts to salve have not been attended with success (*u*). Services unavoidably interrupted before completion, which nevertheless

(*n*) As to the principles on which life salvage remuneration is awarded, see *The Suevic*, (1908) P. 154; 77 L.J. P. 92.

(*o*) 57 & 58 Vict. c. 60, ss. 544—556; *Hartfort* v. *Jones*, 1 Raym. 393; Salk. 654, pl. 2; *The Fusilier*, 2 Moo. P.C. N.S. 51; 34 L.J. Adm. 25; *The Phantom*, L.R. 1 A. & E. 58. Life salvage paid under this Act is not recoverable upon an ordinary policy of marine insurance: *Nourse* v. *Liverpool Owners' Assoc.*, (1896) 2 Q. B. 16; 65 L.J. Q.B. 507.

(*p*) *The Genessee*, 12 Jur. 401.

(*q*) As to apportionment of salvage award, see *The Birnam*, 76 L.J. P. 28; *The Minneapolis*, (1902) P. 30; 71 L.J. P. 28.

(*r*) *The Otto Hermann*, 33 L.J. Adm. 189; *The Thomas Fielden*, 32 L.J. Adm. 61; *The Werra*, 12 P.D. 52; 56 L.J. P. 53. As to appraisement of the value see *The Harmonides*, (1903) P. 1; 72 L.J. P. 9; and *The Hohenzollern*, (1906) P. 339; 76 L.J. P. 17, where it was held that where a divergency exists between the market value of the salved vessel and her value to her owners, the latter is the proper value to be taken.

(*s*) *The Dosseitei*, 10 Jur. 865; *The Yan Yean*, 8 P.D. 147; 52 L.J. P. 67.

(*t*) *The Atlas*, 15 Moo. P.C. 329; 31 L.J. Adm. 210.

(*u*) *The Edward Hawkins*, 31 L.J. Adm. 46; Lush. 515; *The Atlas, supra*; *The Renpor*, 8 P.D. 115; 52 L.J. P. 49; *The Cheerful*, 11 P.D. 3; 55 L.J. P. 5; *The Benlarig*, 14 P.D. 3; 58 L.J. P. 24; *The August Korff*, (1903) P. 166; 72 L.J. P. 53 (towage), but if men are engaged by a ship in distress it is otherwise. See *The Undaunted*, Lush. 90.

materially contribute to the ultimate safety of the salved property, entitle those performing them to salvage remuneration (*x*). A vessel which goes to the assistance of another in distress made by the latter, is not entitled to salvage remuneration if the vessel which made the signals no longer requires her services (*y*). The mere sending of a telegram to the effect that a ship is in distress to persons who are already aware of the fact and are sending assistance does not entitle the sender to salvage remuneration (*z*). A man cannot entitle himself to salvage in respect of services which have been rendered contrary to the express wishes and directions of the owner, and has no right to interfere with persons employed by the owner to save the property (*a*). And, if one set of persons have taken possession of a vessel abandoned at sea and are endeavouring to bring it into port and save it, another set have no right to interfere with them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others (*b*). A passenger is not entitled to claim salvage in respect of that ordinary assistance to a vessel in distress which it is the interest of all persons on board to give, for the purpose of avoiding the common danger (*c*). But, for extraordinary services rendered and dangers incurred for the preservation of the vessel, the passenger is as much entitled to salvage as a mere stranger (*d*). And salvage service may be performed even by the seamen of the ship salved, when an abandonment of her has put an end to their original contract (*e*). So also salvage services may be rendered by a pilot where he has put off to sea to help a vessel, the test not being whether the vessel was at the time of succour in distress or damaged, but whether the pilot could be expected to incur the risk for only pilotage reward (*f*). The crew of a lifeboat who have salved property are entitled to reward as salvors (*g*); so also the launchers of a lifeboat are entitled to a share in the sum recovered for the salvage service, where property is in fact salved (*h*). Where both ships belong to the same owner, the master and crew of the ship which has performed the services

(*x*) *The August Korff*, (1903) P. 166; 72 L.J. P. 53; *The Atlas*, *supra*.

(*y*) *The Elswick Park*, (1904) P. 76; 72 L.J. P. 79. As to improper use of signals of distress, see 57 & 58 Vict. c. 60, s. 434 (2).

(*z*) *The Marguerite Molinos*, (1903) P. 160; 72 L.J. P. 56.

(*a*) *Sutton* v. *Buck*, 2 Taunt. 312.

(*b*) Abbott, 962 (ed. 14).

(*c*) *The Branston*, 2 Hag. 3; *The Vrede*, Lush. 322; 30 L.J. Adm. 209.

(*d*) *Newman* v. *Walters*, 3 Bos. & P. 612.

(*e*) *The Vrede*, *supra*; *The Le Jouet*, L.R. 3 A. & E. 556; 41 L.J. Adm. 95.

(*f*) *Akerblom* v. *Price*, 7 Q.B.D. 129; 50 L.J. Q.B. 629; see *The Anders Knape*, L.R. 4 P.D. 213; 48 L.J. P. 53; *The Santiago*, 70 L.J. P. 12.

(*g*) *The Auguste Legembre*, (1902) P. 123; 71 L.J. P. 53.

(*h*) *The Cayo Bonito*, (1904) P. 310; 73 L.J. P. 93.

are entitled to salvage, provided the services performed are not within the contract which they originally entered into with the owners (*i*). And the owners of a salving vessel are entitled to remuneration, although some of them are also owners of the vessel which did the mischief (*k*). A separate salvage award may be made against the cargo and freight where the danger to a perishable cargo and the freight is much more serious than that to the ship (*l*). An agreement for salvage must be made honestly and for benefit of ship and cargo; there must also be necessity, *i.e.*, not absolute necessity, but the absence of any reasonable alternative (*m*). An agreement for salvage which is reasonable at the time it is made is valid, notwithstanding circumstances may render the services more expensive or hazardous than was anticipated (*n*). The owners of a vessel may bind the master and crew without their assent by an agreement with other parties as to future but not as to past salvage services (*o*). By sect. 156 of the Merchant Shipping Act, 1894 (*p*), every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, is wholly inoperative (*q*); but this is not to apply to the case of any agreement made by the seamen belonging to any ship which by the terms of the agreement is to be employed on salvage service. Compulsion or fraud will avoid a contract as to salvage (*r*). Persons who merely furnish boats, tackle, or other articles of use for salvage purposes, are not entitled to be paid as salvors, but for the use of the articles they have supplied (*s*). There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the compensation is awarded (*t*). Persons rendering services in themselves of a salvage nature under a contract for work and labour, are excluded from subsequently claiming against the property as salvors in respect of those services, whether the contract under which the services are

(*i*) *The Sappho*, L.R. 3 P. C. 690; 40 L.J. P.C. 48; *The Scout*, L.R. 3 A. & E. 512; 41 L.J. Adm. 42; *The Cargo ex Laertes*, 12 P.D. 187; 56 L.J. P. 108.

(*k*) *The Glengaber*, L.R. 3 A. & E. 534; 41 L.J. Adm. 84.

(*l*) *The Velox*, (1906) P. 263; 75 L.J. P. 81.

(*m*) *Per* Kennedy, L.J., *The Crusader*, (1907) P. 196; 76 L.J. P. 102.

(*n*) *The Waverley*, 40 L.J. Adm. 42; L.R. 3 A. & E. 362. See *The Mark Lane*, 15 P.D. 135; *The Rialto*, (1891) P. 175; 60 L.J. P. 71.

(*o*) *The Friesland*, (1904) P. 345; 73 L.J. P. 121; *The Inchmaree*, (1899) P. 111; 68 L.J. P. 30.

(*p*) 57 & 58 Vict. c. 60, s. 156. See *The Wilhelm Tell*, (1892) P. 337; 61 L.J. P. 127.

(*q*) *The Rosario*, 2 P.D. 41; 46 L.J. P. 52; seamen may, however, arrange for an apportionment. See *The Afrika*, 5 P.D. 192; 49 L.J. P. 63.

(*r*) *The Medina*, 2 P.D. 5. As to invalidity of an extortionate agreement for salvage, see *The Port Caledonia*, (1903) P. 184; 72 L.J. P. 60.

(*s*) *The Charlotte*, 12 Jur. 568.

(*t*) *The Carrier Dove*, 2 Moo. P.C. N.S. 243; and see *Nicholson* v. *Chapman*, 2 H.Bl. 258.

performed be made with the owners of the property or with third persons (*u*). Where a passenger ship is wrecked, and by the terms of the contract with the passengers the owners are under no liability to forward them to their destination, the master, who makes arrangements with another vessel to carry on the passengers, does so as the agent of the passengers, and not of the owners (*x*).

Services by trustees.—The law raises no implied promise of remuneration in respect of services of a fiduciary character (*y*). If, therefore, a solicitor consents to act as a trustee, and renders professional services in matters relating to the trust estate, he is not entitled to charge for such services whether he acts for himself alone, being sole trustee, or for himself and others who are his co-trustees, unless there is a provision in the trust-deed to that effect: but he is entitled to charge the trust estate with costs out of pocket (*z*). A trustee, moreover, is not allowed to make the execution of the trust a source of profit to himself, and cannot sue upon an express contract between him and his co-trustees for payment for his services to the trust; for each trustee is to be a check and control upon each and all the co-trustees; and one of them cannot authorize another to make professional charges to be paid out of the trust fund. Where, therefore, a number of trustees appointed one of their own body, who was a lawyer, "factor to the trust," with an allowance for his necessary charges and expenses, and a "reasonable gratification," and the factor sued his co-trustees for his professional charges "by reason of their having employed him as their commissioner, factor, cashier, and attorney in the aforesaid trust," it was held that he was not entitled to recover these charges either from them or from the trust estate (*a*). Where one of several solicitors in partnership has taken upon himself the office of trustee, the firm of which he is a member cannot charge for professional services rendered by them in the execution of the trust (*b*). Where it was proved that the partner of a trustee had, as solicitor to the trust, transacted the whole trust business entirely on his own account and for his own exclusive benefit, under an arrangement which had been made between him and

(*u*) *The Solway Prince*, (1896) P. 120; 65 L.J. P. 45.

(*x*) *The Mariposa*, (1896) P. 273; 65 L.J. P. 104.

(*y*) *Barrett* v. *Hartley*, L.R. 2 Eq. 789. As to appointment by the Court of a judicial trustee with remuneration, see 59 & 60 Vict. c. 35, s. 1 (5).

(*z*) *Moore* v. *Frowd*, 3 Myl. & Cr. 45; 6 L.J. Ch. 372; *Christophers* v. *White*, 10 Beav. 523; *Manson* v. *Baillie*, 2 Macq. 80, questioning *Cradock* v. *Piper*, 1 Mac. & G. 664; 19 L.J. Ch. 107.

(*a*) *Manson* v. *Baillie*, 2 Macq. 80; *Aberdeen Ry.* v. *Blaikie*, 1 Macq. 461.

(*b*) *Collins* v. *Carey*, 2 Beav. 128 *Broughton* v. *Broughton*, 5 De G. M. & G 160; 25 L.J. Ch. 250.

his partner, that they should not be partners in any matters relating to the trust property, but that the partner who was not a trustee should, in all matters relating to the trust, act as sole solicitor to the trust, and be entitled to receive, for his own exclusive benefit, all costs and charges which might be incurred in the execution of the trust, the professional charges of the partner were allowed to be paid out of the trust estate (*c*).

Promises of presents in return for services.—If services have been rendered and benefits conferred on the express understanding that the person rendering the services is to trust entirely to the generosity of the party benefited, there is no contract (*d*). But, if a person promises to make a present in return for services rendered, there is evidence of a contract to pay a reasonable sum (*e*).

Honorary and gratuitous services.—If the employment is by custom of a purely gratuitous character, the *primâ facie* presumption of a letting and hiring of the services is rebutted as soon as the custom is proved. The office of an arbitrator is deemed to be an honorary office; and a person who acts as such cannot charge for his services, unless it was the intention of the parties that the arbitrator should be paid for his time and trouble, or unless there is an express promise to pay him for his services (*f*). Barristers likewise exercise a profession of an honorary character (*g*); they cannot, therefore, maintain an action for remuneration for advice or advocacy, or for services ancillary to the service of an advocate, although there be an express contract to pay them a stipulated sum for such service (*h*); but in cases unconnected with advocacy, and for services not of a professional character, a barrister may, it seems, contract for remuneration. A physician may sue for his services, if he is registered as a physician under the Medical Acts, and is not prohibited by the college to which he belongs from bringing an action for his charges (*i*). If the service appears to have been rendered as a gratuitous act of kindness, or in

(*c*) *Clack* v. *Carlon*, 30 L.J. Ch. 639.

(*d*) *Roberts* v. *Smith*, 4 H. & N. 321; 28 L. J. Ex. 164; *Taylor* v. *Brewer*, 1 M. & S. 190.

(*e*) *Jewry* v. *Busk*, 5 Taunt. 302; *Bryant* v. *Flight*, 5 M. & W. 114; 8 L.J. Ex. 189; *Bird* v. *M'Gaheg*, 2 C. & K. 708.

(*f*) *Virany* v. *Warne*, 4 Esp. 47; *Hoggins* v. *Gordon*, 3 Q.B. 466; 11 L.J. Q.B. 286. See, however, as to lay arbitrators, *Crampton* v. *Ridley*, 20 Q.B.D. 48, 57, where it seems that a promise may be implied.

(*g*) *Lebrasseur & Oakley, In re*, (1896) 2 Ch. 487; 65 L.J. Ch. 763.

(*h*) *Kennedy* v. *Broun*, 13 C.B. N.S. 677; 32 L.J. C.P. 137; *Broun* v. *Kennedy*, 33 L.J. Ch. 71, 342; 33 Beav. 133. *Morris* v. *Hunt*, 1 Chitt. 551; *Veitch* v. *Russell*, 3 Q.B. 928; 12 L.J. Q.B. 13; *Egan* v. *Kensington Union*, 3 Q.B. 935, n.; *Att.-Gen.* v. *Royal College of Physicians*, 1 Jo. & H. 561, 591; 30 L.J. Ch. 757; *Mostyn* v. *Mostyn*, L.R. 5 Ch. 457; 39 L.J. Ch. 780.

(*i*) 49 & 50 Vict. c. 48, s. 6; *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L.J. Ex. 182, see *ante*, p. 115.

discharge of a public duty, the *primâ facie* presumption of a contract of letting and hiring is repelled. Thus, if a man undertakes a journey to become bail for his friend, he is not entitled to be paid for his trouble (*k*).

The law raises no implied promise of remuneration in respect of the services of public officers. If by statute or immemorial usage a public officer is entitled to fees for his services he may maintain an action to recover them; but, where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, no action can be maintained for the recovery of any remuneration (*l*).

Rights and liabilities of employer and workman.—A person who employs another by the piece or by the job, or who lets out task-work to be done for an express or implied remuneration, is, in general, bound to do everything that is necessary to be done on his part to enable the hirer of the work to execute his engagement, and earn the hire or reward. He impliedly undertakes to resort to no misrepresentation or concealment calculated to mislead the servant, to accept the work when completed, and to pay the customary hire, in case no specific rate of remuneration has been agreed upon. When there is an absolute refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the engagement, the undertaker of the work has a right to sue immediately, for remuneration on a *quantum meruit* if the contract is defeasible, or, if not, for compensation for the damage he has sustained in being prevented from earning the stipulated hire (*m*).

Defeasible contracts for work and services.—If a labourer is employed to dig potatoes at so much an acre, or to cut turf at so much a load, the employer may, if there is no determinate term of employment, dispense, at any time, with the future services of the workman, paying him for the work actually done (*n*). If a party employs an agent to transact his business for him, for a certain commission, the employment is determinable at the will of the employer, unless it is coupled with an interest, and the party employed is something more than an agent in the transaction. If an agent is employed to sell property on commission, it is competent to the employer, at any time before a sale has

(*k*) *Reason* v. *Wirdnam*, 1 C. & P. 434.

(*l*) *Jones* v. *Carmarthen* (*Mayor*), 8 M. & W. 605; 10 L.J. Ex. 401.

(*m*) *Planché* v. *Colburn*, 1 M. & Sc. 51; 1 L.J. C.P. 7; *Emmens* v. *Elderton*, 4 H.L.Cas. 624; 13 C.B. 495, *post*, p. 916; *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15; *Mort's Dock & Engineering Co.* v. *Wadey*, 22 T.L.R. 61.

(*n*) But see *Needler* v. *Guest*, Aleyn, 9.

been actually effected, to revoke the authority, and deprive the agent of the expected commission (*o*); but, if expenses have been incurred by the agent, he will be entitled to recover such expenses from the employer, and also a reasonable compensation for any labour he may have undertaken in endeavouring to execute his commission, unless it appears to have been the understanding of the parties that nothing was to be paid unless the act authorized to be done was fully accomplished (*p*). If a commission agent employed to sell property has found a purchaser and effected the authorized contract of sale, he will be entitled to his commission, although the employer may refuse to fulfil the contract; and if he has found a party willing to buy, and the employer is then unable or unwilling to sell, the agent will be entitled to remuneration for his services (*q*).

Time of performance.—By the Judicature Act, 1873, s. 25 (7), stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity (*r*). Time is frequently of the essence of the contract as regards the commencement of the work, but not so with regard to its completion. If it is made a positive term of the contract that the work shall be commenced on a day named, the employer may refuse the services of the workman, and decline to employ him, if he does not tender his services or commence the work at the appointed period; but, when the work has been commenced, the completion of it by a day named will not in general be a condition precedent to the workman's right to the stipulated hire. When the materials for the work, for example, have been furnished by the employer, and the produce of the labour becomes, consequently, his property as the work proceeds, the non-performance of the work by an appointed time does not release the employer from his obligation to pay the contract price. He must in such a case perform his part of the engagement, and bring a cross action against the undertaker of the work to recover compensation for any damage he may have sustained by reason of the non-completion of the work at the appointed period (*s*). If after the time fixed for completion the employer urges the continuance

(*o*) *Simpson* v. *Lamb*, 17 C.B. 603; 25 L.J. C.P. 113.

(*p*) *Moffatt* v. *Laurie*, 15 C.B. 583; 24 L.J. C.P. 56; *De Bernardy* v. *Harding*, 8 Exch. 822; 22 L.J. Ex. 340; *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 13.

(*q*) *Prickett* v. *Badger*, *ante*, p. 874.

(*r*) *Tilley* v. *Thomas*, L.R. 3 Ch. 61.

(*s*) *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205.

of the work, or encourages the workman to proceed, he waives the condition as to time (*t*).

Entire performance of contract condition precedent to payment.—Thus, if a coachman agrees to convey a passenger from London to York for a certain stipulated remuneration, and carries him only half the distance, he is not entitled to any payment, the precedent act to be performed being entire and indivisible. Where the plaintiff undertook to make "complete" certain dilapidated chandeliers for the sum of 10*l.*, and returned them in an incomplete state, it was held that he could not maintain an action for the work actually done (*u*). Where a solicitor covenanted to pay his clerk 2*s.* for every quire of paper he copied out, it was held that this was an entire covenant, of which no apportionment could be made *pro ratâ*, and that the clerk, consequently, could not maintain an action to recover remuneration for copying out any number of sheets less than a quire (*x*).

Divisible and apportionable work.—But, if the work is in its nature divisible and apportionable, and there is nothing in the terms of the contract which, either by express stipulation or necessary intendment, precludes the plaintiff from recovering in respect of a partial execution of it, the plaintiff may, on performing a part only of his engagement, require a corresponding part performance on the part of the defendant (*y*); and if, in a contract of this description, the defendant is deprived, by accident, of the benefit of the work before it is finished, the workman is not, by reason of such accident, deprived of his right to remuneration (*z*).

Building contracts.—If a contract has been entered into to build a house for a specific sum, to be paid on the completion of the building, the contract is entire and indivisible, and the employer is not bound to pay for a half or a quarter of a house; for the court and jury can have no right to apportion that which the parties themselves have treated as entire. But, where a builder engages to build a house, to be paid for his work and labour and the materials supplied by measure and value, or according to the customary rate of remuneration, he is entitled to demand payment from time to time as the work proceeds. Every builder who contracts for the building of a house impliedly undertakes to furnish everything reasonably necessary for its

(*t*) *Burn* v. *Miller*, 4 Taunt. 748.

(*u*) *Sinclair* v. *Bowles*, 9 B. & C. 92; 7 L.J. (O.S.) K.B. 178.

(*x*) *Needler* v. *Guest*, Aleyn, 9. See also *Bates* v. *Hudson*, 6 D. & R. 3.

(*y*) *Taylor* v. *Laird*, 1 H. & N. 266; 25 L.J. Ex. 329; *Button* v. *Thompson*, L.R. 4 C.P. 330; 38 L.J. C.P. 225; *Roberts* v. *Havelock*, 3 B. & Ad. 404.

(*z*) *Menetone* v. *Athawes*, 3 Burr. 1592.

completion (*a*). Where an action was brought by a builder against his employer upon a special contract for the building of a house for a certain sum, and the builder had omitted to put into the building certain joists according to his contract, it was contended that, as the employer had got the benefit of the house, he was bound to pay what it was fairly worth; but the court held that the defendant made no such agreement (*b*). If an architect, employed to prepare plans and specifications for a house, and to procure a builder to erect it, takes out the quantities, and represents to a builder that they are correct, and the builder thereupon makes a tender which is accepted, the builder cannot upon these facts alone recover more than the contract price from the employer, although it turns out that the quantities are wrong, and that the builder has expended upon the building a much larger amount of material than he contemplated (*c*).

Work to be approved of before payment.—If a tailor undertakes to make a coat, or a coachbuilder to build a carriage, upon the terms that it is not to be taken and paid for if, on inspection, style and workmanship are disapproved of, the coat or the carriage may be returned, and payment of the price refused. But if an artist is engaged to work up materials, or to paint a ceiling, and there is consequently no opportunity or power of returning him the produce of his labour, the approval of the work cannot be made a condition precedent to his right to demand some remuneration for what he has done (*d*). If a contract for the building or repairing of a house provides for the inspection and approval of the work by the employer before payment of the contract price, the employer must be afforded an opportunity of inspection before he can be called upon to pay; but he cannot, by withholding his approval unreasonably and *malâ fide*, after an opportunity of inspection has been afforded him, deprive the workman of his hire (*e*). The employer has, indeed, a right in all cases to inspect the work before he pays for it; but his approval of a builder's work is by no means essential to the maintenance of an action by the builder. It will always be a question for the jury to determine, whether the employer has acted *bonâ fide*, and ought reasonably to have been satisfied with the work done (*f*). But, where the workman works up his own materials in the manufacture of a chattel, the

(*a*) *Williams* v. *Fitzmaurice*, 3 H. & N. 844; *Sumpter* v. *Hedges*, (1898) 1 Q.B. 673; 67 L.J. Q.B. 545.

(*b*) *Ellis* v. *Hamlen*, 3 Taunt. 52.

(*c*) *Scrivener* v. *Pask*, L.R. 1 C.P. 715; 18 C.B. N.S. 785.

(*d*) *Andrews* v. *Belfield*, 2 C.B. N.S. 779.

(*e*) *Dallman* v. *King*, 5 Sc. 382; 7 L.J. C.P. 6.

(*f*) *Parsons* v. *Sexton*, 4 C.B. 899; 16 L.J. C.P. 181; *Hughes* v. *Lenny*, 5 M. & W. 183; 8 L.J. Ex. 177.

employer may reserve to himself a right to rescind the contract and reject the chattel, if he finds, on trial or inspection, that it does not suit him, either on the score of workmanship, or of convenience, or taste (*g*). If his acceptance of an engine, or machine, and payment of the contract price, are made dependent upon his approval of the strength and soundness of the workmanship, and he rejects the machine because it does not work well, or does not answer his purpose, and not because it is deficient either in strength or soundness, he will be held responsible for the price (*h*).

When the right to receive payment is made dependent upon the approval of an architect or surveyor, or the production of a certificate that the work has been done according to contract, no right can arise which can be enforced until the approval has been given or the certificate has been obtained (*i*). Work, therefore, which has been done, but not to the satisfaction of the surveyor or architect, cannot be charged for (*k*); but, if the certificate is fraudulently or corruptly withheld, the court will give relief; and an action may, in certain cases, be maintained for the malicious, corrupt, or fraudulent withholding of the certificate both against the architect and against the employer (*l*). If the certificate is not, by the express terms of the contract, required to be in writing, the architect's approbation testified by word of mouth is sufficient (*m*).

Relief against biassed or corrupt decisions of architects and surveyors.—If an architect's certificate is wrongfully or fraudulently withheld, the court will give relief, not only against the parties who are bound to pay, but also against the architect, surveyor, or engineer; and any stipulation in the contract, placing the latter in the position of an arbitrator between the employer and the workman, and making his decision final, and purporting to exclude the jurisdiction of any court with reference to his conduct, will be of no effect (*n*). If questions arising between the contractor for works and the employer are, by the contract, left to the determination of the architect, and the latter has a personal interest unknown to the contractor and

(*g*) *Andrews* v. *Belfield*, 2 C.B. N.S. 779.

(*h*) *Ripley* v. *Lordan*, 6 Jur. N.S. 1078.

(*i*) *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 230; 3 De G. & J. 334; *Morgan* v. *Birnie*, 3 M. & Sc. 76; 9 Bing. 672; *Salford* (*Mayor*) v. *Ackers*, 16 L.J. Ex. 6; 16 M. & W. 85; *Moffatt* v. *Dickson*, 22 L.J. C.P. 265; 13 C.B. 543.

(*k*) *Dobson* v. *Hudson*, 1 C.B. N.S. 659; 26 L.J. C.P. 153.

(*l*) *Milner* v. *Field*, 5 Exch. 829; 20 L.J. Ex. 68; *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L.J. Ex. 177; *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L.J. Q.B. 75.

(*m*) *Roberts* v. *Watkins*, 32 L.J. C.P. 291; 14 C.B. N.S. 592.

(*n*) *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 227. See also *Robins* v. *Goddard*, (1905) 1 K.B. 294; 74 L.J. K.B. 167.

adverse to him (*o*), or does not act fairly between the parties, or manifests any undue partiality, or corruption, the court will interfere to give relief, however strenuously the parties may by their contract have endeavoured to exclude the jurisdiction of the court (*p*).

Actions for wrongfully withholding the certificate may be maintained both against the architect and the employer, if it can be proved that the builder has fulfilled his contract and done all things necessary to be done by him to entitle him to the certificate, and that the architect had full knowledge thereof, and nevertheless neglected to certify in collusion with the employer (*q*). But the employer is not responsible for any misconduct of his architect or surveyor, in refusing to certify, when such misconduct is not brought about by his interference (*r*).

Architect—Property in plans.—Where an architect was employed by a building owner to do all the things which were necessary to be done by an architect for the purpose of designing and carrying out certain building operations, at a remuneration of 5 per cent. upon the contract price of the work, and in pursuance of the employment the architect prepared plans and duly carried out the work, and the building owner paid him the agreed remuneration, it was held that the property in the plans was in the building owner, and that the architect was not entitled to retain them (*s*).

Effect of employer's taking possession and making use of unfinished work.—A landowner who by a building contract provides a site for the erection of a house, and delivers the ground to the builder, does not thereby part with the possession of his land; the builder has the mere temporary custody of it, and may be turned off at any time by the employer (*t*). Where by a building contract it was stipulated that certain houses should be built on the land of the employer for a certain sum by a specified day to the satisfaction of a surveyor, upon whose approval payment was to be made, and the builder became bankrupt and was unable to complete the houses, and the employer then took possession of them and finished them, it was

(*o*) *Kimberley* v. *Dick*, L.R. 13 Eq. 1; 41 L.J. Ch. 38.

(*p*) *Kemp* v. *Rose*, 1 Giff. 258; *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 227; *Ormes* v. *Beadel*, 2 Giff. 166; 30 L.J. Ch. 1; *Pawley* v. *Turnbull*, 3 Giff. 70; *Bliss* v. *Smith*, 34 Beav. 508.

(*q*) *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L.J. Ex. 177; *Milner* v. *Field*, 5 Exch. 829; 20 L.J. Ex. 68; *Scott* v. *Liverpool Corporation*, *supra*.

(*r*) *Clarke* v. *Watson*, 18 C.B. N.S. 278; 34 L.J. C.P. 148.

(*s*) *Gibbon* v. *Pease*, (1905) 1 K.B. 810; 74 L.J. K.B. 502.

(*t*) *Camden* (*Marquis*) v. *Batterbury*, 7 C.B. N.S. 864; 28 L.J. C.P. 335.

held that his taking possession of the unfinished houses did not amount to a waiver of the contract or of any of the terms or conditions thereof, and afforded no evidence that he accepted the benefit of the work actually done under an implied contract to pay for it according to measure and value (*u*). The usual clause in contracts for the construction of works or for building leases, providing that all materials brought on the ground are to become the property of the building owner, must be construed as vesting the materials in the building owner, subject to a condition of defeasance if the builder completes the works. It is a security to the building owner for the performance of the work. If the contractor fails to complete he cannot recover the materials, although the building owner does not complete the works himself or by another contractor (*x*).

Defective work accepted by employer.—Whenever the employer has accepted the benefit of work done for him under a special contract, which has been abandoned or rescinded, he is liable to pay a reasonable remuneration in respect thereof. If the workman undertakes to repair a chattel, the property of the employer, and the new work and materials are so intermixed with the old work, that the one cannot be separated from the other without injury to the chattel, so that the employer must of necessity accept the work, his liability to pay for it, in case it has been negligently executed, depends upon the utility of the work. If the chattel has been rendered more valuable by what has been done, the employer must pay the fair value of the workmanship; if it is in nowise improved, and the work done has been so negligently executed as to be worth nothing, the employer cannot be called upon for payment. The retention by the employer of his own unfinished chattel does not, in such a case, raise any inference of a waiver of any of the conditions of the special contract, or of the entering into a new contract to pay upon a *quantum meruit* (*y*). Where a contract provides for stipulated work at a lump sum and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be claimed (*z*).

Substantial performance of building contracts.—When a contract has been entered into for the building of a house for a certain sum of money to be paid on the completion of the build-

(*u*) *Munro* v. *Butt*, 8 E. & B. 738; *Runger* v. *G. W. Ry.*, 5 H.L.Cas. 118; *Sumpter* v. *Hedges*, (1898) 1 Q.B. 673; 67 L.J. Q.B. 545.

(*x*) *Hart* v. *Porthgain Harbour Co.*, (1903) 1 Ch. 690; 72 L.J. Ch. 426; *Byford* v. *Russell*, (1907) 2 K.B. 522; 76 L.J. K.B. 744.

(*y*) *Munro* v. *Butt*, *supra*; *Ellis* v. *Hamlen*, 3 Taunt. 52, *ante*, p. 877.

(*z*) *Forman* v. *The Liddesdale*, (1900) A.C. 190; 69 L.J. P.C. 44.

ing in accordance with certain plans and specifications, it is not essential to the maintenance of an action that there should be an exact performance in every minute particular; for, wherever divers acts of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, the performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but, if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it(*a*), the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a workmanlike manner; but this is not a condition going to the essence of the contract (*b*).

A building contract, with all its specifications and details, may in some respect be broken with trifling damage to the employer; and, if performance in every minute particular were made a condition precedent to the builder's right to sue upon the contract for work done, "a trifling injury to the one party might occasion the loss of all remuneration to the other for a long and laborious service" (*c*). But, where it appears from the whole tenor of the agreement that the parties thereto intended, the one to insist upon, and the other to submit to, conditions, however unreasonable, the court will in such case give effect to them (*d*).

Where a party engages to do certain work in a certain specified manner, but does not perform the work so as to correspond with the specification, he is not entitled to recover the price agreed upon, nor can he recover according to the actual value of the work done. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification (*e*). And the defendant is not, by reason of his having given evidence of such breach of contract on the part of the plaintiff, and obtained a reduction of the agreed price, precluded from bringing his cross-action to recover compensation for any special damage he may have sustained by reason of the non-compliance by the plaintiff with the strict terms of the

(*a*) *Ante*, p. 50.

(*b*) *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205.

(*c*) Tindal, C.J., *Stavers* v. *Curling*, 3 Sc. 755; 6 L.J. C.P. 41.

(*d*) *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L.J. Q.B. 75.

(*e*) *Thornton* v. *Place*, 1 Moo. & R. 218.

engagement (*f*). Although the defendant may give evidence of such breach of contract in reduction of damages, he is not bound to do so, but may pay the whole of the contract price, and bring a cross-action for damages for the non-performance and defective performance of the work done (*g*). Care must be taken to mark the distinction between an action on the special contract itself for the agreed price of the work, and an action upon a bill of exchange or promissory note given by way of payment of the amount. In the former the value of the work only can be recovered; in the latter the party holding bills given for the price of the work done can recover on them, unless there has been a total failure of the consideration. If the consideration fails partially, as by the inferiority of the work, the buyer must seek his remedy by a cross-action. The contract may be divisible; but the security is entire (*h*). Where plans and specifications are prepared and persons invited to tender thereupon, there is no implied warranty that the work can be successfully done according to such plans and specifications (*i*). But a clause in a contract by which the employer disclaims responsibility for the accuracy of the statements and information with which he supplies the contractor, and as to which the contractor is to satisfy himself, does not confer exemption on the employer for statements fraudulently or recklessly made by the employer or his agent. Whatever be the form of the contract, the party who makes an allegation of fraud is entitled to have the question submitted to a jury (*k*).

Abatement of contract price.—Whenever a contract for work and services on the one side, and payment on the other, has been so far executed as to give rise to a cause of action, but has not been fully performed, it is competent to the employer to show, in reduction of the price agreed to be paid, that the subject-matter of the contract is diminished in value by reason of the inefficient execution of the work. Thus, where the defendant agreed to pay the sum of 70*l.* for a warm-air apparatus, it was held that, if the apparatus was altogether unfit for the purpose, the defendant was not bound to pay for it; but that, if the apparatus was in the main effective, but not quite so complete as it ought to have been, the action was maintainable for the price, and that the jury might deduct from the full price such a sum

(*f*) *Ante*, p. 630; *Mondel* v. *Steel*, 8 M. & W. 858; 10 L.J. Ex. 426; *Rigge* v. *Burbidge*, 15 M. & W. 599; 15 L.J. Ex. 309; and cp. *Bow, McLachlan & Co.* v. "*Camosun*" (*Owners*), (1909) A.C. 597; 79 L.J. P.C. 17.

(*g*) *Davis* v. *Hedges*, L.R. 6 Q.B. 687; 40 L.J. Q.B. 276.

(*h*) *Tye* v. *Gwynne*, 2 Camph. 347.

(*i*) *Thorn* v. *London* (*Mayor*), 1 App. Cas. 120; 45 L.J. Ex. 62.

(*k*) *Pearson* v. *Dublin Corporation*, (1907) A.C. 351; 77 L.J. P.C. 1.

as would enable the defendant to do that which was required to make it perfectly effective (*l*).

Effect of non-performance of building contracts by time specified.—In the case of a contract to build a house, where the employer furnishes the land, which is the principal material for the work, if the house is not built by the time specified, but is afterwards completed, the employer who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed (*m*). Where a builder contracts with a building-owner to complete a building for one entire sum and to enter into sub-contracts for certain portions of the work and materials with sub-contractors and specialists appointed by the building owner, but to be paid by the builder out of the contract price, and as a basis of the whole contract the builder accepts the primary obligation of completing the building at a given date, there is no implied promise on the part of the building-owner that the sub-contractor's or specialist's work shall be performed and materials supplied by them without unreasonable delay, nor is any duty cast upon the building-owner to provide against such delay. So that where under such a contract, the completion of a building has been delayed by the default of the sub-contractors and specialists, the builder cannot maintain an action for damages against the building-owner upon the footing that there was an obligation upon the building-owner to see that the work was done and materials supplied by the sub-contractors and specialists within a reasonable time (*n*).

Penalties for non-performance of building contracts by time specified.—Where, by articles of agreement for the altering and repairing of a warehouse for a fixed sum, it was stipulated that, in the event of the work not being fully completed in three months, the builder should "forfeit and pay" to the employer 5*l.* every week he should be engaged in such work beyond the three months, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work, it was held, in an action brought for extra work, that the employer was entitled to set off the penalty against the price of such extra work, and that he had a double remedy, either to set

(*l*) *Cutler* v. *Close*, 5 C. & P. 338; *Chapel* v. *Hickes*, 2 Cr. & M. 214; 3 L.J. Ex. 38.

(*m*) Tindal, C.J., *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205; *Littler* v. *Holland*, 3 T.R. 590; *Maryon* v. *Carter*, 4 C. & P. 295; *Kingdom* v. *Cox*, 2 C.B. 661; 15 L.J. C.P. 95.

(*n*) *Mitchell* v. *Guildford Union*, 68 J.P. 84; see also *Leslie* v. *Managers of Metropolitan Asylum District*, 68 J.P. 86.

it off as payment, or to deduct it from the contract price (*o*). If performance by the time specified has been prevented by the ordering of extra work, or by the interference of the employer or his agent, the claim to the penalties cannot be enforced (*p*), unless there is an express stipulation that it may be (*q*).

Security for due performance of contract.—If security is to be given by the workman for the due performance of his contract, it is a condition precedent, unless the condition has been waived by the workman's being required to proceed with the work, or the work having been executed, without security (*r*).

Destruction of work before payment—Loss of materials and of price of work.—If the contract is entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work is a condition precedent to the right to payment for any part of it, the workman will be deprived of all legal rights to remuneration if the work is destroyed by accident before it has been completed (*s*); but, if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. Thus, if the contract is an entire and indivisible contract for the building of a house for a specific sum to be paid on its completion, and the edifice is destroyed by lightning, fire or tempest, during the progress of the work, the contractor must stand to the loss, and be himself at the expense of repairing the damage. But, if the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder, as the particular portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labour and materials (*t*).

When the contract is entire and indivisible for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum, to be paid on the completion and delivery of the chattel to the employer, and the chattel is destroyed by inevitable accident whilst it remains unfinished in

(*o*) *Duckworth* v. *Alison*, 1 M. & W. 412; 5 L.J. Ex. 171; *Fletcher* v. *Dyche*, 2 T.R. 32; *Legge* v. *Harlocke*, 12 Q.B. 1015; 18 L.J. Q.B. 45.

(*p*) *Westwood* v. *Secretary for India*, 11 W.R. 261; 7 L.T. 736; *Russell* v. *Sa Da Bandiera*, 13 C.B. N.S. 149; 32 L.J. C.P. 68; *Dodd* v. *Churton*, (1897) 1 Q.B. 562; 66 L.J. Q.B. 477.

(*q*) *Jones* v. *St. John's College, Oxford*, L.R. 6 Q.B. 115; 40 L.J. Q.B. 80.

(*r*) *Roberts* v. *Brett*, 6 C.B. N.S. 611; 28 L.J. C.P. 323; aff., 11 H.L.Cas. 337; 34 L.J. C.P. 241; *Kingston* v. *Preston*, cited 2 Doug. 689.

(*s*) *Appleby* v. *Myers*, L.R. 2 C.P. 651; 36 L.J. C.P. 331.

(*t*) *Menetone* v. *Athawes*, 3 Burr. 1592; *Tripp* v. *Armitage*, 4 M. & W. 699; 8 L.J. Ex. 107; *ante*, p. 586.

the hands of the workman, the employer must stand to the loss of his materials, and the workman to the loss of the value of his labour. Thus, if a printer is employed to print a book at so much per sheet, the value of the printing to be paid for on the completion of the work, and, before the whole impression has been worked off and made ready for delivery, an accidental fire consumes the work, the employer must stand to the loss of his paper, and the printer to the loss of the value of his labour (*u*). But, if the work has been completed, and the copies have been printed and made ready for delivery, and placed at the disposal of the employer, they remain at his risk; and, if an accidental fire then consumes them, he must stand to the loss, and pay the printer his hire (*x*).

If a shipwright is employed to repair a ship, the accessorial materials supplied by him for the work become the property of the employer, as soon as they are attached to the vessel under repair, upon the principle that *omne accessorium sequitur suum principale;* and, if the completion of the work is not made, either by agreement or by custom, a condition precedent to the payment, and the ship is accidentally burnt, the loss of such materials, as well as of the value of the work employed upon them, is the loss of the employer and not of the workman, and the employer, consequently, must pay the fair value of the labour and materials, although he can reap no benefit from what has been done (*y*). But, where a man contracts to expend materials and labour on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire, the contractor is excused from completing the work, but is not entitled to any compensation for the work already done, which has perished without any default of the employer (*z*).

Where a contract for the building of a ship vests the general property in the ship in the employer as the materials are put together (*a*), and the ship is destroyed by fire, the loss of the materials and workmanship will fall on the employer; but, if the property in the thing destroyed remains with the workman, the loss will fall upon the latter. And where tug-owners contracted

(*u*) *Gillett* v. *Mawman*, 1 Taunt. 140.

(*x*) *Adlard* v. *Booth*, 7 C. & P. 108.

(*y*) *Menetone* v. *Athawes*, 3 Burr. 1592.

(*z*) *Appleby* v. *Myers*, L.R. 2 C.P. 651; 36 L.J. C.P. 331. As to the right of a British subject to claim wages for entire voyage on a foreign ship when he refuses to complete the voyage, see *O'Neil* v. *Armstrong*, (1895) 2 Q.B. 418; 65 L.J. Q.B. 7.

(*a*) *Clarke* v. *Spence*, 4 Ad. & E. 470; 5 L.J. Q.B. 161; *ante*, p. 586; *Wood* v. *Bell*, 25 L.J. Q.B. 153, 321; 6 E. & B. 355.

to tow a vessel for a fixed sum to a certain place, and when near their destination through inevitable accident the vessel stranded and could not be got off, it was held that the contract was indivisible, and that they could not recover for any portion of the towage (*b*).

Deviations from building contracts—Extras.—If work has been agreed to be done, and materials supplied, under a building contract for certain estimated prices, and there has subsequently been a deviation from the original plan by consent of the parties, the contract is not on that account excluded, but is to be the rule of payment, as far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging; but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say to what part of it the work shall be applied, the workman may charge for the whole work by measure and value, as if no contract at all had ever been made. But there must be a total deviation, so that the terms of the original contract are not applicable to the new work (*c*). For all work done beyond the contract, under subsequent or antecedent directions, the plaintiff may recover, just as if no special contract had ever been made (*d*). But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them as extras not covered by the contract, unless the alterations are of such a nature that he cannot fail to be aware that they must increase the expense, and cannot be done for the contract price (*e*). If extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them (*f*). If they are to be done only on the direction in writing of the architect, a direction in writing must be obtained (*g*). A. having contracted with B. to use cement mortar in building the walls of a house which he was erecting for B., it was held that B.'s architect had no authority without B.'s consent, to sanction the use of milled lime instead of cement mortar (*h*). And where it is provided that all extras shall be paid for at the price fixed by the employer's surveyor, his certificate is conclusive both as to the extras and the amount due for them (*i*). In cases of variation set up by the way of defence,

(*b*) *The Madras*, (1898) P. 90; 67 L.J. P. 53.

(*c*) *Pepper* v. *Burland*, Peake, 139; *Robson* v. *Godfrey*, Holt, N.P.C. 236; *Ellis* v. *Hamlen*, 3 Taunt. 52.

(*d*) *Thornton* v. *Place*, 1 Moo. & R. 218; *Fletcher* v. *Gillespie*, 3 Bing. 637; 4 L.J. (O.S.) C.P. 202.

(*e*) *Lovelock* v. *King*, 1 Moo. & R. 60.

(*f*) *Dobson* v. *Hudson*, 1 C.B. N.S. 652; 26 L.J. C.P. 153.

(*g*) *Myers* v. *Sarl*, 30 L.J. Q.B. 9; 3 E. & E. 306; *Russell* v. *Da Bandiera*, 13 C.B. N.S. 149; 32 L.J. C.P. 68.

(*h*) *Steel* v. *Young*, (1907) S.C. 360.

(*i*) *Richards* v. *May*, 10 Q.B.D. 400; 52 L.J. Q.B. 272.

the courts look to the subsequent conduct of the parties, for this obvious reason, that, as the parties intend the contract to remain in force, so far as it is not varied, it is only by comparing the conduct of the parties subsequently to the making of the alleged variation with the terms originally agreed upon that the court can determine with certainty upon oral evidence that such variations were mutually intended to take effect.

Prevention of performance of building contracts.—Where it was agreed that the plaintiff should pull down the walls of three houses and erect for the defendant, on the site thereof, a malt-house and other buildings, and the plaintiff offered to do the work, but the defendant prevented him, it was held that the plaintiff had done all that was necessary to be done to enable him to sue the defendant for a breach of contract; the builder or workman is not in such a case entitled to recover the full stipulated remuneration as if the buildings had been actually erected (*k*). A party to a contract for the execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent (*l*); and in such a case the contractor can treat the contract as at an end, and sue on a *quantum meruit* for work and labour done and materials supplied (*m*).

Right of lien of workmen and artificers.—Wherever a workman has bestowed labour or skill in repairing or improving a chattel at the request, or by the employment of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement (*n*). This right of lien is a mere right of retainer until the pecuniary claim has been satisfied, and carries with it no right of sale (*o*). A workman who has detained a chattel in the exercise of a right of lien is not entitled, in the absence of any usage of trade, to charge warehouse rent or the expense of keeping the chattel (*p*). Thus the artificer to whom goods are delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired (*q*), the printer to whom paper has been delivered to be

(*k*) *Peters* v. *Opie*, 1 Ventr. 177; 2 Saund. 350; *Collins* v. *Price*, 5 Bing. 132; 6 L.J. (O.S.) C.P. 244; *Ferry* v. *Williams*, 8 Taunt. 70; 1 Moore, 498.

(*l*) *Roberts* v. *Bury Improvement Commissioners*, L.R. 5 C.P. 310; 39 L.J. C.P. 129.

(*m*) *Lodder* v. *Slowey*, (1904) A.C. 442; 73 L.J. P.C. 82.

(*n*) *Chase* v. *Westmore*, 5 M. & S. 180.

(*o*) *Thames Iron Works Co.* v. *Patent Derrick Co.* 29 L.J. Ch. 714; 1 Jo. & H. 93.

(*p*) *Somes* v. *Brit. Emp. Shipping Co.*, 30 L.J. Q.B. 229; 8 H.L.Cas. 338.

(*q*) *Franklin* v. *Hosier*, 4 B. & Ald. 341; *Williams* v. *Allsup*, 10 C.B. N.S. 417; 30 L.J. C.P. 353. As to a maritime lien, see *The Two Ellens*, L.R. 4 P.C. 161; 41 L.J. Adm. 33; *The Henrich Bjorn*, 11 App.Cas. 270; 55 L.J. P. 80; *Westrup* v. *Great Yarmouth Co.*, 43 Ch.D. 241; 59 L.J. Ch. 111.

printed (*r*), the miller who has ground corn or meal at his mill (*s*), the horse-breaker or trainer by whose skill a horse is trained (*t*), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve its value, or to carry it from one place to another for hire, no lien attaches upon it (*u*).

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused (*x*). Where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed; but such a lien may be established by custom and the usage of trade, or by agreement of the parties (*y*).

Liabilities of taskworkmen.—Every person who has entered into a contract for the performance of a particular task or job is bound to enter upon his employment without delay; to be active, careful, and diligent in the performance of the work; to do it according to orders given and assented to (*z*); and to complete it within a reasonable period, if no precise time has been agreed upon for its fulfilment. If the work is to be performed under the direction of a surveyor to be appointed by the employer, the appointment is a condition precedent; and, if the surveyor is not appointed within a reasonable period, the workman is released from his engagement to do the work (*a*). In ordinary cases, the workman may accomplish the work through the medium of inferior agents and workmen; but, if the work is a work of art and genius, and the contract is founded upon the personal talent of the artist, he impliedly undertakes to perform the work himself, and may not intrust it to an inferior agent of less skill (*b*).

(*r*) *Blake* v. *Nicholson*, 3 M. & S. 167.
(*s*) *Chase* v. *Westmore*, *ante*, p. 887.
(*t*) *Beavan* v. *Waters*, 3 C. & P. 520; *Jacobs* v. *Latour*, 2 M. & P. 201; 6 L.J. (O.S.) C.P. 243; *Scarfe* v. *Morgan*, 4 M. & W. 284; 7 L.J. Ex. 324.
(*u*) *Sanderson* v. *Bell*, 2 Cr. & M. 304; 3 L.J. Ex. 66.
(*x*) *Cumpston* v. *Haigh*, 2 Sc. 684; 5 L.J. C.P. 99.
(*y*) *Bleaden* v. *Hancock*, 4 M. & M. 465.
(*z*) *Streeter* v. *Horlock*, 7 Moore, 287.
(*a*) *Coombe* v. *Greene*, 11 M. & W. 483; 12 L.J. Ex. 291.
(*b*) *Robson* v. *Drummond*, 2 B. & Ad. 308; *British Waggon Co.* v. *Lea*, 5 Q.B.D. 149; 49 L.J. Q.B. 321; approved

Implied obligation to do work well—Skilled workmen.—Every person who professes to be a skilled workman impliedly undertakes to do his work in a workmanlike manner, and according to the rules of his art (*c*). The public profession of an art is a representation, to all who require the services of the professed artisan, that the latter is possessed of the ordinary amount of skill incident to his particular art (*d*). If, therefore, an accountant is employed to make out an account, and he miscalculates the amounts and carries wrong balances to the injury of the employer, he is responsible in damages to the latter (*e*). Clockmakers, jewellers, opticians, and all kinds of skilled workmen and all persons belonging to the learned professions (except barristers), are responsible in damages if they profess to accomplish more than they are able to perform, and undertake work of skill without being possessed of sufficient skill, or apply less than the occasion requires (*f*). So a chemist was held liable for negligence in compounding hair wash, by which the plaintiff's wife was injured (*g*); and a patent agent will be liable for negligence in not being aware of a legal decision which made an important change in the practice of obtaining patents (*h*).

Work rendered useless by negligence or incompetence of workman.—Whenever the work contracted to be done is a work of skill, and the undertaker, being charged with the bare work, executes it so negligently and unskilfully as to render it utterly useless to the employer, he cannot call upon the latter for payment of it. Thus, where a builder contracted with the defendant to re-build the front of his house, and built it out of the perpendicular, so that it was in danger of falling, and required to be taken down, it was held that the builder could not maintain an action in respect of such defective execution of the work (*i*). When a building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure and rebuild it; and, if the builder neglects

by Ld. Lindley in *Tolhurst* v. *Assoc. Portland Cement Manufacturers*, 72 L.J. K.B. 834, at p. 838; (1903) A.C. 414.

(*c*) *Duncan* v. *Blundell*, 3 Stark. 7, cited 5 M. & P. 548.

(*d*) *Harmer* v. *Cornelius*, 5 C.B. N.S. 236; 28 L.J. C.P. 85.

(*e*) *Story* v. *Richardson*, 8 Sc. 291; 9 L.J. C.P. 43; *Basten* v. *Butter*, 7 East, 479; *Moneypenny* v. *Hartland*, 2 C. & P. 378; *Broom* v. *Davis*, 7 East, 480, n. (*a*); *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291.

(*f*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils. 359; *Lanphier* v. *Phipos*, 8 C. & P. 479; *Hancke* v. *Hooper*, 7 C. & P. 81.

(*g*) *George* v. *Skivington*, L.R. 5 Ex. 1; 39 L.J. Ex. 8.

(*h*) *Lee* v. *Walker*, L.R. 7 C.P. 121; 41 L.J. C.P. 91.

(*i*) *Farnsworth* v. *Garrard*, 1 Campb. 38; *Denew* v. *Daverell*, 3 Campb. 451; *Duncan* v. *Blundell*, 3 Stark. 6; *Hayselden* v. *Staff*, 5 Ad. & E. 161; 6 L.J. K.B. 67; *Basten* v. *Butter*, 7 East, 484.

so to do, and refuses to fulfil his part of the contract, the employer may give him notice to remove his materials from off the land, and may resist payment of any portion of the price of the work. If he retains the materials, and makes use of them, he will be bound to pay their fair value; but, if the materials are altogether useless, or the employer has suffered from the breach of contract on the part of the workman more damage and injury than they are worth, he is not bound to pay anything (*k*).

Useless and unskilful professional services.—If a surgeon requires his patient to undergo an operation which turns out to have been altogether unnecessary, he cannot make it the subject of a pecuniary claim. If a medical man unskilfully administers improper medicines, and the patient, consequently, derives no benefit from his attendance, the medical man is not entitled to any remuneration; but, if he has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some peculiarity in the constitution of the patient, for which the medical man is not responsible (*l*). If a surveyor, engineer, or architect, from negligence or want of skill, gives his employers a grossly incorrect estimate of the cost of certain works, and thereby leads them into unnecessary expenses, he is not entitled to be paid for his plans, estimates and specifications (*m*). But, if the incorrectness of the estimate arises from the inherent difficulties in the work itself, the employer will not be relieved from the obligation of payment.

Actions against solicitors for negligence.—Every solicitor is bound to bring a reasonable amount of skill, care and knowledge to the performance of his duty. Whether he has done so in a particular case is a question of fact (*n*). Every solicitor employed by a purchaser of property impliedly undertakes to exercise reasonable skill in the investigation of the title of the vendor. If his client has purchased leasehold property under conditions that he is to have no abstract of the vendor's title, and that the lessor's title is not to be objected to, or gone into, this will not exonerate the solicitor from the duty of investigating the vendor's title so far as to ascertain that there is a lease

(*k*) Tindal, C.J., *Hill* v. *Featherstonehaugh*, 5 M. & P. 544, 548; *Farnsworth* v. *Garrard*, *ante*, p. 889.

(*l*) *Kannen* v. *McMullen*, Peake, 83; *Hupe* v. *Phelps*, 2 Stark. 480.

(*m*) *Moneypenny* v. *Hartland*, 2 C. & P. 378.

(*n*) See *Addison on Torts*, p. 752 (ed. 8).

to him creating the interest he professes to sell, and that it has been duly registered where registration is necessary (*o*). But a solicitor is not liable to an action for negligence, at the suit of one between whom and himself the relation of solicitor and client does not exist, for giving, in answer to a casual enquiry, erroneous information as to the contents of a deed (*p*). A solicitor is liable for the negligence of his agent (*q*), partner (*r*), or clerk (*s*). The obligation of the solicitor is towards his client and not towards a stranger (*t*). Yet, if he undertakes without authority to act for any person he is liable for negligence (*u*).

The solicitor having accepted the retainer is in general bound to prosecute the matter intrusted to him to its termination, but not if he cannot obtain his fees or security for them, and he gives reasonable notice of throwing up the retainer (*x*). The retainer is at an end when judgment is recovered (*y*), but it may be renewed (*z*). A solicitor who has been retained to conduct an action, and who, after judgment in favour of his client, is authorised to do his best for the purpose of obtaining the fruits of the judgment, has control over the process of execution so far as such purpose is concerned, and may consent to the withdrawal of a *fi. fa.* (*a*). He may also accept payment of the debt by instalments if it is for the client's advantage to do so, but he has no implied authority to enter into an agreement on his behalf to postpone execution (*b*). A solicitor is not liable upon points of new occurrence, or of nice or doubtful construction (*c*), but he must show himself acquainted with the ordinary practice of his profession (*d*).

It is the duty of every solicitor to act with fidelity to his client, and to keep the secrets of the latter (*e*). If a solicitor,

(*o*) *Allen* v. *Clark*, 11 W. R. 304; as to the receipt of money for investment by one of several solicitors in partnership, see *ante*, p. 851.

(*p*) *Fish* v. *Kelly*, 17 C.B. N.S. 194.

(*q*) *Simmons* v. *Rose*, 31 Beav. 11.

(*r*) *Norton* v. *Cooper*, 3 Sm. & Giff. 375; *Dundonald* v. *Masterman*, L.R. 7 Eq. 504; 38 L.J. Ch. 350; *Bickford* v. *Darcy*, L.R. 1 Ex. 354; 35 L.J. Ex. 202.

(*s*) *Floyd* v. *Nangle*, 3 Atk. 568; *Prestwich* v. *Poley*, 18 C.B. N.S. 806; 34 L.J. C.P. 189.

(*t*) *Fish* v. *Kelly*, *supra*.

(*u*) *Westaway* v. *Frost*, 17 L.J. Q.B. 286.

(*x*) *Wadsworth* v. *Marshall*, 2 Cr. & J. 665; 1 L.J. Ex. 250; *Hoby* v. *Built*, 3 B. & Ad. 350; *Van Sandau* v. *Browne*, 9 Bing. 402; 2 L.J. C.P. 34; *Underwood* v. *Lewis*, (1894) 2 Q.B. 306; 64 L.J. Q.B. 60; *Court* v. *Berlin*, (1897) 2 Q.B. 396; 66 L.J. Q.B. 714.

(*y*) *Flower* v. *Bolingbroke*, 1 Str. 639; *Brackenbury* v. *Pell*, 12 East, 588; *Macbeath* v. *Ellis*, 4 Bing. 578.

(*z*) *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

(*a*) *Levi* v. *Abbott*, 4 Exch. 588; 19 L.J. Ex. 62.

(*b*) *Lovegrove* v. *White*, L.R. 6 C.P. 440; 40 L.J. C.P. 253.

(*c*) *Godefroy* v. *Dalton*, 6 Bing. 468; 8 L.J. (O.S.) C.P. 79; *Laidler* v. *Elliott*, 3 B. & C. 738; 3 L.J. (O.S.) K.B. 96.

(*d*) *Hunter* v. *Caldwell*, 10 Q.B. 69, 83; 16 L.J. Q.B. 274.

(*e*) Com. Dig. Action on the Case for Deceit, A. 5. As to their duty to keep accounts, see *Neville*, *Ex parte*, L.R. 4 Ch. 43. No agreement between a solicitor and his client as to the former's remuneration made in pursuance of the Solicitors Act, 1870 (33 & 34 Vict. c. 28), will absolve such solicitor from the consequences of his negligence: see sect. 7.

when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever a solicitor finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the solicitor has his client's title-deeds put into his hands for any purpose whatever, he is "to consider his lips sealed with a sacred silence as to the whole of their contents" (*f*).

It is also the duty of every solicitor, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him (*g*). If a solicitor conducting a suit is guilty of misconduct and negligence, by reason whereof all the previous steps taken in the cause become useless, he cannot recover his charges for any part of the business he has done; but, if the suit fails from causes over which the solicitor has no control, the case is otherwise (*h*). If a solicitor issues a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery and practice of the court, and to see that it is adequate for the purposes of the suit; and, if the suit fails from the ignorance of the solicitor in this respect, he cannot recover his costs of the abortive proceedings (*i*).

If a solicitor conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client (*k*). And the same consequences follow if he brings

(*f*) Tindal, C.J., *Taylor* v. *Blacklow*, 3 Bing. N.C. 235, 248; 6 L.J. C.P. 14.

(*g*) *Stannard* v. *Willtharne*, 4 M. & Sc. 376; 3 L.J. C.P. 317.

(*h*) *Bracey* v. *Carter*, 12 Ad. & E. 373; *Long* v. *Orsi*, 18 C.B. 610; 26 L.J. C.B. 127; *Stokes* v. *Trumper*, 2 K. & J. 232; *Chapman* v. *Van Toll*, 8 E. & B. 396; 27 L.J. Q.B. 1.

(*i*) *Cox* v. *Leech*, 1 C.B. N.S. 617; 26 L.J. C.P. 125.

(*k*) *Bracey* v. *Carter*, *supra*; *Frankland* v. *Cole*, 2 Cr. & J. 590; 1 L.J. Ex. 189; *Pitt* v. *Yalden*, 4 Burr. 2063.

an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction (*l*), or negligently suffers judgment to go by default when he is retained to defend an action (*m*); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty intrusted to him; or if he is not present in person, or by his agent at the trial, to see that the witnesses are forthcoming when called upon (*n*). When present at the trial, it is the duty of the solicitor not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance (*o*); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter (*p*). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel (*q*), although that circumstance might go in reduction of damages. But in the absence of a distinct prohibition to compromise, the general authority of a solicitor is sufficient for that purpose (*r*). A solicitor retained to bring an action has no implied authority to compromise the claim before action brought (*s*).

"It would be extremely difficult," observes Tindal, C.J., "to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded. . . . The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession." But "he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law," unless he has thought fit to act upon his own

(*l*) *Williams* v. *Gibbs*, 6 N. & M. 788.

(*m*) *Godefroy* v. *Jay*, 5 Moo. & P. 297; 8 L.J. (O.S.) C.P. 230.

(*n*) *Hawkins* v. *Harwood*, 4 Exch. 503; 19 L.J. Ex. 33; *De Roufigny* v. *Peale*, 3 Taunt. 483; *Swannell* v. *Ellis*, 8 Moore, 340; 2 L.J. (O.S.) C.P. 8.

(*o*) *Reece* v. *Righy*, 4 B. & Ald. 202.

(*p*) *Lowry* v. *Guildford*, 5 C. & P. 234.

(*q*) *Fray* v. *Voules*, 1 E. & B. 839; 28 L.J. Q.B. 232; *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

(*r*) *Prestwich* v. *Poley*, 18 C.B. N.S. 806; 34 L.J. C.P. 189; *Butler* v. *Knight*, *supra*; *Lee* v. *Walker*, L.R. 7 C.P. 121; 41 L.J. C.P. 91; *ante*, p. 889.

(*s*) *Macaulay* v. *Polley*, (1897) 2 Q.B. 122; 66 L.J. Q.B. 665.

judgment and opinion respecting matters which ought to have been laid before counsel (*t*).

If a solicitor is employed to investigate the title to an estate, or to obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible for his negligence (*u*). But he is not responsible for an advance on a mortgage which turns out a deficient security, if he has taken the opinion of a competent surveyor as to the value of the property (*x*). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will (*y*). If he relies upon his own judgment as to the legal operation of documents, he does so at his peril; he ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them (*z*).

If when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether his suspicions were correct (*a*), or to make inquiry whether there are any existing incumbrances on the property (*b*).

By the Solicitors Act, 1870 (*c*), agreements may be made between solicitors and their clients with respect to the remuneration of the former: but, by sect. 7, a provision in any agreement (*d*) that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor, is wholly void. By

(*t*) *Godefroy* v. *Dalton*, 6 Bing. 467; 8 L.J. (O.S.) C.P. 79; *Purves* v. *Landell*, 12 Cl. & Fin. 91, 98; *Shilcock* v. *Passman*, 7 C. & P. 292; *Kemp* v. *Burt*, 4 B. & Ad. 431; 2 L.J. K.B. 69; *Long* v. *Orsi*, 18 C.B. 610; 26 L.J. C.B. 127; *Cox* v. *Leech*, 1 C.B. N.S. 617; 26 L.J. C.P. 125; *Ireson* v. *Pearman*, 3 B. & C. 812, 813; 3 L.J. (O.S.) K.B. 119; *Townley* v. *Jones*, 8 C.B. N.S. 289; 29 L.J. C.P. 299; *Elkington* v. *Holland*, 9 M. & W. 661; 11 L.J. Ex. 273; *Laidler* v. *Elliott*, 3 B. & C. 738; 3 L.J. (O.S.) K.B. 96.

(*u*) *Knights* v. *Quarles*, 4 Moore, 532; 2 B. & B. 102; *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464; *Howell* v. *Young*, 5 B. & C. 259; 4 L.J. (O.S.) K.B. 160; *Chapman* v. *Chapman*, L.R. 9 Eq. 276.

(*x*) *Chapman* v. *Chapman*, *supra*. As to his duty to get the best price for the property entrusted to him for sale, see *Morgan* v. *Steble*, L.R. 7 Q.B. 611; 41 L.J. Q.B. 260.

(*y*) *Wilson* v. *Tucker*, 3 Stark. 156.

(*z*) *Ireson* v. *Pearman*, 3 B. & C. 813; 3 L.J. (O.S.) K.B. 119.

(*a*) *Cooper* v. *Stephenson*, 21 L.J. Q.B. 292.

(*b*) *Hopgood* v. *Parkin*, L.R. 11 Eq. 74; see *Ratcliffe* v. *Barnard*, L.R. 6 Ch. 652; 40 L.J. Ch. 777.

(*c*) 33 & 34 Vict. c. 28.

(*d*) As to what constitutes an agreement, see *Pontifex* v. *Farnham*, 62 L.J. Q.B. 344; as to effect of subsequent bankruptcy of client, see *Pollitt*, *In re*, (1893) 1 Q.B. 445; 62 L.J. Q.B. 236; *Charlwood*, *In re*, (1894) 1 Q.B. 643; 63 L.J. Q.B. 344.

sect. 8, no action can be brought upon any such agreement, but the agreement may be enforced in the manner indicated in the section (*e*). It has been held that this section only applies to prevent actions to recover sums in lieu of costs after the work is done, and not to an action for refusing to allow a solicitor to do the work (*f*). An agreement by a solicitor with his client to charge nothing (*g*) if the action is lost and to take nothing for costs out of any money recovered in such action (*h*), or to charge less than ordinary costs is not required by sect. 4, when set up by the client, to be in writing (*i*). But an agreement to be valid within sect. 4 must in order to bind the client be signed by him (*k*), for instance, an agreement by a client to pay a lump sum in discharge of costs must at all events be in writing (*l*). An agreement as to the payment of costs to his solicitor, though signed by the client only, is an "agreement in writing" within sect. 4 (*m*). Where there has been an adjustment of accounts between a solicitor and his client and a balance struck in favour of the solicitor, the latter is entitled to sue for such balance on an account stated, although no signed bill was delivered and although there was no written agreement as to the costs within the meaning of the Solicitors Acts (*n*). The above statute does not apply to conveyancing or non-contentious business, agreements as to which are regulated by the Solicitors' Remuneration Act, 1881 (*o*), and "shall be in writing, signed by the person to be bound thereby or by his agent in that behalf" (*p*).

Negligence of barristers.—There is no instance of any action having been successfully brought against a barrister for neglect of duty; but if a barrister intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible, like every other wrongdoer, for the mischief thereby occasioned (*q*).

(*e*) But the agreement must be fair and reasonable in regard to the work done: *Cathcart, Ex parte, Stuart, In re*, (1893) 2 Q.B. 201; 62 L.J. Q.B. 623.

(*f*) *Rees* v. *Williams*, L.R. 10 Ex. 200; 44 L.J. Ex. 116.

(*g*) A client who has verbally agreed with his solicitor not to pay any costs, has no right to recover costs from the other party: *Gundry* v. *Sainsbury*, (1910) 2 K.B. 645; 79 L.J. K.B. 713; 33 & 34 Vict. c. 28, ss. 4, 5.

(*h*) *Jennings* v. *Johnson*, L.R. 8 C.P. 425.

(*i*) *Clare* v. *Joseph*, (1907) 2 K.B. 369; 76 L.J. K.B. 724.

(*k*) See *Thompson, In re*, (1894) 1 Q.B. 462; 63 L.J. Q.B. 187; and *per* Thesiger, L.J., in *Bewley* v. *Atkinson*, 13 Ch.D. 283, 299; 49 L.J. Ch. 153, 162, as to dictum of Ld. Coleridge, C.J., in *Lewis, In re*, 1 Q.B.D. 724; 45 L.J. Q.B. 816, that such an agreement must be signed by both parties.

(*l*) *Russell, Son and Scott, In re*, 30 Ch.D. 114; 54 L.J. Ch. 948.

(*m*) *Thompson, In re, supra*; *Jones, In re*, (1895) 2 Ch. 719; 64 L.J. Ch. 832.

(*n*) *Turner and Son* v. *Willis*, (1905) 1 K.B. 468; 74 L.J. K.B. 365.

(*o*) 44 & 45 Vict. c. 44, ss. 8, 9.

(*p*) 44 & 45 Vict. c. 44, s. 8 (2). *Frape, In re*, (1893) 2 Ch. 284; 62 L.J. Ch. 473; *Baylis, In re*, (1896) 2 Ch. 107; 65 L.J. Ch. 612.

(*q*) *Swinfen* v. *Chelmsford* (*Lord*), 5 H. & N. 918; 29 L.J. Ex. 382.

Negligence of surveyors or valuers.—Where the plaintiff undertakes to perform work to the satisfaction of the defendants' surveyor, payment to be made only on the certificate of such surveyor, if the defendants and the surveyor collude to withhold the giving of the certificate, the defendants cannot shelter themselves by means of any such misconduct (*r*). But a declaration against the defendant, that his surveyor wrongfully neglected and refused to give his certificate, discloses no cause of action, for that would be to substitute the opinion of a jury for a certificate of the surveyor, which it was the very object of the contract to prevent (*s*). Where two persons were employed to value between the incoming rector and the representatives of the deceased incumbent, and the defendant, through ignorance of the true principle to be applied to the valuation of ecclesiastical dilapidations, valued so favourably to the opposite party and adversely to the plaintiff, that his valuation was accepted, it was held that he was liable for the results of his ignorance (*t*).

Negligence of bankers.—It has never been decided whether there is any legal obligation on a banker not to disclose the state of his customer's account except upon a reasonable occasion; but, assuming that such an obligation exists, the question what is a reasonable occasion is clearly one for the jury to decide, and if the customer sustain any special damage by the banker having disclosed the state of his account, the banker would, it seems, be responsible (*u*). A banker is not liable for the loss of a box left under his care by a customer for safe custody, of which the customer keeps the key, and for which no payment is made, if it be stolen by one of the clerks of the bank, unless the loss was occasioned by gross negligence on the part of the banker (*x*). But if a banker or banking company undertake the custody of securities for a customer and charge a commission for the receipt of the dividends from them, they would, it seems, be liable for negligence, if they left the securities in the uncontrolled power of their clerk or manager, who fraudulently disposed of them (*y*).

If the customer of a banker, who is desired to keep his cheque-book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to

(*r*) Erle, C.J., *Clarke* v. *Watson*, 34 L.J. C.P. 148; 18 C.B. N.S. 278.

(*s*) *Clarke* v. *Watson*, *supra*.

(*t*) *Jenkins* v. *Betham*, 15 C.B. 168; 24 L.J. C.P. 94.

(*u*) *Hardy* v. *Veasey*, L.R. 3 Ex. 107; 37 L.J. Ex. 76.

(*x*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25; *ante*, p. 845.

(*y*) *United Service Co., In re*, L.R. 6 Ch. 212; 40 L.J. Ch. 286.

throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been anticipated that the power of obtaining a cheque would induce a servant to commit a forgery (*z*). Where a clerk of the plaintiff forged signatures of the drawer, and procured the acceptances of the plaintiff, and then forged indorsements of a firm, and presented the bills across the counter to the Bank of England, who paid them across the counter contrary to their usual custom in cases of such large amounts, it was held that the plaintiff and not the bank had under all the circumstances been guilty of negligence (*a*).

Negligence of public officers.—Public officers in respect of their judicial or discretionary duties are not liable for negligence, but they are liable for negligence in respect of their ministerial duties. Where they perform duties for reward at the request of individuals, they are liable for negligence and are not protected, merely because they act *bonâ fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skilful manner (*b*). Public officers who are servants of the Government are not responsible for the negligence of their subordinates; but public officers who act in a *quasi* public capacity at the request of individuals are liable for the acts of those whom they employ. Thus commissioners appointed by the Crown are liable for the negligent acts of persons employed by them (*c*).

Negligence of surgeons, &c.—After due allowance has been made for the difficult nature of the duty undertaken by a medical man, any negligence upon his part becomes a serious matter, both because he has by undertaking a difficult duty promised to use great skill, and because the consequences of his negligence may be most disastrous. To render a medical man liable for negligence, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he has himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result (*d*). Where an action for negligence was brought

(*z*) *Bank of Ireland* v. *Evan's Charity Trustees*, 5 H.L.Cas. 389, 411; *Swan* v. *North Brit. Austr. Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *Taylor* v. *Gt. Ind. Penins. Ry.*, 28 L.J. Ch. 709; 4 De G. & J. 559; see *Donaldson* v. *Gillott*, L.R. 3 Eq. 274; *Johnston* v. *Renton*, L.R. 9 Eq. 181; *United Service Co., In re, ante*, p. 896.

(*a*) *Vagliano Brothers* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145; see this case, *post*, p. 1244.

(*b*) *Jones* v. *Bird*, 5 B. & Ald. 837.

(*c*) *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 111; 35 L.J. Ex. 225. See also *Reg.* v. *Treasury*, L.R. 7 Q.B. 387; 41 L.J. Q.B. 178.

(*d*) *Rich* v. *Pierpont*, 3 F. & F. 35.

against a surgeon, and it was proved that the plaintiff's mother sent for the defendant, and that the plaintiff's father paid him, it was held that the plaintiff's submitting to the defendant's treatment was no sufficient proof that the defendant had been employed by the plaintiff (*e*). A surgeon, an apothecary, a farrier, a solicitor, or any other professional person, impliedly undertakes for the exercise of ordinary skill and knowledge in the practice of his profession, and is responsible for any injury sustained from his neglect to exercise such skill (*f*). In one case it was ruled by Cockburn, C.J., that surgeons who give their services gratuitously (as at hospitals) were not liable for the negligence of those employed under them (*g*); but it would seem that a surgeon who acts gratuitously ought at least to take ordinary care. The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical and surgical staff. The physicians and surgeons who give their services at the hospital are employed to exercise their profession to the best of their abilities, according to their own discretion, but in exercising it they are in no way under the orders, or bound to obey the directions, of the governors. Although the nurses employed at the hospital are servants of the governors for general purposes, they are not so for the purposes of operations conducted by the medical staff (*h*). Physicians could not at common law recover their fees, unless under a special contract (*i*), but surgeons could (*k*); and now by 49 & 50 Vict. c. 48, s. 6, physicians can recover their fees and need not show any special contract.

An unqualified person who acts as a doctor is equally bound to bring competent skill to the performance of the duty which he has undertaken (*l*).

Wilful selection of unqualified persons.—The employer himself is bound to exercise ordinary caution in the selection of the party he employs. If he selects a common quack or an unauthorized practitioner, the latter is responsible only for a reasonable and *bonâ fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses; and, if he has done his best and failed, he cannot be made responsible for a

(*e*) *Gladwell* v. *Steggall*, 8 Sc. 67; 8 L.J. C.P. 361.

(*f*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils. 359; *Hancke* v. *Hooper*, 7 C. & P. 84; *Lanphier* v. *Phipos*, 8 C. & P. 479.

(*g*) *Perionowski* v. *Freeman*, 4 F. & F. 982.

(*h*) *Hillyer* v. *St. Bartholomew's Hospital (Governors)*, (1909) 2 K.B. 820; 78 L.J. K.B. 958.

(*i*) *Chorley* v. *Bolcot*, 4 T.R. 317.

(*k*) *Battersby* v. *Lawrence*, Car. & M. 277.

(*l*) *Ruddock* v. *Lowe*, 4 F. & F. 519.

want of skill; for it was the employer's own fault to trust an unlearned and unskilful person, known not to be regularly and properly qualified (*m*).

Arbitrators.—A person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons, does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill, or knowledge, or care, but only to act honestly and *bonâ fide;* and this doctrine applies, not only to an arbitrator, properly so called, but to every person who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion (*n*). And although, where the matter to be determined by the referee is one of value only, that is not strictly an arbitration (*o*); yet, where in ascertaining the value of property or the amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles of judicial inquiries, by hearing the parties and the evidence of their witnesses, that is an arbitration, and not merely a valuation (*p*). Where two valuers are appointed to ascertain the price to be paid for the goodwill, stock, and fixtures of a business, with a reference to the decision of an umpire, if they differ, there is no arbitration until the umpirage takes effect (*q*). An umpire or a single arbitrator occupies a judicial position and is bound so far as practicable to follow legal rules (*r*).

Bailment of materials to workmen to be manufactured or repaired for hire.—When materials for work have been delivered to a workman to be dealt with by him in the way of his trade, he is bound to take all reasonable and ordinary precaution for their protection; and, if a loss has occurred from robbery, or from fire or inundation, or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men to guard against the mischief. Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates: and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at

(*m*) But see *Ruddock* v. *Lowe*, *ante*, p. 898.

(*n*) *Pappa* v. *Rose*, L.R. 7 C.P. 32, 525; 41 L.J. C.P. 187; *Tharsis Sulphur Co.* v. *Loftus*, L.R. 8 C.P. 1; 42 L.J. C.P. 6; *Stevenson* v. *Watson*, 4 C.P.D. 148; 48 L.J. C.P. 318. See *Addison on Torts*, p. 735 (ed. 8).

(*o*) *Collins* v. *Collins*, 28 L.J. Ch. 184; 26 Beav. 306; *Bos* v. *Helsham*, L.R. 2 Ex. 72; 36 L.J. Ex. 20.

(*p*) *Hopper, In re*, L.R. 2 Q.B. 367; 36 L.J. Q.B. 97.

(*q*) *Turner* v. *Goulden*, L.R. 9 C.P. 57 43 L.J. C.P. 60.

(*r*) *Per* Farwell, L.J., *Enoch and Zaretzky, Bock & Co., In re*, (1910) 1 K.B. 327; 79 L.J. K.B. 363.

last burst open the gates and dashed the bailor's vessel against another vessel, it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident (*s*). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him (*t*).

Theft by servants.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence (*u*). A watchmaker is bound to secure property placed in his hands in the way of his trade, as to protect it against depredations that may be committed by the persons in his employ (*x*).

Distinction between robbery and theft.—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and robbed of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery, it being considered that individual care or vigilance could avail but little against the open attack of the determined robber; in the other he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety (*y*). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of the articles as he had taken of his own property, he was not responsible for the theft committed by his servant (*z*); but every depositary of chattels to be kept for hire is *primâ facie* responsible for a theft committed by his own servants within the house (*a*), and can only discharge himself from

(*s*) *Leck* v. *Maestaer*, 1 Campb. 138.

(*t*) Ld. Campbell, C.J., *Dansey* v. *Richardson*, 3 E. & B. 169; 23 L.J. Q.B. 228.

(*u*) *Walker* v. *British Guarantee Assoc.*, 18 Q.B. 277; 21 L.J. Q.B. 257, 260.

(*x*) *Clarke* v. *Earnshaw*, Gow, 30.

(*y*) Abbott, C.J., in *Robinson* v. *Ward*, Ry. & M. 276.

(*z*) *Finucane* v. *Small*, 1 Esp. 315.

(*a*) *Hodgson* v. *Fullarton*, 4 Taunt. 787; Dallas, C.J., in *Clarke* v. *Earnshaw*,

liability by showing that the theft was committed under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it.

Liability of bailee for negligence of servant.—The defendant hired a carriage and horse from the plaintiffs; the defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction; while he was thus engaged, the carriage and horse were injured, owing to his negligent driving, and it was held that there had been a breach of the defendant's contract as bailee for which he was liable (*b*). If the bailee's servants depart from the course of their employment, he ceases to be responsible for their acts, whether they be negligent (*c*) or felonious (*d*).

Losses occasioned by negligence of bailor.—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, &c., and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss (*e*).

Negligence of bailors.—It is the duty of every bailor of dangerous substances, knowing the dangerous nature of them, to take care that the danger is communicated to the bailee; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant (*f*).

Fraudulent concealment of dangerous nature of articles delivered to bailee to be warehoused or carried.—Every person who conceals in boxes and packages articles known by him to be of a dangerous nature, and delivers them to another to be warehoused or carried with other goods, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger attendant upon the dealing with them; and it is no answer to aver that the articles were well known in commerce, and that the plaintiff knew what they were,

Gow, 30; Campbell, C.J., and Coleridge, J., in *Dansey* v. *Richardson*, 3 E. & B. 156—171; 23 L.J. Q.B. 223—229; *De Rothschild* v. *Royal Mail, &c. Co.*, 7 Exch. 734; 21 L.J. Ex. 273.

(*b*) *Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413; 60 L.J. Q.B. 676.

(*c*) *Saunderson* v. *Collins*, (1904) 1 K.B. 628; 73 L.J. K.B. 358.

(*d*) *Cheshire* v. *Bailey*, (1905) 1 K.B. 237; 74 L.J. K.B. 176. See, further, *Addison on Torts*, 747 (ed. 8).

(*e*) *Cailiff* v. *Danvers*, 1 Peake, N.P.C. 155; *Addison on Torts*, 24 (ed. 7).

(*f*) *Farrant* v. *Barnes*, 32 L.J. C.P. 137; 11 C.B. N.S. 553.

without an express averment that he knew them to be dangerous (*g*).

Deposit of goods under special contract.—In a contract of bailment, the bailee may impose any reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept and his responsibility for the re-delivery of them dependent upon those terms being observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly inconsistent with any contract at all. Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct (*h*).

Detention of chattels by bailee under claim of lien.—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand in respect of them has been satisfied by the bailor. The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of the debt secured by the lien being barred by the Statute of Limitations (*i*). And it will exist, although it arises out of an immoral consideration, if the plaintiff cannot recover without relying on the immorality, on the principle of *in pari delicto potior est conditio possidentis* (*k*).

Right of lien.—If a defendant, having a lien upon goods, refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property (*l*). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to

(*g*) *Hutchinson* v. *Guion*, 5 C.B. N.S. 149; 28 L.J. C.P. 63; *Brass* v. *Maitland*, 6 E. & B. 490; 26 L.J. Q.B. 49; *Gibbon* v. *Paynton*, 4 Burr. 2298; *Batson* v. *Donovan*, 4 B. & Ald. 33, 37; *Williams* v. *East India Co.*, 3 East, 192.

(*h*) Byles, J., *Van Toll* v. *S. E. Ry.*, 12 C.B. N.S. 75; 31 L.J. C.P. 241; *Peek* v. *North Staffordshire Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241; this subject is more freely illustrated, *post*, p. 1035.

(*i*) *Spears* v. *Hartley*, 3 Esp. 81; *Broomhead, In re*, 16 L.J. Q.B. 355.

(*k*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309; 38 L.J. Q.B. 225.

(*l*) *Cannee* v. *Spanton*, 8 Sc. N.R. 714; 14 L.J. C.P. 23; *Dirks* v. *Richards*, 5 Sc. N.R. 534; 4 M. & Gr. 574; *Weeks* v. *Goode*, 6 C.B. N.S. 367.

be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (*m*). Where a person, observes Alderson, B., has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods he thereby puts an end to his lien (*n*); but where goods have been deposited as security for a loan of money to be repaid on a day certain, there is an implied power of sale in case of default in payment on the day named (*o*). An unauthorised dealing with a pledge will not, it seems, revest the property in the pledgor, though it may give him a right of action for any damage actually caused by such unauthorised proceeding (*p*). And it has been held, that a lender of money on the security of railway stock has no right to realise the security during the currency of the loan, and that, if he does so, the owner may recover from him the price he got for the stock, if it is to his interest to do so (*q*).

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l*., to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser (*r*). Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an outhouse on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the outhouse, and, the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and, no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an

(*m*) *Scarfe* v. *Morgan*, 4 M. & W. 281; 7 L.J. Ex. 324; *Kerford* v. *Mondel*, 28 L.J. Ex. 303.

(*n*) *White* v. *Spettigue*, 13 M. & W. 603; 14 L.J. Ex. 99.

(*o*) *Pigot* v. *Cubley*, 15 C.B. N.S. 701; 33 L.J. C.P. 134.

(*p*) *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232; *Halliday* v. *Holgate*, L.R. 3 Ex. 299; 37 L.J. Ex. 174.

(*q*) *Langton* v. *Waite*, L.R. 6 Eq. 165; 37 L.J. Ch. 345; on appeal, L.R. 4 Ch. 402.

(*r*) *Gurr* v. *Cuthbert*, 12 L.J. Ex. 309.

action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples (*s*).

A person cannot set up a right of lien which is at variance with the terms or conditions or implied understanding, upon which he received the property.—A livery-stable keeper has no lien on a horse delivered to him to keep. Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep (*t*), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions (*u*), the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking (*x*). And if a trainer of race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien (*y*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt (*z*). If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter (*a*). If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner (*b*). Whenever goods in the hands of a bailee or depositary are, by the terms of the contract, to be re-delivered to the owner at some stated period, or, if by the agree-

(*s*) *Milgate* v. *Kebble*, 3 M. & Gr. 100; 10 L.J. C.P. 277.

(*t*) *Judson* v. *Etheridge*, 1 Cr. & M. 743; 2 L.J. Ex. 300; *Yorke* v. *Grenaugh*, 2 Ld. Raym. 868.

(*u*) *Orchard* v. *Rackstraw*, 19 L.J. C.P. 303.

(*x*) *Jackson* v. *Cummins*, 5 M. & W. 342; 8 L.J. Ex. 265; *Chapman* v. *Allen*, Cro.Car. 273.

(*y*) *Forth* v. *Simpson*, 13 Q.B. 685; 18 L.J. Q.B. 263.

(*z*) *Muir* v. *Fleming*, D. & R. N.P.C. 30.

(*a*) *Key* v. *Flint*, 8 Taunt. 23; 1 Moore, 451; *Buchanan* v. *Findlay*, 9 B. & C. 749; 7 L.J. (O.S.) K.B. 314.

(*b*) *Burn* v. *Brown*, 2 Stark. 273.

ment the plaintiff is entitled to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien (*c*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed (*d*). "If a security" (such as bill, note, or bond) "is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone" (*e*).

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal (*f*). But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded; and if he claims a right to retain them for two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists (*g*).

Parties against whom lien may be claimed.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner (*h*), unless the person in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favour of all who require his services (*i*). A person who hires a dog-cart under a hire-purchase agreement, and undertakes "to keep and preserve the said dog-cart from injury," has implied authority from the owner to employ a coach-builder to do necessary repairs to the dog-cart, and if he does so, will create a lien in favour of the coach-builder not only as against himself, but also as against the owner of the dog-cart (*k*). But where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-

(*c*) *Crawshay* v. *Homfray*, 4 B. & Ald. 52.

(*d*) *Raitt* v. *Mitchell*, 4 Campb. 146.

(*e*) *Hewison* v. *Guthrie*, 3 Sc. 298; 5 I.J. C.P. 283; *Cowell* v. *Simpson*, 16 Ves. 280; *Hornecastle* v. *Farran*, 3 B. & Ald. 497. See, however, *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587.

(*f*) *Boardman* v. *Sill*, 1 Campb. 410, n.; *Weeks* v. *Goode*, 6 C.B. N.S. 367; *White* v. *Gainer*, 9 Moore, 45.

(*g*) *Scarfe* v. *Morgan*, 4 M. & W. 281; 7 L.J. Ex. 324.

(*h*) *Hartop* v. *Hoare*, 3 Atk. 44; *Lempriere* v. *Pasley*, 2 T.R. 485; *Castellain* v. *Thompson*, 13 C.B. N.S. 105 32 L.J. C.P. 79.

(*i*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*k*) *Keene* v. *Thomas*, (1905) 1 K.B. 136; 74 L.J. K.B. 21.

maker had no lien upon the chaise as against the master for the price of the repairs (*l*). It has been held, that if a person obtains the property in goods by fraud, and pawns them, before the seller has avoided the contract, the pawnee is entitled to a lien upon them for the money advanced as against the seller (*m*). But the possession of the goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to which he has no colour of title, the *jus tertii* may always be set up against the pawnor by the pawnee (*n*).

General lien is a right on the part of the manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognisant of it, and to have contracted subject to the usage: but, as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a business in which a general lien is recognised, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien (*o*). A general lien cannot be set up in opposition to the terms and conditions upon which the goods were

(*l*) *Hiscox* v. *Greenwood*, 4 Esp. 174; *Weldon* v. *Gould*, 3 Esp. 268.

(*m*) *Parker* v. *Patrick*, 5 T.R. 175; doubted in *Peer* v. *Humphrey*, 2 Ad. & E. 499; 4 L.J. K.B. 100; but said to be good law by Parke, B., in *Load* v. *Green*, 15 M. & W. 219; 15 L.J. Ex. 113; and by Cresswell, J., in *White* v. *Garden*, 20 L.J. C.P. 168; 10 C.B. 919.

(*n*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209.

(*o*) *Bock* v. *Gorrissen*, 2 De G. F. & J. 434; 30 L.J. Ch. 39, 42.

received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods (*p*). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him (*q*). In some places, dyers, calico-printers, &c., have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them, not only for the work done in respect of the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c., other goods which had previously been delivered back to their owners (*r*); and in other places, where no such usage has been shown to exist, they have been held to have no such general lien (*s*). The usage, when it exists, must be shown to be long established, notorious, and reasonable, and not contrary to any established principle of law (*t*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work (*u*); also, that an agent who carries on business, in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the management of the business (*x*).

Notice that goods will be held subject to general lien.—The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, or common ferryman, and not being bound to exercise his calling in favour of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien (*y*).

(*p*) *Walker* v. *Birch*, 6 T.R. 262.

(*q*) *Key* v. *Flint*, 1 Moore, 451; 8 Taunt. 21.

(*r*) *Savill* v. *Barchard*, 4 Esp. 52; *Naylor* v. *Mangles*, 1 *ib.* 109; *Spears* v. *Hartley*, 3 *ib.* 81; *Rose* v. *Hart*, 8 Taunt. 499; 2 Moore, 547; *Webb* v. *Fox*, 2 Peake, N.P.C. 167.

(*s*) *Green* v. *Farmer*, 4 Burr. 2214; 1 W.Bl. 651; *Holderness* v. *Collinson*, 7 B. & C. 216; 6 L.J. (O.S.) K.B. 17.

(*t*) *Rushforth* v. *Hadfield*, 6 East, 528; *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99; 6 L.J. C.P. 131.

(*u*) *Blake* v. *Nicholson*, 3 M. & S. 167.

(*x*) *Foxcraft* v. *Wood*, 4 Russ. 488.

(*y*) *Kirkman* v. *Shawcross*, 6 T.R. 14.

General lien by custom of trade—Warehousekeepers—Wharfingers (*z*).—Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all moneys or any balance thereof due from such merchants to such public warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor, for expenses incurred in respect of other goods of third persons which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent;" which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade (*a*). Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another (*b*). If a wharfinger has a general authority to receive all goods directed for A. B., and goods come to his wharf directed by mistake for A. B., the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger cannot set up a lien on such goods for a general balance of accounts due from A. B. to him (*c*).

Extinguishment of lien by abandonment of possession.—If a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property, his right of lien does not revive (*d*); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished (*e*). Possession of

(*z*) As to lien for freight, see 57 & 58 Vict. c. 60, s. 494; as to lien of wharfingers or warehousemen, ss. 495–500.

(*a*) Tindal, C.J., *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99; 6 L.J. C.P. 131; Bro. Abr. tit. Customs, 205, pl. 5, 36, Hen. 6, cited *Rex* v. *Humphery*, M'Clel. & Y. 181.

(*b*) *Dresser* v. *Bosanquet*, 32 L.J. Q.B. 374; 4 B. & S. 686.

(*c*) *Richardson* v. *Goss*, 3 Bos. & P. 123.

(*d*) *Sweet* v. *Pym*, 1 East, 4.

(*e*) *Wallace* v. *Woodgate*, R. & M. 193.

goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien (*f*). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody have been held to be the servants of such masters, holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship (*g*).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien (*h*), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale (*i*), for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the re-payment of money (*k*). An inn-keeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London (*l*). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien (*m*); but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

Statutory power of sale in discharge of right of lien.—By the Merchant Shipping Act, 1894, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods

(*f*) *Jacobs* v. *Latour*, 2 Moo. & P. 201; 6 L.J. (O.S.) C.P. 243.

(*g*) *Reeves* v. *Capper*, 5 Bing. N.C. 136. See *ante*, p. 908, note (*z*).

(*h*) *Clark* v. *Gilbert*, 2 Bing. N.C. 357; 5 L.J. C.P. 61.

(*i*) See *Johnson* v. *Stear*, 33 L.J. C.P. 130; 15 C.B. N.S. 330.

(*k*) *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232.

(*l*) *Jones* v. *Pearle*, 1 Str. 556.

(*m*) *Legg* v. *Evans*, 6 M. & W. 42; 9 L.J. Ex. 102; see *Young* v. *Lambert*, L.R. 3 P.C. 142; 39 L.J. P.C. 21.

placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them (*n*).

Tender of debt in extinguishment of right of lien.—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them (*o*).

Transfer of the bailment.—In all cases of bailment of chattels for hire or reward, it is essential that the bailee should preserve his control over the property, and his power of restoring it to the owner. If, therefore, he parts with the possession of the chattel, and places it under the control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed (*p*). Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter (*q*). Where, for example, goods have been bailed by the owner to a warehousekeeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehousekeeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them: but he may, if he pleases, at once attorn to the purchaser, and rely upon the title of the latter (*r*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorised by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand

(*n*) 57 & 58 Vict. c. 60, ss. 497—499.

(*o*) *Ratcliff* v. *Davies*, Cro.Jac. 244; *Chilton* v. *Carrington*, 24 L.J. C.P. 10; 16 C.B. 206; but in cases of mortgage, see *Bank of New South Wales* v. *O'Connor*, 14 App.Cas. 273; 58 L.J. P.C. 82.

(*p*) *Cooper* v. *Willomat*, 1 C.B. 682; 14 L.J. C.P. 219.

(*q*) *Addison on Torts*, 590 (ed. 8); *Lees* v. *Bayes*, 18 C.B. 599; 25 L.J. C.P. 249; *Solomons* v. *Dawes*, 1 Esp. 82.

(*r*) *Ogle* v. *Atkinson*, 5 Taunt. 762; *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209; *Addison on Torts*, 588 (ed. 8) *et seq.*

possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand, may maintain an action for the conversion or detention of the property (*s*), the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C.J., must be taken to apply, that if A. bails goods to C., and afterwards give his whole right to them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailment is not thereby transferred to B. (*t*). If the right of property in the subject-matter of the bailment has been transferred by devise, the devisee may sue for the detention or loss of the property; and it is no answer to the action to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee (*u*). So, if the right of property in title-deeds, or an heirloom, comes to the heir-at-law by descent, the heir is the proper person to sue for their detention (*x*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them (*y*).

A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been defeated by matter subsequent to the bailment or to the recognition of the title by the defendant (*z*). He may refuse to redeliver the goods to the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them (*a*); but the bailee cannot, if the possession of the bailor

(*s*) *Franklin* v. *Neate*, 13 M. & W. 484; 14 L.J. Ex. 59; 1 Roll.Abr. Detinue, c. 2, 3.

(*t*) *Rich* v. *Aldred*, 6 Mod. 216.

(*u*) *Goodman* v. *Boycott*, 2 B. & S. 1; 31 L.J. Q.B. 69: *Bristol Bank* v. *Midland Ry.*, (1891) 2 Q.B. 653; 61 L.J. Q.B. 115.

(*x*) Bro.Abr. Detinue, pl. 30, 45.

(*y*) *Freeman* v. *Birch*, 3 Q.B. 483; 1 N. & M. 420; *Nicolls* v. *Bastard*, 2 C. M. & R. 660; 5 L.J. Ex. 7.

(*z*) *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 L.J. Ex. 407.

(*a*) *Shelbury* v. *Scotsford*, Yelv. 22; *Biddle* v. *Bond*, 6 B. & S. 225; 34 L.J. Q.B. 137; *ante*, p. 849.

was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii* (*b*). He can set up the title of another only "if he defends upon the right and title and by the authority of that person" (*c*). But if the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, the bailee may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defendant detained the plate by the order and under the authority of the latter (*d*).

If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*e*). In an action for a conversion of chattels, it was held by Lord Kenyon that where the demand of the things for which the action is brought is not made by the owner who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them till that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*f*); and if the defendant has a *bonâ fide* doubt as to the title of the claimant, it must be shown that reasonable time was

(*b*) *Armory* v. *Delamirie*, 1 Str. 505.

(*c*) Pollock, C.B., *Thorne* v. *Tilbury*, *supra*; Blackburn, J., *Biddle* v. *Bond*, *supra*; *Bourne* v. *Fosbrooke*, 34 L.J. C.P. 164; 18 C.B. N.S. 515; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187.

(*d*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209.

(*e*) *Lees* v. *Bayes*, 18 C.B. 607; 25 L.J. C.P. 249; *European & Austral. R. M. Co.* v. *R. M. St. P. Co.*, 30 L.J. C.P. 246; *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618; 28 L.J. C.P. 58.

(*f*) *Solomons* v. *Dawes*, 1 Esp. 82.

given him for clearing up that doubt (*g*). But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute unqualified refusal to deliver up the chattels, there is evidence of a conversion (*h*). Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either one or the other (*i*).

Joint and separate rights of action.—If a chattel has been deposited by two or more joint-owners of it in the hands of a bailee, who has agreed to keep it for them, it is not in the power of one of them to take it out of his hands without the consent of the others. If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners (*k*). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them (*l*). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*m*). Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages (*n*).

Re-delivery of materials furnished by employer.—If the bailor, before the work has been done, countermands the order for it, he has a right to the immediate return of the chattel, although by his having countermanded the order, he may render himself liable to an action for a breach of contract (*o*). If the bailee by mistake, or in obedience to a forged order, returns the chattel to the wrong person, and the article is lost, he is responsible for the loss (*p*).

Contracts for performance of work—Building contracts—Pre-

(*g*) *Pillot* v. *Wilkinson*, 32 L.J. Ex. 201; 2 H. & C. 72; affirmed, 34 L.J. Ex. 22; 3 H. & C. 345.

(*h*) *Pillot* v. *Wilkinson, supra; Woodley* v. *Coventry*, 2 H. & C. 164; 32 L.J. Ex. 185.

(*i*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*k*) *Atwood* v. *Ernest*, 13 C.B. 889; 22 L.J. C.P. 225.

(*l*) *Brandon* v. *Scott*, 7 E. & B. 237; 26 L.J. Q.B. 163.

(*m*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 851; 22 L.J. Ex. 355; *Broadbent* v. *Ledward*, 11 Ad. & E. 209.

(*n*) *Metcalfe* v. *L. B. & S. C. Ry.*, 4 C.B. N.S. 317; 27 L.J. C.P. 333.

(*o*) *Lilley* v. *Barnsley*, 1 C. & K. 344.

(*p*) *Wilson* v. *Powis*, 11 Moore, 543; 4 L.J. (O.S.) C.P. 122; *Lubbock* v. *Inglis*, 1 Stark. 104.

vention of performance—Damages.—Where a contract has been entered into for the building of a house, and the owner refuses to permit the building to be completed, and prevents the workman from earning the stipulated remuneration, the measure of damages in respect of so much of the contract as remains unperformed would seem to be the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay (*q*). And in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant (*r*).

When a contract for the performance of work and labour has not been fully carried out by the workman, but the employer retains the benefit of a part performance, and the contract is apportionable, or the plaintiff has been discharged from his liability to complete the portion unperformed, the measure of the damages is the residue of the full sum agreed to be paid, after deducting such an amount as will enable the defendant to get the contract completed according to the original intention of the contracting parties (*s*). If the plaintiff has contracted to do the work and supply materials for a fixed sum, and the defendant afterwards finds some of the material, the defendant is entitled to deduct the fair value of his materials from the contract price (*t*). Where a judgment had been recovered by the plaintiff against a relation of the defendant, and the latter promised the plaintiff that, if he would forbear to issue execution upon the judgment, the defendant would erect and finish a substantial house, and cause a lease thereof to be granted to the plaintiff, and the plaintiff promised that such lease, when granted, should be in full satisfaction of the judgment, it was held that the measure of damages arising from the breach of the defendant's promise was the value of the house, if it had been erected, and of the lease thereof, and not the difference between the value of the judgment and the value of the house and lease (*u*).

(*q*) *Masterton* v. *Brooketyre* (*Mayor*), 7 Hill, N.Y. Rep. 61.

(*r*) *Planchè* v. *Colburn*, 1 M. & Sc. 51 ; 1 L.J. C.P. 7 ; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B.N.S. 733 ; 34 L.J. C.P. 15 ; *ante*, p. 146.

(*s*) *Ante*, pp. 876—887 ; *Cutler* v. *Close*, 5 C. & P. 335.

(*t*) *Newton* v. *Forster*, 12 M. & W. 772.

(*u*) *Strutt* v. *Farlar*, 16 M. & W. 249 ; 16 L.J. Ex. 84.

SECTION II.

MASTER AND SERVANT.

Contracts of hiring and service.—The contract of letting and hiring relates also to human labour, workmen being daily hired in a great variety of affairs. To constitute a contract of hiring and service, there must be either an express or an implied mutual engagement binding one party to employ and remunerate, and the other to serve, for some determinate term or period (*ante*, p. 5). Sometimes rights and duties are created and imposed by statute; *e.g.*, under the London Hackney Carriages Act, 1843 (*x*).

In each case, the terms of the contract must be looked at to discover the nature of the obligation undertaken. Thus, where there is no contract on the part of the master to find employment for the servant, but it is left optional either with the servant to serve or with the master to employ, the master will not be obliged to employ the servant at reasonable times for a reasonable number of working days during the term of service (*y*). But the fact that a workman is paid by piece work does not absolve the employer from his obligation to provide the workman with a reasonable amount of work during the term of service or in lieu thereof to pay by way of damages the average amount that would have been earned if work had been provided (*z*). So, wherever one party covenants to serve for a particular period, and the other covenants to pay him a salary or wages for the service during the term, there is an implied covenant on the part of the latter to retain the servant in his service during the term, provided the latter serves faithfully, and is guilty of no misconduct warranting a dismissal. Where it was agreed between the plaintiff and a joint-stock company that the former should be the permanent solicitor of the company at a salary of 100*l.* a year in lieu of an annual bill of costs, and should for such salary advise and act for the company on all occasions, it was held that there was an

(*x*) 6 & 7 Vict. c. 86. See *King* v. *London Improved Cab Co.*, 23 Q.B.D. 281; 58 L.J. Q.B. 456; *Keen* v. *Henry*, (1894) 1 Q.B. 292; 63 L.J. Q.B. 211; *Gates* v. *Bill & Son*, (1902) 2 K.B. 38; 71 L.J. K.B. 702. But under the Locomotives Act, 1865, 28 & 29 Vict. c. 83, it was held that the relationship of master and servant was not constituted, where a locomotive was let out for hire: *Smith* v. *Bailey*, (1891) 2 Q.B. 403; 60 L.J. Q. B. 779.

(*y*) *Williamson* v. *Taylor*, 5 Q.B. 175; 13 L.J. Q.B. 81; *Aspdin* v. *Austin*, 5 Q.B. 671; 13 L.J. Q.B. 155; cp. *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L.J. Ex. 359; *Reg.* v. *Welch*, 2 E. & B. 357; 22 L.J. M.C. 145; *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L.J. M.C. 81; with which Alverstone, C.J., in *Devonald* v. *Rosser*, (1906) 2 K.B. 728, 741; 75 L.J. K.B. 688, thought the first-mentioned cases inconsistent.

(*z*) *Devonald* v. *Rosser*, *supra*.

implied contract on the part of the company to retain the solicitor in their service for one year at least, and pay him the salary he had agreed to accept, but that the word "permanent" did not confer any durable appointment beyond the year, so as to prevent the employer from withdrawing the retainer (*a*). On the other hand, where five years was stated to be the term of service but there was no express covenant on the part of the master to employ or retain the servant for five years, it was held that the master was at liberty to dismiss the servant whenever he pleased and to discontinue the payment of wages (*b*). Where a firm agreed to employ a person as representative salesman for a fixed period and he agreed to devote the whole of his time to the business of the firm, it was nevertheless held to be within the province of the master to say that he would go on paying wages without at the same time providing work, there being no undertaking on the part of the master to keep the servant *au fait* at his work (*c*), and there are many cases of hiring and employment of parties to serve in some particular character or capacity where the servant is bound to serve if called upon, and is entitled to his salary by holding himself in readiness to serve, although his services are not called into requisition by the employer. In these cases there is a continuous hiring or retainer; and the readiness and willingness to serve on the part of the servant are equivalent to actual service.

As to who is a servant, one test is that he is put in his place to do an act which the master intended to do himself (*d*). So where an association merely engaged to provide duly qualified nurses but not to nurse patients through the agency of the nurses as their servants, the relationship of master and servant was held not to subsist even though the association paid salaries to the nurses and made charges for their services to the persons nursed (*e*). Again, the element of who controls the servant or to whose orders he is subservient, may be of importance (*f*). Where an action was brought against "General" Booth, as head of the Salvation Army, for acts done by members of the

(*a*) *Emmens* v. *Elderton*, 4 H.L.Cas. 624, 645; 13 C.B. 495; *Reg.* v. *Welch*, 2 E. & B. 362; 22 L.J. M.C. 145; *Rust* v. *Nottidge*, 1 E. & B. 99; 22 L.J. Q.B. 73; *Hartley* v. *Cummings*, 17 L.J. C.P. 84; 5 C.B. 247; *Pilkington* v. *Scott*, 15 M. & W. 660; 15 L.J. Ex. 359; *M'Intyre* v. *Belcher*, 32 L.J. C.P. 254; 14 C.B. N.S. 654.

(*b*) *Dunn* v. *Sayles*, 5 Q.B. 685; 13 L.J. Q.B. 159; distinguished in *Emmens* v. *Elderton*, *supra*.

(*c*) *Turner* v. *Sawdon*, (1901) 2 K.B. 653; 70 L.J. K.B. 897.

(*d*) *Per* Willes, J., in *Murray* v. *Currie*, L.R. 6 C.P. 24, 27; 40 L.J. C.P. 26.

(*e*) *Hall* v. *Lees*, (1904) 2 K.B. 602; 73 L.J. K.B. 819.

(*f*) *Sadler* v. *Henlock*, 4 E. & B. 570, 578; 24 L.J. K.B. 138; *Waldock* v. *Winfield*, (1901) 2 K.B. 596; 70 L.J. K.B. 925; cp. *Rourke* v. *White Moss Colliery Co.*, 2 C.P.D. 205; 46 L.J. C.P. 283; *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Ltd.*, (1893) 1 Q.B. 629; 63 L.J. Q.B. 25.

army, it was held that there being no evidence to show what relationship subsisted between the General and the particular members, it could not be inferred that these members were his servants (*g*).

In the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation on the servant that he shall honestly and faithfully serve his master, and that he shall not abuse his confidence in matters appertaining to his service (*h*).

Authentication and proof of contract (*i*).—A contract of hiring and service need not be authenticated by writing, unless the term of the hiring exceeds a year (*ante*, p. 35); and, if reduced into writing, it need not be stamped, if it is an agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant, or between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom (*k*), and not a contract of apprenticeship (*l*). Where there is no express contract between the parties, the hiring may be presumed from the mere fact of the service, unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a menial servant for a continued period, the law presumes that the service has been rendered in fulfilment of a contract of hiring and service; and, if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages (*m*). But, if the service has been with a near relation of the party serving, a hiring cannot be presumed from it, but an express hiring must be proved in order to support a claim for wages; for the law regards services rendered by near relations to one another as gratuitous acts, and does not presume that they are to be paid for, unless there is an express contract to that effect (*n*). And, if a poor person is taken out of charity and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue to serve (*o*).

(*g*) *London General Omnibus Co.* v. *Booth*, 63 L.J. Q.B. 244.

(*h*) *Robb* v. *Green*, (1895) 2 Q.B. 315; 64 L.J. Q.B. 593.

(*i*) As to agreements between the master of a ship and the crew, see 57 & 58 Vict. c. 60, ss. 113—125; and as to their rescission by the Court, see sect. 168.

(*k*) Stamp Act, 1891, 54 & 55 Vict. c. 39, Sched. I.

(*l*) An indenture of apprenticeship to the sea service is exempt from stamp duty: Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 108 (1).

(*m*) Ld. Ellenborough, C.J., *R.* v. *Pendleton*, 15 East, 449, 454; *Phillips* v. *Jones*, 1 Ad. & E. 333.

(*n*) *Davies* v. *Davies*, 9 C. & P. 87; *R.* v. *Stokesley*, 6 T.R. 757; *R.* v. *Sow*, 1 B. & Ald. 178.

(*o*) *R.* v. *Weyhill*, 1 W.Bl. 206; 2 Bott. 207, case 271.

Yearly hirings.—When the employment of a servant is of a permanent nature, in the absence of any custom to rebut the presumption, the hiring is presumed to be a yearly hiring (*p*); and in such a case, the servant not being a household or domestic servant, the hiring cannot be put an end to by either party without the consent of the other, before the termination of the current year (*q*). Service by a husbandman for a year is strong presumptive evidence of a yearly hiring (*r*). A general hiring of a clerk, foreman, journeyman, or traveller, at annual wages, "with board in the house," is, in general, a yearly hiring, which can only be put an end to by consent, or at the expiration of the current year (*s*); so is a general hiring of a clerk at so much per annum, nothing being said about the periods of payment (*t*); so also is a general hiring of a governess at annual wages, with board in the house (*u*); and so also is a general hiring of editors, sub-editors, reporters, and other persons regularly employed upon old-standing and permanently-established newspapers and periodicals (*x*), but the duration of the term of hiring will be regulated and controlled by custom and usage and the surrounding circumstances of the case (*y*). Reservations of quarterly, monthly, or weekly wages are not inconsistent with a yearly hiring. "Whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service, if the contract were for a year" (*z*); but, if there has been no continued service for a lengthened period, and there is nothing in the nature of the employment, and no particular custom or usage leading necessarily to the conclusion that the hiring was for a year, the payment of weekly or monthly wages raises a presumption in favour of a weekly or monthly hiring (*a*). A "hiring for twelve months certain, and to continue from time to time until three months' notice in writing be given by either party to determine the same," is a hiring for a year certain only; and either party is at liberty to put an end to it at the expiration

(*p*) *Beeston* v. *Collyer*, 4 Bing. 309; 5 L.J. (O.S.) C.P. 180; *Fawcett* v. *Cash*, 5 B. & Ad. 904; 3 L.J. K.B. 113; *Lilley* v. *Elwin*, 11 Q.B. 742; 17 L.J. Q.B. 132.

(*q*) *Emmens* v. *Elderton*, 4 H.L.Cas. 624; 13 C.B. 495.

(*r*) *R.* v. *Lyth*, 5 T.R. 337.

(*s*) *Beeston* v. *Collyer*, 12 Moore, 552; 5 L.J. (O.S.) C.P. 180; *R.* v. *Batheaston*, Burr. Set.Cas. 823, No. 257; *Turner* v. *Robinson*, 5 B. & Ad. 789; 2 N. & M. 829; *Davis* v. *Marshall*, 9 W.R. 520.

(*t*) *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & E. 171; 4 L.J. K.B. 157.

(*u*) *Todd* v. *Kerrich*, 8 Exch. 151; 22 L.J. Ex. 1.

(*x*) *Holcroft* v. *Barber*, 1 Car. & K. 4; *Baxter* v. *Nurse*, 7 Sc. N.R. 801; 13 L.J. C.P. 82; *Williams* v. *Byrne*, 7 Ad. & E. 177; 6 L.J. K.B. 239.

(*y*) *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L.J. Ex. 459; *Green* v. *Wright*, 1 C.P.D. 591.

(*z*) Kenyon, C.J., *Rex* v. *Birdbrooke*, 4 T.R. 246; *R.* v. *Seaton*, Cald. 440.

(*a*) *R.* v. *Pucklechurch*, 5 East, 384; *Baxter* v. *Nurse*, 7 Sc. N.R. 801; 13 L.J. C.P. 82.

of the first year, by giving three months' previous notice (*b*). And it has been held that an agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," was determinable at the end of the twelfth month without notice (*c*). A custom that either master or servant may determine domestic service at the end of the first month by notice given at or before the expiration of the first fortnight, is not in itself unreasonable; but inasmuch as such a custom has not yet been so fully established that judicial notice can be taken of it, it must be proved in each case as a question of fact (*d*).

Defeasible yearly hirings—Domestic service—Month's warning or a month's wages.—If by custom or usage of trade the hiring may be put an end to and the contract dissolved, by notice given by either of the parties, the hiring is a conditional or defeasible yearly hiring, determinable by giving the customary notice at any time during the term. By the custom of particular trades a general hiring of a commercial traveller is a hiring for a year, subject to an implied understanding that either party may determine the engagement by giving three months' notice (*e*). A general hiring of menial or household servants (*f*), such as cooks, scullions, housemaids, footmen, butlers, coachmen, grooms, where no time is mentioned for the duration of the service, is a hiring for a year, and so on from year to year, defeasible by custom and usage, at the option of either of the parties, on giving a month's warning, or on the part of the master by paying or tendering a month's wages (*g*). In the case of a contract in writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words (*h*). A servant may be a menial servant, and as such clothed with this implied power of defeasance, although not resident within the walls of the master's house. This has been held to be the case with a head gardener hired for a year at 100*l*.

(*b*) *Brown* v. *Symons*, 8 C.B. N.S. 208; 29 L.J. C.P. 251.

(*c*) *Langton* v. *Carleton*, L.R. 9 Ex. 57; 43 L.J. Ex. 54.

(*d*) *Moult* v. *Halliday*, (1898) 1 Q.B. 125; 67 L.J. Q.B. 451.

(*e*) *Metzner* v. *Bolton*, 9 Exch. 518; 23 L.J. Ex. 130.

(*f*) As to the meaning of menial servant, see Erle, C.J., in *Nicoll* v. *Greaves*, 33 L.J. C.P. 259, 261; 17 C.B. N.S. 27; *Johnson* v. *Blenkinsopp*, 5 Jur. 870; *Todd* v. *Kerrich*, 8 Exch. 151; 22 L.J. Ex. 1; *Lawler* v. *Linden*, Ir.R. 10 C.L. 188; *Forgan* v. *Burke*, 12 Ir.R. C.L. 495.

(*g*) *R.* v. *Worfield*, 5 T.R. 506; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Lilley* v. *Elwin*, 11 Q.B. 742. The fact that wages are paid at lesser terms does not rebut the presumption: *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Williams* v. *Byrne*, 7 Ad. & E. 177; *Forgan* v. *Burke*, 12 Ir.R. C.L. 495.

(*h*) *Johnson* v. *Blenkensop*, 5 Jur. 870.

wages, with a house in the master's grounds, and the privilege of taking in apprentices for a year at 15*l.* premium (*i*); also with a huntsman engaged at a salary of 100*l.* a year, with a house to live in and perquisites (*k*).

When a power of defeasance is vested in the parties, either by custom or by special agreement, as upon the happening of a given event, the hiring is nevertheless a yearly hiring; so that, if the power of defeasance is not exercised, and the contract is permitted to run on, there is a year's hiring and service (*l*). "It is a yearly hiring, notwithstanding the power of determining it, if that is not exercised before the expiration of the year. The contingency not having happened, and the contract not having been defeated during the year, it enures after the year's service as a yearly hiring" (*m*). A servant may engage himself to serve for a certain determinate period, but may give the employer the option of determining the contract, and dismissing him at any period of the service. Where the engagement of a clerk or a superintendent was to be for three years, "at the option" of the employer, at a yearly salary, this was held to be a contract binding the servant to serve three years, and giving the employer the option of determining the contract at the end of any year by a proper notice, but not of dismissing the servant at any time; and that, if the servant was dismissed in the middle of a current year, he was entitled to compensation (*n*).

Monthly or weekly hiring.—When the wages are reserved weekly with a proviso for a month's warning, the presumption is in favour of a defeasible yearly hiring; but where a journeyman miller was hired "at monthly wages, with liberty to depart at a month's wages or a month's warning," the hiring was held to be a hiring by the month (*o*). So, if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring (*p*). "The mere arrangement," observes Bayley, J., "that the wages shall be at one rate in the summer and at

(*i*) *Nowlan* v. *Ablett*, 2 Cr. M. & R. 54 : 4 L.J. Ex. 155.

(*k*) *Nicoll* v. *Greaves*, 17 C.B. N.S. 27 : 33 L.J. C.P. 259.

(*l*) *R.* v. *Atherton*, Burr. Set.Cas. 203, No. 71 ; *R.* v. *Birdbrooke*, 4 T.R. 246 ; *R.* v. *Farleigh Wallop*, 1 B. & Ad. 340, 342 ; 9 L.J. (O.S.) M.C. 9 ; *R.* v. *New Windsor*, Burr. Set.Cas. 22, No. 7 ; *R.* v. *Gt. Yarmouth*, 5 M. & S. 114 ; *R.* v. *Northwold*, 2 D. & R. 790.

(*m*) *R.* v. *Sandhurst*, 7 B. & C. 562 ; 6 L.J. (O.S.) M.C. 15 ; *R.* v. *Byker*, 3 D. & R. 336 ; 2 B. & C. 119 ; *R.* v. *Lidney*, Burr. Set.Cas. 1.

(*n*) *Down* v. *Pinto*, 9 Exch. 327 ; 23 L.J. Ex. 103.

(*o*) *R.* v. *Clare*, 2 Bott. 299, pl. 295.

(*p*) Ellenborough, C.J., *R.* v. *Dodderhill*, 3 M. & S. 245 ; Burr. Set.Cas. 280, No. 98 ; *R.* v. *Pucklechurch*, 5 East, 384; *R.* v. *Hanbury*, 2 East, 425 ; *R.* v. *Mitcham*, 12 East, 352 ; Ashurst, J., *R.* v. *Newton Toney*, 2 T.R. 455 ; *R.* v. *Odiham*, *ib.*, 622 ; *Baxter* v. *Nurse*, 7 Sc. N.R. 801 ; 13 L.J. C.P. 82 ; *R.* v. *Elstack*, 2 Bott. 227, pl. 292 ; *R.* v. *Dedham*, 2 Bott. 227, pl. 292 ; *R.* v. *Warminster*, 6 B. & C. 77 ; 5 L.J. (O.S.) K.B. 12 ; *Evans* v. *Roe*, L.R. 7 C.P. 138.

another in the winter does not show that the parties contemplated a service to endure through the summer and winter, and therefore that they intended hiring for a year; but shows only that they intended that, if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week" (*q*). On the other hand, if the nature of the employment or the terms of the contract are inconsistent with a weekly hiring, as where there is a stipulation for a fortnight's or a month's notice to quit, the reservation of weekly wages will be regarded merely as a mode of payment, and not as an indication of the duration of the contract (*r*).

Service at will.—The contract of service may provide for service at will merely, as where a boy was to work "for meat, drink, and clothes, as long as he had a mind to stop" (*s*), or, where the workman was "to come and go when he liked," and the servant and his master were "to be at liberty to separate when they pleased" (*t*). But, while slight circumstances may be sufficient for the purpose, some contract of service must in every case be established (*u*), and no such contract will be presumed where the servant is merely taken from motives of charity (*x*).

Rights and liabilities of master and servant.—It is the first duty of the master to take the servant into his employ, and enable him to earn the wages agreed to be paid; and, if he neglects so to do, he renders himself liable forthwith to an action for breach of contract. The master is also bound to provide for the safety of his servant in the course of his employment to the best of his judgment; though there is no implied obligation on his part to take more care of the servant than he may reasonably be expected to take of himself (*y*). So, while there is no implied agreement by the master in an ordinary contract of hiring and service not to expose the servant to extraordinary risks in the course of his employment (*z*), if the servant sustains injury in the course of his employment from the negligence

(*q*) *R.* v. *Rolvendon*, 1 M. & R. 691; *R.* v. *Dodderhill*, 3 M. & S. 243; *R.* v. *Lambeth*, 4 *ib.* 315.

(*r*) *R.* v. *Hampreston*, 5 T.R. 208; *R.* v. *Birdbrooke*, 4 T.R. 245; *R.* v. *St. Andrew, Pershore*, 8 B. & C. 679; 7 L.J. (O.S.) M.C. 23; *R.* v. *Gt. Yarmouth*, 5 M. & S. 117; *Davis* v. *Marshall*, 9 W.R. 520; *Forgan* v. *Burke*, 12 Ir. C.L.R. 495.

(*s*) *R.* v. *Christ's Parish, York*, 3 B. & C. 459; 5 D. & R. 314.

(*t*) *R.* v. *Gt. Bowden*, 7 B. & C. 249; 6 L.J. (O.S.) M.C. 17.

(*u*) *R.* v. *St. Matthew's, Ipswich*, 3 T.R. 449.

(*x*) *R.* v. *Weyhill*, Bur. Set.Cas. 491; *ante*, p. 917.

(*y*) *Riley* v. *Baxendale*, 6 H. & N. 445; 30 L.J. Ex. 87; *Priestley* v. *Fowler*, 3 M. & W. 5; 7 L.J. Ex. 42; *Paterson* v. *Wallace*, 1 Macq. 748; *Davies* v. *England*, 33 L.J. Q.B. 321. As to injuries from unfenced machinery, see *Clarke* v. *Holmes*, 7 H. & N. 937; 31 L.J. Ex. 356.

(*z*) *Riley* v. *Baxendale*, 6 H. & N. 445; 30 L.J. Ex. 87.

of the master, the latter will be responsible in damages (*a*). The master, however, is not liable for surgical attendance and medicine rendered to a servant who has been injured in the execution of his master's service, not through the master's negligence, unless the surgeon has been called in by the master's orders (*b*); nor for injuries sustained from the unseaworthiness of a vessel in which the servant is employed (*c*); nor for injuries which one servant has sustained through the negligence of another servant of the same employer (as we shall presently see), provided the master provides proper machinery (*d*), and takes care that his servants are persons of competent skill and ordinary carefulness (*e*); for a servant, when he engages to serve a master, undertakes as between him and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in "the discharge of his duty as servant of him who is the common master of both" (*f*). But where a servant is compelled through illness to absent himself from his work, the master will be bound to pay him his wages until the proper termination of his employment, even though the illness was caused by an act of misconduct on the servant's part which occurred before the contract and which he did not know at the time of his contract would render him incapable of performing his work (*g*).

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. So, the master is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a carriage in which the servant is directed by the master to drive, or from the employer's keeping an insufficient staff of servants for the performance of

(*a*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701; *Clarke* v. *Holmes*, *supra*; *Weems* v. *Matthieson*, 4 Macq. 215; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333.

(*b*) *Wennell* v. *Adney*, 3 B. & P. 247; *Cooper* v. *Phillips*, 4 C. & P. 581. As to recovery of expenses incurred in curing injuries sustained by a servant through the acts of third parties, see *Addison on Torts*, 848 (ed. 8).

(*c*) *Couch* v. *Steel*, 3 E. & B. 402; 23 L.J. Q.B. 121.

(*d*) *Searle* v. *Lindsay*, 11 C.B. N.S. 429; 31 L.J. C.P. 106.

(*e*) *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L.J. Q.B. 30; *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139.

(*f*) *Hutchinson* v. *York*, *Newc. & Berw. Ry.*, 5 Exch. 343; 19 L.J. Ex. 296; *Wigmore* v. *Jay*, 5 Ex. 354; 19 L.J. Ex. 300; *Seymour* v. *Maddox*, 16 Q.B. 326; 20 L.J. Q.B. 327; *Lovegrove* v. *L. B. & S. C. Ry.*, 16 C.B. N.S. 669; 33 L.J. C.P. 329; *Waller* v. *S. E. Ry.*, 3 H. & C. 102; 32 L.J. Ex. 205; *Murphy* v. *Caralli*, 3 H. & C. 462; 34 L.J. Ex. 14; *Tunney* v. *Midland Ry.*, L.R. 1 C.P. 291; *Cribb* v. *Kynoch*, (1907) 2 K.B. 548; 76 L.J. K.B. 948. As to who are fellow-servants, see *Hall* v. *Johnson*, 3 H. & C. 589; 34 L.J. Ex. 222; *Feltham* v. *England*, L.R. 2 Q.B. 33; 36 L.J. Q.B. 14; *Warburton* v. *G. W. Ry.*, L.R. 2 Ex. 30; 36 L.J. Ex. 9.

(*g*) *K*—— v. *Raschen*, 38 L.T. 38.

the work he has to do (*h*), or through dangerous machinery, which the servant has voluntarily undertaken to use (*i*), or for dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which he has voluntarily undertaken to mount, with as much knowledge of the attendant risk as the person who employs him (*k*).

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish and keep in working order sound roadworthy coaches, and the coachman was maimed for life, it was held that the coachman had no remedy, the law not permitting him to recover damages from his own master and employer, nor yet from the coach-maker, whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought not to be influenced" (*l*).

If, however, a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct (*m*). For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable (*n*). And where rules are framed by employers to regulate the exercise of a dangerous employment, and such rules are carelessly framed, so as to cause dangers which might be prevented by proper rules, the employers will be responsible for the consequences of their negligence (*o*). Where statutory regulations exist for the management of a colliery (*p*), but are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the person injured has brought the mischief upon himself by his own negligence (*q*). And where machinery

(*h*) *Skipp* v. *East. Counties Ry.*, 9 Exch. 223 ; 23 L.J. Ex. 23.

(*i*) *Dynen* v. *Leach*, 26 L.J. Ex. 221.

(*k*) *Assop* v. *Yates*, 2 H. & N. 770 ; 27 L.J. Ex. 156 ; *Griffiths* v. *Gidlow*, 3 H. & N. 648 ; 27 L.J. Ex. 404 ; *Potts* v. *Plunkett*, 9 Ir. C.L.R. 290.

(*l*) *Winterbottom* v. *Wright*, 10 M. & W. 115 ; 11 L.J. Ex. 415 ; *Priestley* v. *Fowler*, 3 M. & W. 6 ; 7 L.J. Ex. 42 ; *Riley* v. *Baxendale*, 6 H. & N. 455 ; 30 L.J. Ex. 87 ; *Potts* v. *Port Carlisle, &c. Ry.*, 2 L.T. N.S. 283 ; *Heaven* v. *Pender*, 11 Q.B.D. 503 ; 52 L.J. Q.B. 702. See *Addison on Torts*, 14 (ed. 8).

(*m*) *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 295 ; *Mellors* v. *Shaw*, 1 B. & S. 437 ; 30 L.J. Q.B. 333 ; *Weems* v. *Matthieson*, 4 Macq. 215 ; *Farrant* v. *Barnes*, 31 L.J. C.P. 137 ; 11 C.B. N.S. 553 ; *Williams* v. *Clough*, 3 H. & N. 258 ; 27 L.J. Ex. 325.

(*n*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183 ; 3 E. & E. 701.

(*o*) *Vose* v. *Lanc. and York. Ry.*, 2 H. & N. 728 ; 27 L.J. Ex. 249 ; 50 & 51 Vict. c. 58.

(*p*) As to ventilation of collieries, see *Brough* v. *Homfray*, L.R. 3 Q.B. 771 ; 37 L.J. M.C. 177.

(*q*) *Caswell* v. *Worth*, 5 E. & B. 855 ; 25 L.J. Q.B. 121 ; *Senior* v. *Ward*, 1 E. & E. 385 ; 28 L.J. Q.B. 139.

is required by Act of Parliament to be protected, the master will be responsible for the want of such protection, unless the accident has been caused by the negligence of the servant himself (*r*). Where the dangerous nature of the employment is obvious, the servant must necessarily be taken to have known it; yet the latter's knowledge does not make him a "volunteer" so as to exonerate his master from his liability for breach of a statutory duty to protect the servant from the dangerous thing (*s*).

Dangerous employments.—If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of the workman himself, the latter has no ground to recover damages from the employer for injuries sustained from the non-observance of the rule (*t*).

If hidden and secret dangers exist upon the master's premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*u*). If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed. So if a servant be employed to cut up diseased cattle (*x*). It is otherwise if the servant accepts of the employment knowing of the risk he runs (see *infra*). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages (*y*); as where a floor of a warehouse gave way and injured a workman who was thereon (*z*). So if a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected dangers, which they had no means of guarding against (*a*).

But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them

(*r*) See, as to factories, the provisions for health and safety in parts of the Factory and Workshop Act, 1901, 1 Edw. 7, c. 22; and see *post*, p. 925.

(*s*) *Britton* v. *G. W. Cotton Co.*, L.R. 7 Ex. 130; 41 L.J. Ex. 99. See Employers' Liability Act, 43 & 44 Vict. c. 42; *Addison on Torts*, 783, 784 (ed. 8).

(*t*) *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139.

(*u*) *Williams* v. *Clough*, 3 H. & N. 258; 27 L.J. Ex. 325; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333; *Ashworth* v. *Stanwix*, 3 E. & E. 701; 30 L.J. Q.B. 183.

(*x*) *Davies* v. *England*, 33 L.J. Q.B. 321.

(*y*) *Potts* v. *Port Carlisle Ry.*, 2 L.T. N.S. 283; 8 W.R. 524.

(*z*) *Brown* v. *Accrington Cotton Co.*, 3 H. & C. 511; 34 L.J. Ex. 208.

(*a*) *Vose* v. *Lanc. and York. Ry.*, 2 H. & N. 728; 27 L.J. Ex. 249.

by his own vigilance and care. If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract (*b*). The maxim *volenti non fit injuria* has been much discussed in recent cases. It was at one time thought that by reason of sect. 1, sub-sect. (1) of the Employers' Liability Act, 1880 (*c*), which makes a master liable where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with his business, the master could no longer rely on the defence that the servant knew of the danger; it was however held, that where a servant voluntarily did work with a full knowledge of the risk he ran, the master was not liable (*d*). There is therefore in every case a question as to the servant's knowledge of the extent of the danger (*e*), and a further question as to how far he voluntarily incurred it (*f*).

Where the workman is employed in the use of dangerous machinery with the use of which he professes to be acquainted, and sustains injury from his own want of care, he has no ground of action against the employer (*g*). But if an Act of Parliament requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur (*h*). It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition (*i*). And it is in all cases the master's duty to be careful that his workman be not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when the master knows, or

(*b*) *Seymour* v. *Maddox*, 16 Q.B. 332; 20 L.J. Q.B. 327; *Bolch* v. *Smith*, 7 H. & N. 736; 31 L.J. Q.B. 201.

(*c*) 43 & 44 Vict. c. 42. See *Addison on Torts*, 784 (ed. 8).

(*d*) *Thomas* v. *Quartermaine*, 18 Q.B.D. 685; 56 L.J. Q.B. 340; *Membery* v. *G. W. Ry.*, 14 App.Cas. 179; 58 L.J. Q.B. 563.

(*e*) *Yarmouth* v. *France*, 19 Q.B.D. 647; 57 L.J. Q.B. 7. See *Osborne* v. *L. & N. W. Ry.*, 21 Q.B.D. 220; 57 L.J. Q.B. 618.

(*f*) *Thrussell* v. *Handyside*, 20 Q.B.D. 359; 57 L.J. Q.B. 347. In *Membery* v. *G. W. Ry.*, *supra*, Ld. Bramwell was of opinion that where a man was not physically constrained, but had the option to do a thing or not, the maxim *volenti non fit injuria* applied if he did it and was thereby injured. See *Smith* v. *Baker*, (1891) A.C. 325; 60 L.J. Q.B. 618; *Williams* v. *Birmingham Battery Co.*, (1899) 2 Q.B. 338; 68 L.J. Q.B. 918.

(*g*) *Dynen* v. *Leach*, 26 L.J. Ex. 221; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 294. See *Watling* v. *Oastler*, L.R. 6 Ex. 73; 40 L.J. Ex. 43.

(*h*) *Clarke* v. *Holmes*, 7 H. & N. 937; 31 L.J. Ex. 356; *Weems* v. *Matthieson*, 4 Macq. 215. See also *Britton* v. *G. W. Cotton Co.*, L.R. 7 Ex. 130; 41 L.J. Ex. 99; *Birtwistle* v. *Hindle*, (1897) 1 Q.B. 192; 66 L.J. Q.B. 173; and 1 Edw. 7, c. 22.

(*i*) *Brydon* v. *Stewart*, 2 Macq. 34.

has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages (*k*).

Injuries to servant from negligence of fellow-servant.—Where several servants are employed by the same master in one common employment, the master is not at common law responsible for injury resulting to one of them from the negligence or breach of statutory duty (*l*) of another (*m*), provided that he has taken due care not to expose his servant to unreasonable risks (*n*), and has been guilty of no want of care in the selection of proper servants (*o*). The principle underlying the doctrine of common employment is that the injured servant, when he engaged to serve his master, accepted, as between him and his master, all the ordinary risks of the service, including the risks involved by putting himself in juxtaposition with other persons employed by the same master, whose presence is incidental to the occupation in which he is engaged, and that he cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself (*p*). With regard to such a matter, the rights of a master and his servant, *inter se*, are determined by the express or implied contract between them (*q*). And if the risk has been undertaken, it matters not that the servant is occupied in a different department from those who are negligent or that his actual work for the day has terminated prior to the occurrence of the accident (*r*). But the servants must have been fellow-servants, engaged in a common service (*s*); though mere temporary subjection to the same

(*k*) *Roberts* v. *Smith*, 2 H. & N. 213; 26 L.J. Ex. 319; *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333.

(*l*) Where the statutory duty is imposed directly and absolutely on the master, the latter cannot avail himself of the defence of common employment: *Groves* v. *Wimborne (Ld.)*, (1898) 2 Q.B. 402; 67 L.J. Q.B. 862; *David* v. *Britannic Merthyr Coal Co.*, (1909) 2 K.B. 146; 78 L.J. K.B. 659.

(*m*) *M'Eniry* v. *Waterford*, 8 Ir. C.L.R. 312; *Tunney* v. *Midland Ry.*, L.R. 1 C.P. 291, in which case the plaintiff, a labourer, was being carried on the line, in pursuance of his contract of service with the company; *Hando* v. *L. C. & D. Ry.*, L.R. 2 Q.B. 439, n.

(*n*) *Hutchinson* v. *York Ry.*, 5 Exch. 343; 19 L.J. Ex. 296.

(*o*) *Tarrant* v. *Webb*, 18 C.B. 805; 25 L.J. C.P. 261. See *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326.

(*p*) See *Morgan* v. *Vale of Neath Ry.*, L.R. 1 Q.B. 149; 35 L.J. Q.B. 123; *Burr* v. *Theatre Royal, Drury Lane*, (1907) 1 K.B. 544, 553; 76 L.J. K.B. 459.

(*q*) *Per* Shaw, C.J., in *Farwell* v. *Boston and Worcester Railroad Corporation* (1842), 4 Metcalf (45 Mass.), 49, cited in *Bartonshill Coal Co.* v. *McGuire*, 3 Macq. 294, 300; approved by Farwell, L.J., in *Coldrick* v. *Partridge, Jones & Co.*, (1909) 1 K.B. 530, 544; 78 L.J. K.B. 452.

(*r*) *Coldrick* v. *Partridge, Jones & Co.*, (1909) 1 K.B. 530; 78 L.J. K.B. 452.

(*s*) *Abraham* v. *Reynolds*, 5 H. & N. 143, 149; *Waller* v. *S. E. Ry.*, 32 L.J.

superintendent will not be sufficient, if they were not in fact the servants of the same master (*t*). The circumstances must show conclusively that the person injured submitted himself either expressly or by implication to the control of the master whose workmen caused the injury (*u*). If a fellow-workman in a mine was also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master was then responsible for injury caused by the negligence of such fellow-workman (*x*). But a certificated manager of a mine, and a foreman, were both held to be fellow-servants with the other servants, whose work was superintended (*y*). So a sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, were held to be all fellow-servants, engaged in one common employment (*z*). The master of a ship is a fellow-servant to a seaman employed on the ship so as to be engaged in common employment with him (*a*); but the master and crew of a ship are not in the common employment with the master and crew of another ship belonging to the same owner (*b*). Where a shipping company employ a contractor to unload their ship, and appoint certain of the crew to assist in the unloading, it is a question of fact whether such members of the crew were under the orders and control of the contractor's foreman or not (*c*). The doctrine is none the less applicable where a master may have a duty to give instruction to an infant servant engaged in a dangerous trade (*d*). It does not however apply in the case of a pauper, compellable by law to obey an order to assist in certain work, who is injured by the negligence of a servant of the guardians (*e*). A mere volunteer may be a fellow-servant (*f*).

By the Employers' (*g*) Liability Act, 1880 (*h*), the master in

Ex. 203; 2 H. & C. 102; *Lovegrove* v. *L. B. & S. C. Ry.*, 16 C.B. N.S. 669; 33 L.J. C.P. 329; *Morgan* v. *Vale of Neath Ry.*, L.R. 1 Q.B. 149; 35 L.J. Q.B. 123.

(*t*) *Warburton* v. *G. W. Ry.*, L.R. 2 Ex. 30; 36 L.J. Ex. 9.

(*u*) *Johnson* v. *Lindsay*, (1891) A.C. 371; 61 L.J. Q.B. 90; *Cameron* v. *Nystrom*, (1893) A.C. 308; 62 L.J. P.C. 85.

(*x*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701.

(*y*) *Howells* v. *Landore Steel Co.*, L.R. 10 Q.B. 62; 44 L.J. Q.B. 25; *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326.

(*z*) *Wiggett* v. *Fox*, 11 Exch. 832; 25 L.J. Ex. 188, explained in *Johnson* v. *Lindsay*, *supra*.

(*a*) *Hedley* v. *Pinkney & Sons' Steamship Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

(*b*) *The Petrel*, (1893) P. 320; 62 L.J. P. 92.

(*c*) *Union Steamship Co.* v. *Claridge*, (1894) A.C. 185; 63 L.J. P.C. 56.

(*d*) *Young* v. *Hoffman Manufacturing Co.*, (1907) 2 K.B. 646; 76 L.J. K.B. 993; approving *Cribb* v. *Kynoch, Ltd.*, (1907) 2 K.B. 548; 76 L.J. K.B. 948.

(*e*) *Tozeland* v. *West Ham Guardians*, (1907) 1 K.B. 920; 76 L.J. K.B. 514.

(*f*) *Degg* v. *Midland Ry.*, 1 H. & N. 773; 26 L.J. Ex. 171; *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L.J. Q.B. 30; cp. *Wright* v. *L. & N. W. Ry.*, 1 Q.B.D. 252; 45 L.J. Q.B. 570; *Holmes* v. *N. E. Ry.*, L.R. 6 Ex. 123; 40 L.J. Ex. 121. As to master's liability for negligence of volunteer, see *Gwilliam* v. *Twist*, (1895) 2 Q.B. 84; 64 L.J. Q.B. 474.

(*g*) The Act only applies to workmen as defined by 38 & 39 Vict. c. 90, s. 10.

(*h*) 43 & 44 Vict. c. 42, s. 1. The whole subject is fully treated in *Addison on Torts*, 780—783 (ed. 8).

some cases is made liable for injuries caused to a workman by the negligence of a fellow-workman having superintendence entrusted to him (*i*), or to whose orders the workman was bound to conform, and did conform, or by any act or omission of any fellow-workman in obedience to the rules or bye-laws, or particular instructions of the master. The amount of compensation recoverable is limited (*k*), and the action is to be brought in the first instance in the County Court (*l*), and notice of the injury given in writing (*m*). A clause in a written contract of employment, providing that the master is not to be liable to the servant under the Employers' Liability Act, 1880, does not rebut the legal presumption that the servant has undertaken the risk of negligence on the part of his fellow-servants (*n*).

Workmen's Compensation.—By the Workmen's Compensation Act, 1906 (*o*), every employer is liable to pay compensation to a workman (*p*) who sustains personal injury by accident (*q*) arising out of and in the course of his employment (*r*), disabling the workman for a period of at least one week from earning full wages at his work. When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in the Act is to affect the civil liability of the employer, and the workman may, at his option, either claim compensation

(*i*) ee S43 & 44 Vict. c. 42, s. 8.

(*k*) Sect. 3.

(*l*) Sect. 6.

(*m*) Sect. 4. As to workman contracting himself out of the Act, see *Griffiths* v. *Dudley* (*Earl*), 9 Q.B.D. 357 ; 51 L.J. Q.B. 543.

(*n*) *Burr* v. *Theatre Royal, Drury Lane*, (1907) 1 K.B. 544 ; 76 L.J. K.B. 459.

(*o*) 6 Edw. 7, c. 58. The subject of workmen's compensation will be found fully treated at pp. 788—815 of *Addison on Torts* (ed. 8).

(*p*) "Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year, or a person whose employment is of a casual nature (see *Hill* v. *Begg*, (1908) 2 K.B. 802 ; 77 L.J. K.B. 1074), and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person working under a contract of service or apprenticeship, whether by way of manual labour, clerical work, or other wise, and whether the contract is expressed or implied, oral or in writing (s. 13). As to the rights of dependants of a workman whose death has been caused by an accident, see Sched. I. (1) ; and as to who are "dependants," see s. 13.

(*q*) See *Hensey* v. *White*, (1900) 1 Q.B. 481 ; 69 L.J. Q.B. 188 ; *Thompson* v. *Ashington Coal Co.*, 84 L.T. 412 ; *Boardman* v. *Scott*, (1902) 1 K.B. 43 ; 71 L.J. K.B. 3 ; *Fenton* v. *Thorley* (1903) A.C. 443 ; 72 L.J. K.B. 787 ; *Brintons* v. *Turvey*, (1905) A.C. 230 ; 74 L.J. K.B. 474.

(*r*) *Smith* v. *Lanc. and York. Ry.*, (1899) 1 Q.B. 141 ; 68 L.J. Q.B. 51 ; *Lowe* v. *Pearson*, (1899) 1 Q.B. 261 ; 68 L.J. Q.B. 122 ; *Rees* v. *Thomas*, (1899) 1 Q.B. 1015 ; 68 L.J. Q.B. 539 ; *Holness* v. *Mackay and Davis*, (1899) 2 Q.B. 319 ; 68 L.J. Q.B. 724 ; *Holmes* v. *Gt. Northern Ry.*, (1900) 2 Q.B. 409 ; 69 L.J. Q.B. 854 ; *Whitehead* v. *Reader*, (1901) 2 K.B. 48 ; 70 L.J. K.B. 546 ; *Armitage* v. *Lanc. and York. Ry.*, (1902) 2 K.B. 178 ; 71 L.J. K.B. 778 ; *Smith* v. *Normanton Colliery Co.*, (1903) 1 K.B. 204 ; 72 L.J. K.B. 76 ; *Benson* v. *Lanc. and York. Ry.*, (1904) 1 K.B. 242 ; 73 L.J. K.B. 122 ; *Sharp* v. *Johnson & Co.*, (1905) 2 K.B. 139 ; 74 L.J. K.B. 566 ; *Gane* v. *Norton Hill Colliery Co.*, (1909) 2 K.B. 539 ; 78 D.J. K.B. 921.

under the Act or take proceedings independently of the Act (*s*). Also, where the injury is shown to be attributable to serious and wilful misconduct of the workman, compensation will be disallowed except in cases where death or serious and permanent disablement have resulted (*t*).

The term "personal injury" includes certain industrial diseases (*u*). In case of sub-contracting, except in the case of agricultural work, the principal is liable just as if the workman had been immediately employed by him; with, however, a right of indemnification against any person who would have been liable to pay compensation to the workman independently of this provision (*x*). Notice of the accident must be given as soon as practicable after the happening of the accident and before the workman has voluntarily left the employment in which he was injured, and the claim for compensation must be made within six months from the occurrence of the accident or time of death (*y*). The notice must be in the prescribed form and be served in the prescribed manner (*z*).

Contracts excluding the operation of the Act are not permitted, except under a scheme of compensation, benefit, or insurance certified by the Registrar of Friendly Societies (*a*). All questions arising under the Act are, if not settled by agreement, to be settled by arbitration (*b*).

Duties of servant.—Every servant impliedly undertakes to obey the just and reasonable commands of his master, and to be careful and industrious in the performance of the work intrusted to him to execute. A servant who professes to be capable of undertaking an office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of the office; and, if he does not possess that skill, or if, possessing it, he fails to exercise it, he is responsible for a breach of contract. A servant, in the service of a tradesman, impliedly promises to do no act knowingly and wilfully which may injure his master's trade; but, while he must not attempt to draw away his master's customers, there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself (*c*). His possession of the master's property is,

(*s*) 6 Edw. 7, c. 58, s. 1 (2) (b).
(*t*) Sect. 1 (2) (c).
(*u*) Sect. 8 and Sched. III.
(*x*) Sect. 4. As to cases where a legal liability is incurred by some person other than the employer, see sect. 6.
(*y*) Sect. 2 (1); *Powell* v. *Main Colliery Co.*, (1900) A.C. 366; 69 L.J. Q.B. 758.
(*z*) Sect. 2 (2), (3), (4).
(*a*) Sect. 3.
(*b*) Sect. 1 (3) and Sched. II. As to the amount of compensation payable, see Sched. I.
(*c*) *Nichol* v. *Martyn*, 2 Esp. 732. A servant may not, however, surreptitiously copy from his master's order book a list of his master's customers for

as we have already seen, the master's possession. He has in contemplation of law the mere custody of it, so that, if he is provided with a house or a lodging by the master, he may be turned out of it at any moment without any notice to quit (*d*). It is the duty of a servant to account for moneys had and received by him on his master's account (*e*), even though his master could not have recovered them from the parties with whom the servant contracted (*f*).

If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant, and the proceedings in the action against the master are evidence as to the amount of these damages, but not of the circumstances under which they were recovered (*g*). If the captain of a ship engages in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the loss of his property (*h*).

Termination of the contract of hiring and service.—This may be by consent of the parties, by the death of either the master or the servant (*i*), by notice, express or implied, or by dismissal without notice on the ground of incompetency, misconduct or other sufficient reason. Where the contract is terminated by mutual consent, and nothing is said about wages earned since the end of the last year's service, the law implies no engagement to pay for the services performed in the meantime (*k*). If the contract is made with a firm in partnership to serve the firm for a certain term, the contract is dissolved by the death of one of the partners (*l*). The passing of a resolution to wind up a company, or the appointment by the court of a receiver or manager, will operate as notice of dismissal to the company's servants (*m*), even though the liquidator or the receiver and

his own use after he has left the service: *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L.J. Ch. 505; *Robb* v. *Green*, (1895) 2 Q.B. 315; 64 L.J. Q.B 593. As to the use by servants after the termination of their service of materials or information acquired by them in the course of their service, see *Louis* v. *Smellie*, 73 L.T. 226; *Lamb* v. *Evans*, (1893) 1 Ch. 218; 62 L.J. Ch. 404; *Kirchner & Co.* v. *Gruban*, (1909) 1 Ch. 413, 422; 78 L.J. Ch. 117.

(*d*) *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54; *White* v. *Bayley*, 10 C.B. N.S. 227; 30 L.J. C.P. 253. A servant cannot be said to occupy a house as servant, if it is not his master's house: *R.* v. *Lynn*, 8 A. & E. 379; 3 N. & P. 411.

(*e*) *Evans* v. *Birch*, 3 Campb. 10.

(*f*) *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch.D. 339; 59 L.T. 345.

(*g*) *Green* v. *New River Co.*, 4 T.R. 590.

(*h*) *Blewitt* v. *Hill*, 13 East, 12.

(*i*) *Farrow* v. *Wilson*, L.R. 4 C.P. 744; 38 L.J. C.P. 326; *Phillips* v. *Hull Alhambra Palace Co.*, (1901) 1 K.B. 59; 70 L.J. K.B. 26.

(*k*) *Lamburn* v. *Cruden*, 2 M. & Gr. 253.

(*l*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207; cp. Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 33.

(*m*) *Schumann, Ex parte, Forster & Co., In re*, 19 L.R. Ir. 240; *Reid* v.

manager continues to employ the servants in analogous duties (*n*). Where a seaman, in consequence of an outbreak of war, would be exposed, in the event of his continuing the voyage, to greater risks than those he had contracted to run, it was held that he was justified in leaving the ship and was entitled to recover the stipulated fixed remuneration for his services notwithstanding that the voyage was not completed (*o*).

Warning—Notice to leave.—In the case of a yearly hiring, not made defeasible by custom or by the agreement of the parties, reasonable notice must be given on either side of the intention of determining the contract, which notice must expire with the current year of hiring, as in the case of a tenancy from year to year; but the same length of notice is not required in the case of a yearly hiring of a servant as is required in the case of a yearly hiring of land. A quarter's notice, given a quarter of a year before the expiration of the current year of hiring, would in all cases be amply sufficient; and a month's notice is often all that is required by custom and usage to determine the contract and entitle the servant to leave (*p*). So also an indefinite hiring is determinable by a reasonable notice in the absence of any agreement or custom to the contrary (*q*).

Dismissal for incompetency or misconduct.—If a labourer, servant, or artisan has been hired as a skilled servant, and is found to be utterly incompetent to do what he has expressly or impliedly undertaken to perform, the employer is not bound to go on employing him to the end of the term, but may at once dismiss him (*r*).

If a servant wilfully disobeys or habitually neglects the reasonable orders of the master; if he absents himself repeatedly from the service, or refuses to perform his work, or to submit to the domestic regulations of the house, or is guilty of gross moral misconduct, or of fraudulent misrepresentation in the discharge of his duties, to the injury of his employer (*s*),

Explosives Co., 19 Q.B.D. 264; 56 L.J. Q.B. 388. But the bankruptcy of the master has been held not of itself to operate as a dissolution of the contract of service: *Thomas* v. *Williams*, 1 Ad. & E. 685; 3 L.J. K.B. 202; see, however, Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41, as to the effect of bankruptcy on contracts of apprenticeship and articles of clerkship.

(*n*) *Chapman's Case*, L.R. 1 Eq. 346; *Oriental Bank Corporation, In re, McDowall's Case*, 32 Ch.D. 366; 55 L.J. Ch. 620.

(*o*) *O'Neil* v. *Armstrong, Mitchell & Co.*, (1895) 2 Q.B. 418; 65 L.J. Q.B. 7.

(*p*) *Williams* v. *Byrne*, 7 Ad. & E. 177; 6 L.J. K.B. 239; *Parker* v. *Ibbetson*, 4 C.B. N.S. 346; 27 L.J. C.P. 236; *Brown* v. *Symons*, 8 C.B. N.S. 208; 29 L.J. C.P. 251; see *ante*, p. 918.

(*q*) *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L.J. Ex. 459; *Creen* v. *Wright*, 1 C.P.D. 591.

(*r*) *Horton* v. *McMurtry*, 5 H. & N. 667; 29 L.J. Ex. 260.

(*s*) *Harmer* v. *Cornelius*, 5 C.B. N.S 236; 28 L.J. C.P. 85. As to pleading misconduct, see *Burgess* v. *Beaumont*, 7 M. & Gr. 962; 14 L.J. C.P. 13; *Lush* v. *Russell*, 5 Exch. 203; 19 L.J. Ex. 244.

the contract may be dissolved by the master, and the servant dismissed. There is no fixed rule of law defining the degree of misconduct which will justify such dismissal (*t*) and dissolution of the contract, but the following degrees of misconduct and disobedience have been held sufficient:—Being frequently absent and often sleeping out without leave (*u*); pregnancy (*x*); assaulting a fellow maid-servant with intent to ravish her (*y*); refusing to work during the customary hours of labour (*z*); habitually neglecting to perform the duties undertaken (*a*); refusing to conform to the hour of dinner (*b*); abusing and insulting the master and disturbing the peace of his family (*c*); trespassing in game preserves, after having been cautioned and ordered not to enter them (*d*); enticing away the master's servants (*e*); becoming the father of a bastard (*f*); seducing the master's maid-servant; repeatedly coming home intoxicated (*g*); making fraudulent or grossly inaccurate entries in account-books (*h*); accepting a secret commission (*i*); absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, and after leave of absence had been asked for and refused (*k*); the setting up of a claim inconsistent with the relation of master and servant, such as a claim to be a partner (*l*); engaging to a large extent in gambling speculations on the Stock Exchange (*m*); and the assertion of rights and privileges not warranted by the contract or the nature of the service, and injurious to the interests of the master (*n*). The forgetfulness of a servant in the performance of an important part of his duty need not be habitual in order to amount to negligence justifying his dismissal without notice; a single act of forgetfulness may, under certain circumstances, be sufficient (*o*). If a justifying cause for the dismissal exists, the master may avail himself of it as a defence to an action, although it may not have formed the ground of dismissal, and although the master may not have known of

(*t*) *Clouston & Co.* v. *Corry*, (1906) A.C. 122; 75 L.J. P.C. 20.

(*u*) *Robinson* v. *Hindman*, 3 Esp. 235.

(*x*) *R.* v. *Brampton*, Cald. 14, 16, 17.

(*y*) *Atkin* v. *Acton*, 4 C. & P. 208.

(*z*) *Lilley* v. *Elwin*, 11 Q.B. 742; 17 L.J. Q.B. 132.

(*a*) *Arding* v. *Lomax*, 24 L.J. Ex. 80; 10 Exch. 734.

(*b*) *Spain* v. *Arnott*, 2 Stark. 256.

(*c*) *Shaw* v. *Chairitie*, 3 C. & K. 25.

(*d*) *Read* v. *Dunsmore*, 9 C. & P. 588.

(*e*) *Lumley* v. *Gye*, 2 E. & B. 216; 22 L.J. Q.B. 463. See *Bowen* v. *Hall*, 6 Q.B.D. 333; 50 L.J. Q.B. 305.

(*f*) *R.* v. *Welford*, Cald. 57.

(*g*) *Wise* v. *Wilson*, 1 C. & K. 662; *Clouston & Co.* v. *Corry*, (1906) A.C. 122, 129; 75 L.J. P.C. 20.

(*h*) *Baillie* v. *Kell*, 6 Sc. 379; 7 L.J. C.P. 249.

(*i*) *Swale* v. *Ipswich Tannery*, 11 Com.Cas. 88.

(*k*) *Turner* v. *Mason*, 14 M. & W. 112; 14 L.J. Ex. 311.

(*l*) *Amor* v. *Fearon*, 9 Ad. & E. 548; 8 L.J. Q.B. 95.

(*m*) *Pearce* v. *Foster*, 17 Q.B.D. 536; 55 L.J. Q.B. 306.

(*n*) *Lacy* v. *Osbaldiston*, 8 C. & P. 80.

(*o*) *Baster* v. *London & County Printing Works*, (1899) 1 Q.B. 901; 68 L.J. Q.B. 622.

its existence at the time he discharged the servant (*p*). Whether the requisite degree of misconduct was present is a question for the jury, but the judge may say that there was no evidence to support the allegation of justifiable dismissal, in which case he need not submit any issue (*q*).

The following instances of misconduct and disobedience of orders have been held *not* to constitute a sufficient ground of dismissal and dissolution of the contract of hiring and service without notice:—Temporary absence without leave, producing no serious inconvenience to the employer (*r*); occasional insolence of manners and sulkiness; occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang; stopping at one hotel when ordered to stop at another (*s*); temporary absence on customary holidays (*t*), or for the purpose of having a severe hurt attended to (*u*), or for the purpose of procuring another situation, such absence being warranted by custom (*x*).

In the absence of misconduct on the part of a servant, employers cannot dismiss him except by giving reasonable notice, unless in the agreement of service there are words enabling them to dismiss him summarily (*y*).

Disability from sickness.—If a household servant, hired for a year or any aliquot portion of a year, has been struck down with disease and permanently disabled, so that he can never be expected to return to his work, the contract of hiring is dissolved, and the master may dismiss him (*z*); but, in case of temporary disablement or sickness, the master is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his work (*a*).

Wrongful dismissal.—If the master improperly dismisses his servant, or prevents him by a continued system of persecution from continuing in the service, he is bound to make compensation to the servant for all the damages sustained by the latter; for the law implies, on the part of a person who contracts to pay a salary for services for a certain term, an obligation to permit

(*p*) *Spotswood* v. *Barrow*, 5 Exch. 110; 19 L.J. Ex. 226.

(*q*) *Clouston & Co.* v. *Corry*, (1906) A.C. 122, 129; 75 L.J. P.C. 20.

(*r*) *Fillieul* v. *Armstrong*, 7 Ad. & E. 557; 7 L.J. Q.B. 7.

(*s*) *Callo* v. *Brouncker*, 4 C. & P. 518; *Cussons* v. *Skinner*, 11 M. & W. 161; 12 L.J. Ex. 347.

(*t*) *Reg.* v. *Stoke-on-Trent*, 5 Q.B. 303; 13 L.J. M.C. 41.

(*u*) *Chandler* v. *Grieves*, 2 H.Bl. 606, n.

(*x*) *R.* v. *Islip*, 1 Str. 422; *R.* v. *Polesworth*, 2 B. & Ald. 483.

(*y*) *African Association, Ltd. & Allen, In re*, (1910) 1 K.B. 396; 79 L.J. K.B. 259.

(*z*) *Cuckson* v. *Stones*, 1 E. & E. 248; 28 L.J. Q.B. 25. See, as to effect of Workmen's Compensation Act, *Elliott* v. *Liggins*, (1902) 2 K.B. 84; 71 L.J. K.B. 483.

(*a*) *R.* v. *Sudbrooke*, 1 Smith, 59; *Chandler* v. *Grieves*, 2 H.Bl. 606, n.

those services to be performed (*b*). If the servant is improperly dismissed, he ought not to keep himself in a state of readiness to serve during the residue of the term of hiring, but should endeavour to find another situation, and should sue on the special contract for the damage he has sustained by reason of the wrongful dismissal (*c*). Where a traveller hired a courier to travel with him, and renounced the contract before the time fixed for the commencement of the service arrived, it was held that the courier was not bound to wait for the arrival of such time and then tender his services, but that he might at once sue for the breach of contract (*d*). The Crown, in the absence of statutory provision to the contrary, may dismiss at pleasure a person employed in the civil service of the Crown (*e*).

Damages for wrongful dissolution of contract—Wages pro ratâ.—Whenever one party has absolutely refused to perform his part of the contract, it is in the power of the other party either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and sue on a *quantum meruit* for the work actually done (*f*). If the party elects to treat the contract as subsisting, and to sue for a breach of it, he cannot afterwards go on a *quantum meruit* as for an abandoned contract. If, for example, a servant hired by the year at yearly wages, payable quarterly, brings an action upon the contract, and recovers damages for a wrongful dismissal, he cannot afterwards maintain an action for wages *pro ratâ* up to the time of his dismissal. The damages, therefore, in the action on the special contract should be assessed so as to include the wages up to the time of the dismissal (*g*). When the contract is for a year's service, at wages payable yearly, the contract is entire and indivisible, and the servant or workman cannot recover from the employer wages *pro ratâ*, unless the contract has been rescinded or abandoned, or has been put an end to by the exercise of a power of defeasance vested in the parties; so that, if the servant dies in the middle of the year, his personal representatives will

(*b*) *Emmens* v. *Elderton*, 4 H.L. Cas. 624; 13 C.B. 495, *ante*, p. 916.

(*c*) Parke, B., *Emmens* v. *Elderton*, *supra*; *Fewings* v. *Tisdal*, 1 Exch. 295; 17 L.J. Ex. 18; Erle, J., *Goodman* v. *Pocock*, 15 Q.B. 583; 19 L.J. Q.B. 410; *Yelland*, *Ex parte*, L.R. 4 Eq. 350; *Clarke*, *Ex parte*, L.R. 7 Eq. 550; 38 L.J. Ch. 562; *Logan*, *Ex parte*, 9 Eq. 149.

(*d*) *Hochster* v. *De La Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; and see *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78, *ante*, p. 142.

(*e*) *Dunn* v. *Reg.*, (1896) 1 Q.B. 116; 65 L.J. Q.B. 279; see *Gould* v. *Stuart*, (1896) A.C. 575; 65 L.J. P.C. 82; *Young* v. *Waller*, (1898) A.C. 661; 67 L.J. P.C. 80.

(*f*) *De Bernardy* v. *Harding*, 8 Exch. 822; 22 L.J. Ex. 340; *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33. As to when the remedy by injunction lies against a breach of the contract of service, see *Kirchner* v. *Gruban*, (1909) 1 Ch. 413; 78 L.J. Ch. 117.

(*g*) *Goodman* v. *Pocock*, 15 Q.B 576; 19 L.J. Q.B. 410.

not be entitled to recover a proportionate part of the salary, in respect of the time he actually served (*h*); and, if he is himself guilty of such misconduct as entitles the master to dissolve the contract and dismiss him from his service, he will lose all right to wages in respect of the portion of the year he has actually served (*i*). But, if the contract is put an end to by virtue of a power of defeasance vested in either of the parties by custom or by agreement, the wages are apportionable, and the servant must be paid *pro ratâ* up to the time of his departure. If, however, the contract is dissolved by mutual consent, and nothing is said of bygone services or wages not due at the time of the dissolution of the contract, no new contract arises by implication of law to pay wages *pro ratâ* (*k*). Where there is a repudiation of the whole contract, stipulations in it that the servant is not to commence or be employed in a similar business within a specified time or area cannot be enforced by the repudiating party (*l*).

Amount of wages recoverable—Deductions.—If the amount of salary or wages to be paid is left by the contract of hiring and service to be fixed by a third party, the clerk or servant must apply to such third party to fix the salary or wages as a condition precedent to the employer's liability (*m*). If the amount to be paid has not been settled by the terms of the contract, there is an implied promise on the part of the employer to pay wages according to the customary and reasonable rate of remuneration. When a defeasible yearly hiring has been dissolved by the dismissal of the servant without notice, the month's wages payable by custom (*ante*, p. 919) are not, in contemplation of law, wages for services, but compensation for the dismissal without notice (*n*). The master cannot deduct from wages money paid by him to effect the servant's cure from a dangerous illness (*o*). The wages in certain trades, moreover, cannot in general be lawfully paid otherwise than in the current coin of the realm (*ante*, p. 117).

(*h*) *Plymouth* (*Countess*) v. *Throgmorton*, Salk. 65; 3 Mod. 153; *Cutter* v. *Powell*, 6 T.R. 326.

(*i*) Bro.Abr. fol. 57 (Laborer), pl. 58; *ib.* fol. 170, pl. 31; Apportionment, 26, pl. 13; Vin. Abr. (Apportionment), 8 and 9; *Spain* v. *Arnott*, 2 Stark. N.P. 256; *Huttman* v. *Boulnois*, 2 C. & P. 512; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Ridgway* v. *Hungerford M. Co.*, 3 Ad. & E. 171; 4 L.J. K.B. 157; *Lilley* v. *Elwin*, 11 Q.B. 742; 17 L.J. Q.B. 132.

(*k*) *Lamburn* v. *Cruden*, 2 Sc. N.R. 534; 10 L.J. C.P. 121. *Aliter*, if there was no hiring for a year, or the master sends the servant away: *Bayley* v. *Rimmell*, 1 M. & W. 506; 5 L.J. Ex. 192; *Phillips* v. *Jones*, 1 Ad. & E. 333. See *Maw* v. *Jones*, 25 Q.B.D. 107; 59 L.J. Q.B. 542.

(*l*) *General Bill Posting Co.* v. *Atkinson*, (1909) A.C. 118; 78 L.J. Ch. 77; *Measures Brothers* v. *Measures*, (1910) 2 Ch. 218; 79 L.J. Ch. 707.

(*m*) *Owen* v. *Bowen*, 4 C. & P. 93.

(*n*) *Fewings* v. *Tisdal*, 1 Exch. 295; 17 L.J. Ex. 18.

(*o*) *Sellen* v. *Norman*, 4 C. & P. 80.

If a servant has left a considerable time without claiming wages, the presumption is that all wages have been paid (*p*). And, if it is usual, in the case of particular classes of servants and workmen, to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there is a *primâ facie* presumption of payment (*q*).

Jurisdiction of the County Court and of justices.—The Acts empowering justices to deal with disputes between various sorts of servants and their masters having been repealed by the Conspiracy and Protection of Property Act, 1875 (*r*), an Act was passed in the same session (*s*), giving power to county courts and justices to deal with them (*t*).

Breach of contract involving injury to others.—A wilful breach of contract by persons employed in the supply of gas or water is subject to a penalty, and so is a wilful breach of any contract of service the probable consequence of which will be to do injury to others or their property (*u*).

Seamen's wages.—By the Merchant Shipping Act, 1894 (*x*), a summary remedy is provided for the recovery of seamen's wages, which are not to be dependent on the ship's earning freight (*y*), and, in case of the death of the seaman, are to be apportioned and paid in manner therein provided (*z*). Where a seaman's service terminates by wreck or illness before the date contemplated in the agreement, he is entitled to wages up to the time of such termination, but not for any longer period (*a*), unless such termination is brought about by the wilful act of the captain and owners (*b*). The master is liable, the ship is liable, and the owner is liable for the mariner's wages (*c*). When seamen enter into articles to serve for a voyage or for a certain term, a contract by the master to pay increased wages for the services they are by the articles bound to render, is nugatory and void (*d*). A seaman's contract of service may be

(*p*) *Sellen* v. *Norman*, 4 C. & P. 81; *Evans* v. *Birch*, 3 Campb. 10; Parke, B., *Gough* v. *Findon*, 7 Exch. 50; 21 L.J. Ex. 58.

(*q*) Abbott, C.J., *Sellen* v. *Norman*, 4 C. & P. 81, n.

(*r*) 38 & 39 Vict. c. 86, s. 17.

(*s*) The Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90. On the interpretation of the statute, see *Warburton* v. *Heyworth*, 6 Q.B.D. 1; 50 L.J. Q.B. 137; *Grainger* v. *Aynsley*, 6 Q.B.D. 182; 50 L.J. M.C. 48; *Jackson* v. *Hill*, 13 Q.B.D. 618; *Great Northern Fishing Co.* v. *Edgehill*, 11 Q.B.D. 225.

(*t*) See also *ante*, pp. 927, 928.

(*u*) 38 & 39 Vict. c. 86, ss. 4, 5.

(*x*) 57 & 58 Vict. c. 60, s. 164.

(*y*) Sect. 157.

(*z*) Sects. 169—181.

(*a*) Sect. 158. As to the meaning of the word "loss" in the section, see *Sivewright* v. *Allen*, (1906) 2 K.B. 81; 75 L.J. K.B. 476.

(*b*) *Austin Friars S.S. Co.* v. *Strack*, (1905) 2 K.B. 315; 74 L.J. K.B. 683.

(*c*) *The Stephen Wright*, 12 Jur. 732.

(*d*) *Ante*, p. 4; *Harris* v. *Carter*, 23 L.J. Q.B. 295; 3 E. & B. 559.

terminated (*e*) either by final abandonment of the ship, or by discharge given by the master (*f*). Where seamen engaged on an ordinary commercial voyage were ordered to proceed to a belligerent port during a war, with a cargo which included contraband of war, refused to do so and were imprisoned, it was held that they were entitled to their wages under their contract of service (*g*). In every contract of service between the owner of a ship and the master or any seaman, and in every instrument of apprenticeship, there is to be implied an obligation on the owner and master, that the owner, master, and agents, and every agent, shall use all reasonable means to insure the seaworthiness of the ship (*h*).

Contracts of apprenticeship.—When the employer exercises some trade, and it is made a term of the contract that he shall teach as well as employ and remunerate the servant for some specific period in return for the service rendered, the contract amounts to an apprenticeship. Every such contract must be stamped accordingly (*i*). If there is an engagement on the part of the servant to serve and to learn, but no express or implied engagement on the part of the employer to *teach*, so that no action can be maintained upon the contract against the latter for neglecting to teach, the contract is a contract of hiring and service only, and not a contract of apprenticeship (*k*). But it is not necessary that the words "apprentice" and "to learn" and "to teach" should be used by the parties in their contract; for, wherever it appears to have been the intention of the parties that the one was to teach and the other to learn, the contract will be one of apprenticeship (*l*). As the contract is always made to last for more than one year, it must be authenticated by writing, signed by the party to be charged therewith (*ante*, p. 34. By 5 Eliz. c. 4, s. 25 (repealed), the binding of an apprentice for the purpose of exercising trades was required to be made by indenture; but now, by 54 Geo. 3, c. 96, s. 2, it is enacted that it shall be lawful for any person to take or retain or

(*e*) As to when a voyage may terminate, see *The Scarsdale*, (1906) P. 103; 75 L.J. P. 31; *Haylett* v. *Thompson*, (1911) 1 K.B. 311; 80 L.J. K.B. 267.

(*f*) *The Warrior*, 1 Lush. 476.

(*g*) *Palace Shipping Co.* v. *Caine*, (1907) A.C. 386; 76 L.J. K.B. 1079.

(*h*) 57 & 58 Vict. c. 60, s. 458. See *Thompson* v. *Farrer*, 9 Q.B.D. 372; 51 L.J. Q.B. 534; *Hedley* v. *Pinkney & Sons' S.S. Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

(*i*) *R.* v. *Nether Knutsford*, 1 B. & Ad. 726; and see Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 25; special provision is made for articles of clerkship to a solicitor; and instruments of apprenticeship of pauper children, and, in Ireland, where the premium or consideration does not exceed £10, are exempted from stamp duty. In other cases, the stamp duty is 2*s.* 6*d.* As to apprentices to the sea service, see Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 108.

(*k*) *R.* v. *Shinfield*, 14 East, 541; *R.* v. *Burbach*, 1 M. & S. 370.

(*l*) *R.* v. *Wishford*, 5 N. & M. 540.

become an apprentice, though not according to sects. 25, 30, and 41 of the statute of Elizabeth, and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual; but it is provided that the enactment shall not affect the immemorial customs of towns or bye-laws of corporations. An indenture of apprenticeship is sufficiently executed by the apprentice desiring a bystander to write his name for him opposite the seal, and by his then taking the deed and delivering it to his master (*m*). A contract of apprenticeship may be entered into with a corporation as master (*n*).

Rights and liabilities of parties to indentures of apprenticeship.—An infant above the age of fourteen, and unmarried, is by the custom of London responsible upon covenants contained in indentures of apprenticeship executed by him just the same as if he were of full age (*o*); but he is by the common law, where the apprenticeship is not within the city of London, exempt from all liability *ex contractu*, by reason of his minority (*ante*, p. 405) (*p*). Therefore it is that his friends ordinarily become bound for his faithful service and good conduct. The parties who so covenant for an infant apprentice are not responsible for trifling instances of misconduct, such as staying out on Sunday evenings half-an-hour beyond the time allowed (*q*), or for temporary absence and disobedience of orders, unattended by substantial injury to the master. But for all gross misconduct, and repeated or lengthened absence producing substantial injury to the master, they will be held responsible; and, if an infant apprentice avoids the contract on his coming of age, and refuses to continue in the service of his master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract (*r*). Incapacity of the apprentice to serve and to learn by reason of ill-health or an accident does not discharge the master from his covenant to provide for and to maintain him (*s*). Provisions which are unreasonable and not for the benefit of an infant apprentice cannot be enforced (*t*); but payment of wages may be agreed

(*m*) *R.* v. *Longnor*, 4 B. & Ad. 649; 2 L.J. M.C. 62.

(*n*) *Burnley Equitable Society* v *Casson*, (1891) 1 Q.B. 75; 60 L.J. M.C. 59.

(*o*) *Burton* v. *Palmer*, 2 Bulstr. 192.

(*p*) As to his liability on a covenant by him in the indenture to pay the premium, see Co. Litt. 172, A.; *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*q*) *Wright* v. *Gilson*, 3 C. & P. 583.

(*r*) *Cuming* v. *Hill*, 3 B. & Ald. 59.

(*s*) *R.* v. *Hales Owen*, 1 Str. 99; *Reg.* v. *Smith*, 8 C. & P. 153; *Patten* v. *Wood*, 51 J.P. 549.

(*t*) See *Meakin* v. *Morris*, 12 Q.B.D. 352; 53 L.J. M.C. 72; *Francesco* v. *Barnum*, 60 L.J. Ch. 63; *Corn* v. *Mathews*, (1893) 1 Q.B. 310; 62 L.J. M.C. 61.

to be suspended during such time as the works are stopped through accident beyond the control of the master (*u*). If the master has covenanted to teach three trades, and ceases to carry on one of them, he is guilty of a breach of contract, and the apprentice may, if he pleases, refuse to continue to serve (*x*). Where the contract is silent as to the place where the trade is to be carried on, there is an implied stipulation that the contract is to be performed at the place where the business was carried on at the date of the indenture (*y*).

Profits acquired by a servant or apprentice in the course of or in connection with his service belong to the master (*z*).

Dissolution of the contract of apprenticeship.—The same amount of misconduct which, in the case of a contract of hiring and service, would authorise the master to dissolve the contract and discharge the servant, will not release him from liability upon his covenant in an indenture of apprenticeship (*a*), unless the contract in express terms gives the master power to dismiss the apprentice (*b*). But, if the apprentice is guilty of such an amount of misconduct as renders it impracticable for the master to maintain, employ, and teach him, according to the terms of the indenture, the master cannot be sued for neglecting to perform his covenants in that behalf (*c*). "By the custom of London it is a sufficient cause for a master to turn away his apprentice if he frequents gaming houses," although gaming may not be expressly prohibited by the indenture (*d*). If the apprentice deserts the master's service and enlists in the army or contracts another relation which disables him from lawfully returning to his master, the latter is not bound to receive him back (*e*). If the fulfilment of the contract has not been prevented by the wrongful act of the master, the latter is not bound to refund any portion of the premium received (*f*). The indenture of apprenticeship of an infant may be avoided by him, so far as regards his own personal liability on the contract, on his coming of age; and the master must trust for the continuance of the service thereunder to the covenants of those who

(*u*) *Green* v. *Thompson*, (1899) 2 Q.B. 1; 68 L.J. Q.B. 719.

(*x*) *Ellen* v. *Topp*, 6 Exch. 424; 20 L.J. Ex. 241.

(*y*) *Eaton* v. *Western*, 9 Q.B.D. 636; 52 L.J. Q.B. 41.

(*z*) *Barber* v. *Dennis*, 6 Mod. 69; *Anon.*, 12 Mod. 415.

(*a*) *Winstone* v. *Lynn*, 1 B. & C. 460; 1 L.J. (O.S.) K.B. 126; *Wise* v. *Wilson*, 1 C. & K. 669; *Phillips* v. *Clift*, 4 H. & N. 168; 28 L.J. Ex. 153.

(*b*) *Westwick* v. *Theodor*, L.R. 10 Q.B. 224; 44 L.J. Q.B. 110.

(*c*) *Mercer* v. *Whall*, 5 Q.B. 447; 14 L.J. Q.B. 267; *Rayment* or *Raymond* v. *Minton*, L.R. 1 Ex. 244; 35 L.J. Ex. 153; *Brown* v. *Banks*, 3 Giff. 190; *Learoyd* v. *Brook*, (1891) 1 Q.B. 431; 60 L.J. Q.B. 373; where the apprentice was an habitual thief.

(*d*) *Woodroffe* v. *Farnham*, 2 Vern. 290.

(*e*) *Hughes* v. *Humphreys*, 6 B. & C. 680; 5 L.J. (O.S.) K.B. 270.

(*f*) *Cuff* v. *Brown*, 5 Pr. 297.

engage for the infant, unless the binding is under the authority of an Act of Parliament (*g*). The contract may also be dissolved by cancelling the indenture, or by giving it up with the consent of all parties *animo cancellandi;* likewise by the death of the master or of the apprentice (*h*), or by the bankruptcy of the master (*i*), or by the dissolution of the master's firm (*k*). If the master dies during the term, his representatives are not bound to return any part of the premium, as there is only a partial failure of consideration (*l*); and, if the apprentice becomes permanently ill, the covenant that he shall serve during the term is discharged (*m*). As to the effect of the master's bankruptcy, see Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41.

Discharge by Court of Summary Jurisdiction.—The court has the same powers in case of a dispute between a master and apprentice as in case of a dispute between an employer and workman, and as if the contract were between an employer and workman, and may make an order directing the apprentice to perform his duties, and, if he neglects, imprison him or rescind the instrument of apprenticeship, and order the whole or part of any premium to be repaid (*n*).

Damages for refusing to employ, and for wrongful dismissal.—If a master renounces the contract he has made with a servant, and deprives the latter of the means of earning the stipulated remuneration, or refuses to take him into his employ, the jury, in assessing the damages, are justified in looking to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial (*o*). The damages for a wrongful dismissal cannot, however, include compensation for the manner of the dismissal, for injured feelings, or for the loss sustained through greater difficulty of obtaining fresh employment (*p*). If an action is brought by a domestic servant for a dismissal without the customary month's notice, a month's wages are recoverable as the agreed damages (*ante*, pp. 918—921, 934). If the contract is not defeasible by giving a

(*g*) *Davis, Ex parte*, 5 T.R. 715; *Gill, Ex parte*, 7 East, 376.

(*h*) *Baxter* v. *Burfield*, 2 Str. 1266; 32 Geo. 3, c. 57.

(*i*) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41 (1).

(*k*) *Eaton* v. *Western*, *ante*, p. 939.

(*l*) *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Ferns* v. *Carr*, 28 Ch.D. 409; 54 L.J. Ch. 478 (clerk articled to solicitor).

(*m*) *Boast* v. *Firth*, L.R. 4 C.P. 1; 38 L.J. C.P. 1.

(*n*) Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, s. 6, which statute, however, only applies to apprentices under the Poor Relief Acts or to the business of a workman; cp. *Finley* v. *Jowle*, 12 East, 248; *Gray, In re*, 2 D. & L. 539; 14 L.J. M.C. 26.

(*o*) *Hochster* v. *De La Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; *Lake* v. *Campbell*, L.T. 582.

(*p*) *Addis* v. *Gramophone Co.*, (1909) A.C. 488; 78 L.J. K.B. 1122.

month's notice, but is for a year's service, and the defendant is improperly discharged before the end of the year, he may recover for the work actually done by him up to the time of his dismissal, and for the damage he has sustained by being prevented from continuing his services and earning the stipulated hire (*q*). The action may be brought as soon as the dismissal takes place; and the measure of damages is an indemnity to the plaintiff for the loss he sustains by the breach. If he has found other equally eligible employment, the damages will be small; but, if not, they may far exceed the salary agreed to be paid (*r*); and it is his duty to use diligence to find such employment (*s*). Where the plaintiff's service was terminated by the dissolution of partnership of his employers, but the remaining partners offered him employment on similar terms, which he refused, he was held entitled to recover nominal damages only (*t*). In an action upon a covenant in an apprenticeship deed to recover damages for the loss of the services of the apprentice, it was held that damages were recoverable only up to the time of action brought, as the contract continued in force, and the apprentice might still be compelled to serve (*u*).

Servant's character.—In the absence of agreement to the contrary effect, there is apparently no legal obligation on the master to give the servant a character; but by some old statutes, regulations were established respecting the characters of labourers (*x*).

Title to clothes by hiring and service.—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year (*y*).

(*q*) *Ante*, p. 934; *Cutter* v. *Powell*, 2 Smith's L.C. 1 (ed. 11).

(*r*) *Emmens* v. *Elderton*, 4 H.L. Cas. 645; 13 C.B. 495.

(*s*) *Beckham* v. *Drake*, 2 H.L. Cas. 606; *Emmens* v. *Elderton*, *supra*.

(*t*) *Brace* v. *Calder*, (1895) 2 Q.B. 253; 64 L.J. Q.B. 582.

(*u*) *Lewis* v. *Peachey*, 1 H. & C. 518; 31 L.J. Ex. 496.

(*x*) *Per* Ld. Kenyon, C.J., in *Carroll* v. *Bird*, 3 Esp. 201; *Handley* v. *Moffatt*, Ir.R. 7 C.L. 104; 21 W.R. 231; *Pullman* v. *Hill*, (1891) 1 Q.B. 524, 528; 60 L.J. Q.B. 299. As to the offence of giving a false character, see the Servants' Characters Act, 1792, 32 Geo. 3, c. 56; and *Rex* v. *Costello*, (1910) 1 K.B. 28; 79 L.J. K.B. 90.

(*y*) *Crocker* v. *Molyneux*, 3 C. & P. 470.

SECTION III.

PRINCIPAL AND AGENT.

Agencies and commissions.—Whenever one man undertakes the management of the business of another without hire or reward, and enters upon his task, the contract between the parties is, as we have before seen, a contract of mandate, or a gratuitous commission (*ante*, p. 860). When the person employed is to be paid for his services, the contract is a contract for the letting and hiring of work and labour, care and attention, and belongs to the class *locatio operis faciendi* (*ante*, p. 864). If the services of the party are hired for a term, the contract is a contract of hiring and service (*ante*, p. 915). In either case the party employing is the principal, and the person employed the agent. If a commission-agent is engaged to sell goods for the principal, he paying him a certain sum per quarter, it does not necessarily follow that there is a contract of hiring and service between the parties (*z*).

In all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employer (*a*). Thus, interest made by an agent, by the use of his principal's money, belongs to the principal (*b*); and not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that, if an agent who has purchased goods according to order, sells them again to advantage with the view of appropriating the gain to himself, although he should have answered the loss, if any; yet his employer is entitled to the profits (*c*). Thus, where the captain of a ship, in letting it to Government for six months, had stipulated with the Government officer by whom the ship was taken up, that a sum of money should be paid to him for his own benefit, in addition to the freight, it was held that the money belonged to the shipowner (*d*). Where an army agent and contractor, who had been employed by the plaintiff to provide a reasonable outfit for her son, debited the plaintiff with the full amount of the invoice prices charged by the tradesman supply-

(*z*) *Butterfield* v. *Marler*, 3 C. & K. 163.

(*a*) *Story on Agency*, s. 211.

(*b*) *Rogers* v. *Boehm*, 2 Esp. 702.

(*c*) *Paley on Principal and Agent*, p. 51.

(*d*) *Thompson* v. *Havelock*, 1 Campb. 527; and see *Diplock* v. *Blackburn*, 3 Campb. 43.

ing the outfit, though discount had been allowed him in each instance, it was held that the plaintiff was entitled to the discount (*e*). Where the defendant represented to the plaintiff that he could procure him some shares in a company at 3*l*. a share, and transferred certain shares to the plaintiff, and was paid 3*l*. a share, and the plaintiff subsequently discovered that the defendant was himself the owner of the shares, and had lately purchased them for 2*l*. a share, the defendant was ordered to pay back the difference in the price (*f*). But where a shipowner employed merchants to insure for him, and they charged him full premiums, but were allowed discount by the underwriters beyond brokerage, it was held that, as the allowance was usual, and the shipowner appeared to have accepted the terms, he could not afterwards recover the discount (*g*).

Where an agent, effecting a sale for his principal, himself becomes the purchaser, he is not entitled to any commission (*h*); and where he has taken a secret commission from the purchaser, the principal, notwithstanding that he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which he himself has paid to the agent (*i*). But where an agent in effecting a sale for his principal has, without fraud, received a secret commission or discount in an incidental matter not connected with his duty to sell, the agent, though liable to make good to the principal such secret commission or discount, is entitled to retain commission paid to him as remuneration for his services in effecting the sale (*k*); and where the various transactions of an agency are severable, the agent, though not entitled to his commission in cases in which he has acted dishonestly, is entitled to it in cases in which he has acted honestly (*l*). Where agents appointed to negotiate a debenture issue for a percentage on the amount subscribed as commission employed a sub-agent at a proportion of that commission, and the sub-agent through a guarantee society negotiated the issue, and was adopted by the principals as their agent, and then without the knowledge of the principals or the agents received a commission from the guarantee society, it was held that the fact that the sub-agent had received the secret profit did not prevent the agents from

(*e*) *Turnbull* v. *Garden*, 38 L.J. Ch. 331.

(*f*) *Kimber* v. *Barber*, L.R. 8 Ch. 56; and see *Morison* v. *Thompson*, L.R. 9 Q.B. 480; 43 L.J. Q.B. 215.

(*g*) *Baring* v. *Stanton*, 3 Ch.D. 502; *G. W. Ins. Co.* v. *Cunliffe*, L.R. 9 Ch. 525; 43 L.J. Ch. 741.

(*h*) *Salomons* v. *Pender*, 3 H. & C. 639; 34 L.J. Ex. 95.

(*i*) *Andrew* v. *Ramsay*, (1903) 2 K.B. 635; 72 L.J. K.B. 865.

(*k*) *Hippesley* v. *Knee Brothers*, (1905) 1 K.B. 1; 74 L.J. K.B. 68.

(*l*) *Niteduls Tændstikfabrik* v. *Bruster*, (1906) 2 Ch. 671; 75 L.J. Ch. 798.

recovering the agreed commission from the principals (*m*). A solicitor acting for both parties on the sale of a patent who receives commission with the full knowledge of the purchaser is not bound to account for it to the latter (*n*).

Punishment of corrupt transactions with agents.—By the Prevention of Corruption Act, 1906 (*nn*), sect. 1, "(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do . . . any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, . . . any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal; he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

"(2) For the purposes of this Act the expression 'consideration' includes valuable consideration of any kind; the expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer.

"(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act."

By sect. 2, "(1) A prosecution for an offence under this Act

(*m*) *Powell* v. *Jones*, (1905) 1 K.B. 11; 74 L.J. K.B. 115. (1902) 1 Ch. 765; 71 L.J. Ch. 374.

(*n*) *Haslam and Hier Evans, In re*,

(*nn*) 6 Edw. 7, c. 34.

shall not be instituted without the consent, in England, of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland. . . . (3) Every information for any offence under this Act shall be upon oath. . . . (5) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act. (6) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions."

Revocation of authority.—If no term of service has been expressly or impliedly agreed upon, the employer may at any time dispense with the future services of the agent, and revoke the authority delegated to him, so far as it relates to things to be done and remaining unexecuted. If a party is engaged as a "permanent attorney," the word "permanent" does not confer any durable or special appointment as attorney, and the principal is not precluded from withdrawing the retainer; but if he is retained at a yearly salary, he is, in general, entitled to damages, if he is dismissed before the end of the year (*o*). Things actually done by the agent in the execution of his commission will, of course, be binding upon the principal; but the agent cannot, after his authority has been countermanded, enter, as between himself and the principal, into any fresh transaction. If the principal furnishes his agent with a sum of money, to be expended in the purchase of property, the principal may at any time, before the purchase is made and the money expended, revoke the authority, and require the money to be repaid to him (*p*). If goods are intrusted to a commission agent for sale, the principal may, at any time before a sale has been made, require the goods to be returned to him (*q*); and the agent has no right to sell contrary to the express directions or instructions of his employer, for the purpose of repaying himself his advances (*r*). But the right to stop money intrusted to an agent to be paid to a third party, or to stop a sale, or revoke the orders or authority given, is always subject to this limitation, that the agent is merely an agent, and is not himself interested in, or responsible for, the payment of the money according to the directions he received when it was placed in his hands (*s*), and has not done anything to render himself personally liable to the

(*o*) *Emmens* v. *Elderton*, 13 C.B. 495; 4 H.L.Cas. 624.

(*p*) *Fletcher* v. *Marshall*, 15 M. & W. 755, 763.

(*q*) *Raleigh* v. *Atkinson*, 6 M. & W. 670; 9 L.J. Ex. 206.

(*r*) *Smart* v. *Sandars*, 3 C.B. 380; 16 L.J. C.P. 39; S.C. 5 C.B. 895; 17 L.J. C.P. 258; *Chinnock* v. *Sainsbury*, 30 L.J. Ch. 409.

(*s*) *Yates* v. *Hoppe*, 9 C.B. 541; 19 L.J. C.P. 180.

third party in consequence of the orders of the principal (*t*). But mere advances made by a factor do not give him any rights in derogation of the right of the principal to give directions as to the time and manner of sale, unless such rights are conferred upon the factor by some express agreement, or by a known usage of trade (*u*). If an agent agrees to act for a firm in partnership for a term of years, the contract is dissolved by the death of one of the partners during the term (*x*).

When agent's authority is irrevocable.—An authority coupled with an interest cannot be revoked, inasmuch as "where an agreement is entered into for sufficient consideration, and either forms part of a security, or is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable" (*y*). If a principal employs an agent to do something which by law involves the agent in a legal liability, the principal cannot draw back and leave the agent to bear the liability at his own expense, and even though the contract cannot be enforced at law, yet if, as a matter of business, the agent would be liable to lose character or customers, or to suffer serious pecuniary inconvenience if he did not carry out the contract into which he has entered on behalf of his principal, the latter will be taken to have impliedly contracted to indemnify him from the consequences which would ensue in the ordinary course of business from the step which he has taken (*z*). Where a debtor handed to his creditor a power of attorney authorising him to sell certain lands of the debtor, and pay the debt out of the proceeds of the sale, it was held that this power of attorney could not be revoked (*a*). But where the owners of an estate appointed an agent by power of attorney to possess and manage the estate, and the agent gave a personal guarantee to a mortgagee of the estate to pay the mortgage debt, it was held that the power was revocable as it merely appointed the agent manager at a salary and contained no reference to and was not intended to be dependent upon his guarantee (*b*).

Accounts.—It is the duty of an agent to keep regular accounts and vouchers (*c*); and, if he refuses to account, after demand

(*t*) *M'Ewen* v. *Woods*, 11 Q.B. 13; 17 L.J. Q.B. 207.

(*u*) *De Comas* v. *Prost*, 2 Moo. P.C. N.S. 158.

(*x*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207. See 53 & 54 Vict. c. 39, s. 33.

(*y*) *Per* Ld. Atkinson in *Frith* v. *Frith*, 75 L.J. P.C. 50; (1906) A.C. 254; Story on Agency, s. 476.

(*z*) *Seymour* v. *Bridge*, 14 Q.B.D. 460; 54 L.J. Q.B. 347.

(*a*) *Gaussen* v. *Morton*, 10 B. & C. 731; 8 L.J. (O.S.) K.B. 313; *Clerk* v. *Laurie*, 2 H. & N. 200; 26 L.J. Ex. 317.

(*b*) (1906) A.C. 254; 75 L.J. P.C. 50.

(*c*) Romilly, M.R., *Stainton* v. *Carron Co.*, 24 Beav. 353; 27 L.J. Ch. 89.

is made, he will be responsible in damages (*d*). If goods have been intrusted to an agent to sell, and he renders no account of them, it will be presumed *primâ facie* that they have been sold, and the money received (*e*). An agent is bound to produce to his principal the accounts kept for him, and if the principal is abroad, the agent must produce them to any properly appointed agent of the principal, but the principal cannot insist on their production to an improper person (*f*). If an agent mixes up his principal's property with his own, he must show clearly what part of the property belongs to him; and, if he fails in doing so, it will be treated as the property of the principal (*g*). An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitation in bar of a suit for an account by his principal (*h*).

Liabilities of brokers, factors, and commission agents to their principals.—All persons are brokers who contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a "fee or reward" (*i*). Every broker and commission agent who is employed to make purchases, or to sell on behalf of his principal, impliedly promises to execute the commission intrusted to him in a careful manner, and to obey the directions he receives. If he is ordered to purchase an article of first-rate quality, and he buys an inferior commodity, he is guilty of a breach of contract, and is responsible to the principal in damages (*k*). He is bound to exercise his discretion to the best advantage for the benefit of his principal, to render just accounts, and to keep the property of his principal unmixed with his own property, or the property of other parties (*l*). He has, in general, an implied authority to sell at such time and for such prices as he may think best for his employer; he may sell on credit, if it is customary so to do, or if he acts under a *del credere* commission; and he must account for the produce of all sales effected by him when called upon so to do (*m*). He cannot himself become the purchaser of the property intrusted to him to sell, unless he deals for it with the principal,

(*d*) *Topham* v. *Braddick*, 1 Taunt. 575.

(*e*) *Hunter* v. *Welsh*, 1 Stark. 224.

(*f*) *Dadswell* v. *Jacobs*, 34 Ch.D. 278; 56 L.J. Ch. 233.

(*g*) Story's Eq. Jur. s. 468.

(*h*) *Burdick* v. *Garrick*, L.R. 5 Ch. 233; 39 L.J. Ch. 369; *Bell, In re*, 34 Ch.D. 462; 56 L.J. Ch. 307; *Lyell* v. *Kennedy*, 14 App.Cas. 437; 59 L.J. Q.B. 268; *North American Land and Timber Co.* v. *Watkins*, (1904) 2 Ch.233; 73 L.J. Ch. 626.

(*i*) *Milford* v. *Hughes*, 16 M. & W. 177; 16 L.J. Ex. 40.

(*k*) *Mainwaring* v. *Brandon*, 2 Moore, 125.

(*l*) *Clarke* v. *Tipping*, 9 Beav. 284; *Thom* v. *Bigland*, 8 Exch. 725; 22 L.J. Ex. 243; *Gray* v. *Haig*, 20 Beav. 238.

(*m*) *Crosskey* v. *Mills*, 1 C. M. & R. 298; 3 L.J. Ex. 297; *Boorman* v. *Brown*, 3 Q.B. 515, 527; 11 L.J. Ex. 437; 11 Cl. & F. 1; *Boden* v. *French*, 10 C.B. 886; 20 L.J. C.P. 143.

openly and fairly, "at arm's length," and after a full disclosure of everything he knows concerning it (*n*); nor can he purchase his own goods for his principal (*o*). If money has been paid by a principal to his brokers to enable them to carry out a contract which he had authorised, and which, at the time of such payment, he believed them to have entered into on his account, whereas, in truth, the authorised contract had never been made, the principal may recover the money from the agents (*p*). A mere forwarding agent is not bound to see whether the quality of goods, which he is employed to ship or to forward, corresponds with a contract which he has been instrumental in negotiating (*q*).

Liability of principals to brokers, factors and agents.—The principal is not bound by the unauthorised acts of his agent, but he is bound where the substance of the authority is pursued. Thus where the principal ordered five hundred tons of sugars, and the agent could only get, from several different persons, four hundred tons, it was held that the principal was bound to accept the four hundred tons (*r*).

Del credere *commissions.*—When the agent, in consideration of an additional commission, guarantees to his principal the payment of all debts that become due through his agency to the principal, he is said to act under a *del credere* commission, a phrase derived from the Italian word *credere*, to trust (*s*). Every person accepting and acting under a commission of this sort for the sale of goods makes himself responsible for the solvency of his vendees, and on their failure becomes liable to the principal for the payment of the price of the goods he sells (*t*). His contract, however, is not a contract or promise, as we have seen (*ante*, p. 32), to answer for the debt or default of another within the meaning of the Statute of Frauds, but an original independent contract, and only another form of selling goods (*u*). A *del credere* agent has no right without notice to his principal to employ another agent to execute the commis-

(*n*) *Murphy* v. *O'Shea*, 2 Jones & Lat. 422; *Trevelyan* v. *Charter*, 9 Beav. 140; *Dunne* v. *English*, 18 Eq. 524.

(*o*) *Bentley* v. *Craven*, 18 Beav. 75; *Cape Breton Co., In re*, 29 Ch.D. 795; 54 L.J. Ch. 822. See *Ladywell Mining Co.* v. *Brookes*, 35 Ch.D. 400; 56 L.J. Ch. 684; *Cavendish-Bentinck* v. *Fenn*, 12 App.Cas. 652; 57 L.J. Ch. 552.

(*p*) *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

(*q*) *Zuilchenbart* v. *Alexander*, 1 B. & S. 234; 30 L.J. Q.B. 254.

(*r*) *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201; *Johnston* v. *Kershaw*, L.R. 2 Ex. 82; 36 L.J. Ex. 44.

(*s*) *Morris* v. *Cleasby*, 4 M. & S. 566; *Hornby* v. *Lacy*, 6 M. & S. 166, qualifying *Grove* v. *Dubois*, 1 T.R. 112.

(*t*) *Mackenzie* v. *Scott*, 6 Bro.P.C. 280.

(*u*) *Couturier* v. *Hastie*, 8 Exch. 40; 22 L.J. Ex. 97; 5 H.L.Cas. 673; 25 L.J. Ex. 253; *Wickham* v. *Wickham*, 2 Kay & J. 478; *Sutton* v. *Grey*, (1894) 1 Q.B. 285; 63 L.J. Q.B. 633.

sion (*x*). Where a factor having a *del credere* commission has made advances to his principal, and has sold goods on account of the latter, he cannot, whether he has received the proceeds of the sale or not, recover from the principal so much of the advances as is covered by the price of the goods, unless there is an express agreement between them, making the advances payable immediately, and postponing the time of payment of the price of the goods (*y*). A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent (*z*).

Liabilities of insurance-brokers to their principals.—If an insurance-broker neglects the orders of his principal, or is guilty of misconduct and negligence in effecting an assurance, he will be responsible for all the damage sustained by his employer, and may be clothed with all the responsibilities which would have devolved upon the underwriter had the insurance been regularly effected. He may be compelled to pay to his principal the full sum ordered to be insured, or a total or average loss, as the case may be; but he is, of course, entitled to every benefit and objection of which the underwriter himself could have taken advantage if the assurance had been duly effected, such as fraud, deviation, non-compliance with warranties, or the like (*a*). He is bound, moreover, to exercise a reasonable and proper amount of care, skill, and judgment in the execution of his duty (*b*). If a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that the latter will obey an order to insure; and, although he has no effects, yet, if the course of dealing between them has been to send and comply with orders for insurance, the former has a right to expect that such orders will still be obeyed, unless he receives notice to the contrary; and if the merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction (*c*). If the broker finds that he is unable to effect an insurance upon the terms offered by the principal, it is his duty to give the latter notice of the fact; and if he makes the insurance on terms different from

(*x*) *Cockran* v. *Irlam*, 2 M. & S. 301.

(*y*) *Graham* v. *Ackroyd*, 10 Hare, 192, 202.

(*z*) *Nevill, In re, White, Ex parte*, L.R. 6 Ch. 397; 40 L.J. Bankr. 73.

(*a*) *Park* v. *Hammond*, 2 Marsh. 191; *Mallough* v. *Barber*, 4 Campb. 150; *Turpin* v. *Bilton*, 6 Sc. N.R. 447; 12 L.J. C.P. 167.

(*b*) *Chapman* v. *Walton*, 10 Bing. 57; 2 L.J. C.P. 213; *Cahill* v. *Dawson*, 26 L.J. C.P. 253; 3 C.B. N.S. 106.

(*c*) *Smith* v. *Lascelles*, 2 T.R. 187; *Corlett* v. *Gordon*, 3 Campb. 472.

those prescribed, he will be responsible to the principal (*d*). But, if insufficient orders are sent, and the agent or broker does all that is usual to get the insurance effected, that is sufficient (*e*). The insurance-broker is agent for both parties: for the assured, as to the policy, and for the underwriter as to the premium, but for nothing else; and the latter may maintain an action for the premium, unless circumstances have occurred entitling the insured to a return of it, in which case it is the duty of the broker, if he has notice thereof, to retain the money and return it to the insured (*f*). The broker and not the assured is liable to the underwriter for the premium on a policy of marine insurance (*g*). If he has acted as the agent of the underwriter in paying the loss upon the policy, he cannot recover back the money on the ground that before the loss the underwriter had become insolvent (*h*). It is the usage amongst merchants, insurance-brokers, and underwriters, in the city of London, to set off the general balance of accounts between the broker and the underwriter, at the time of the loss, against the loss, and for the broker then to debit himself to that amount in his account with the assured, and the underwriter is then considered to be discharged of his debt to the assured; and, when the assured is cognizant of this course of dealing, and assents to it, the passing of the accounts between the broker, the underwriter, and the assured, operates as a payment to the latter, and as an extinguishment of the underwriter's debt (*i*). The broker now keeps two accounts with underwriters, called the credit and the cash accounts, into which the premiums received from the principals of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from the individual assured, whose particular premium has gone into that account (*k*). The authority given to a broker when he is to effect a policy of insurance does not extend to warrant him in cancelling it (*l*).

Share-brokers and stock-brokers.—If a share-broker, directed to buy shares, buys what is ordinarily bought and sold in the stock market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares without authority. There

(*d*) *Callender* v. *Oelrichs*, 6 Sc. 761; 8 L.J. C.P. 24.

(*e*) *Smith* v. *Cologan*, 2 T.R. 188, n.

(*f*) *Shee* v. *Clarkson*, 12 East, 507.

(*g*) *Universo Ins. Co.* v. *Marine Ins. Co.*, (1897) 2 Q.B. 93; 66 L.J. Q.B. 564.

(*h*) *Edgar* v. *Bumstead*, 1 Campb. 411; *Jameson* v. *Swainstone*, 2 *ib.* 546, n.

(*i*) *Stewart* v. *Aberdein*, 4 M. & W. 211; 7 L.J. Ex. 292.

(*k*) As to broker's accounts, see *Beckwith* v. *Bullen*, 8 E. & B. 683; 27 L.J. Q.B. 162.

(*l*) *Xenos* v. *Wickham*, L.R. 2 H.L. 296; 36 L.J. C.P. 313.

is no warranty or undertaking, on the part of a broker employed to buy shares or scrip, that the article, which merely passes through the broker's hands, is anything more than what it purports to be, and is generally understood to be in the market (*m*). Every principal who employs a stock-broker to transact business for him in the stock market is bound by the rules of the Stock Exchange and the established mode of transacting business, whether he knew of the usage or not (*n*), unless the rules are unreasonable (*o*). If a share-broker sells pursuant to his authority, and the principal neglects to deliver the shares, and the broker is consequently obliged to buy other shares in the market, he is entitled to recover from his employer all the damages, costs, and expenses, besides the customary remuneration for his trouble and loss of time (*p*). And, generally, whenever the share-broker has been compelled by the custom of the Stock Exchange to make good the default of the principal, he has a remedy over against the latter. Therefore, if he pays calls on shares which he has purchased for his principal, he may recover the amount from the latter (*q*). Where a person buys shares on the Stock Exchange through his broker from a jobber and has them carried over to a future settling day, and in the meantime his broker has been declared a defaulter on the Stock Exchange, a relationship of buyer and seller is established between him and the jobber; and where such a buyer, on his broker's default, refuses the shares at "hammer" price and repudiates the transaction, the jobbers are entitled to sell out the shares and recover from him the whole difference between the price realised and the price at which they were carried over, and are not restricted to the difference between that price and the "hammer" price (*r*). Where a stockbroker who is instructed by a client to carry over for him a specified number

(*m*) *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297; *Mitchell* v. *Newhall*, 15 M. & W. 308; 15 L.J. Ex. 292; *Westropp* v. *Solomon*, 8 C.B. 373; 19 L.J. C.P. 1.

(*n*) *Sutton* v. *Tatham*, 10 Ad. & E. 27; 8 L.J. Q.B. 210; *Pollock* v. *Stables*, 12 Q.B. 765, 774; 17 L.J. Q.B. 352; *Grissell* v. *Bristowe*, L.R. 4 C. P. 36; 38 L.J. C.P. 10; *Coles* v. *Bristowe*, L.R. 4 Ch. 3; 38 L.J. Ch. 81; *Nickalls* v. *Merry*, L.R. 7 H.L. 530; 45 L.J. Ch. 575; *Loring* v. *Davis*, 32 Ch.D. 625; 55 L.J. Ch. 725; *Forget* v. *Baxter*, (1900) A.C. 467, 479; 69 L.J. P.C. 101; see, however, *ante*, p. 70. As to Stock Exchange Rules not being binding upon outside creditors, see *Tomkins* v. *Saffery*, 3 App.Cas. 213; 47 L.J. Bankr. 11; *Plumbly*, *In re*, *Grant*, *Ex parte*, 13 Ch.D. 667.

(*o*) *Pearson* v. *Scott*, 9 Ch.D. 198; 47 L.J. Ch. 705; *Robinson* v. *Mollett*, L.R. 7 H.L. 802; 44 L.J. C.P. 362; *Davis* v. *Howard*, 24 Q.B.D. 691; 59 L.J. Q.B. 133.

(*p*) *Bayliffe* v. *Butterworth*, 1 Exch. 425; 17 L.J. Ex. 78.

(*q*) *Bayley* v. *Wilkins*, 7 C.B. 886; 18 L.J. C.P. 273; *Taylor* v. *Stray*, 2 C.B. N.S. 175; 26 L.J. C.P. 287.

(*r*) *Anderson* v. *Beard*, (1900) 2 Q.B. 260; 69 L.J. Q.B. 610; *Levitt* v. *Hamblet*, (1901) 2 K.B. 53; 70 L.J. K.B. 520; as to liability of defaulting broker to jobber for balance of differences between contract and hammer prices, see *Mendelssohn* v. *Ratcliff*, (1904) A.C. 456; 73 L.J. K.B. 1027; affirming (1902) 2 K.B. 653; 71 L.J. K.B. 984.

of shares for a particular account, purchases in his own name from a jobber a larger number of shares, appropriating in his books the specified number to the client, and the remainder to another person, no such contractual relation is established between the seller of the shares and the broker's client as will entitle the former, upon the failure of the broker, to maintain an action against the client for damages for refusing to accept the shares so appropriated to him (*s*). A broker who, on the refusal of a client to take up shares purchased on his behalf, goes into the market and sells the shares at the proper market price to a jobber, and as part of the same transaction repurchases them from the jobber at a profit to himself, must account to the client for such profit by reason of the fiduciary relation of principal and agent existing between him and his client (*t*). Where a stock-broker wrongfully closes a customer's account which he has agreed to keep open to a certain date, the measure of damages for which he is liable is the highest price the stocks would have realized between the date when he closed the account and the date to which he had agreed to keep it open (*u*).

Solicitors are, as we have already seen, bound, in common with all professional men, to exercise a reasonable degree of care and skill in the conduct and management of the business intrusted to them to execute (*ante*, p. 890). In the case of a gift by a client to his solicitor, there is a presumption of undue influence on the part of the solicitor, the *onus* being on the solicitor of showing that the gift was not obtained by such influence (*x*); and in the case of a sale by a client to his solicitor the *onus* is on the solicitor of showing that the client knew what he was doing, that he was properly advised, and that the price given was fair (*y*); but the validity of the purchase cannot be impeached by a stranger (*z*). If a solicitor discontinues proceedings in an action which he has commenced by direction of his client, he is bound to show a reasonable ground for such discontinuance; and he must, in general, give due notice to his

(*s*) *Beckhusen* v. *Hamblet*, (1900) 2 Q.B. 18; 69 L.J. Q.B. 431; dismissed on the facts in the C.A., (1901) 2 K.B. 73; 70 L.J. K.B. 600. As to lumping several orders in one contract, see *Scott* v. *Godfrey*, (1901) 2 K.B. 726; 70 L.J. K.B. 954.

(*t*) *Erskine, Oxenford & Co.* v. *Sachs*, (1901) 2 K.B. 504; 70 L.J. K.B. 978; *Macoun* v. *Erskine, Oxenford & Co.*, (1901) 2 K.B. 493; 70 L.J. K.B. 973.

(*u*) *Per* Wills, J., *Michael* v. *Hart*, (1901) 2 K.B. 867; 70 L.J. K.B. 1000; this point was left open in the C.A., (1902) 1 K.B. 482; 71 L.J. K.B. 265; affirmed on facts in H.L., 89 L.T. 422.

(*x*) *Wright* v. *Carter*, (1903) 1 Ch. 27; 72 L.J. Ch. 138.

(*y*) *Wright* v. *Carter*, *supra*; *Holman* v. *Loynes*, 4 De G. M. & G. 270; 23 L.J. Ch. 529; *Gibbs* v. *Daniel*, 4 Giff. 1; as to purchase by a solicitor of the subject-matter of an action, see *Simpson* v. *Lamb*, 7 E. & B. 84; 26 L.J. Q.B. 121; *Davis* v. *Freethy*, 24 Q.B.D. 519; 59 L.J. Q.B. 318. See also *Addison on Torts*, 509 (ed. 8).

(*z*) *Knight* v. *Bowyer*, 27 L.J. Ch. 520; 2 De G. & J. 421.

client of his intention to discontinue; and, if he improperly throws up a cause, he has no right to be paid *pro ratâ* for his work and labour (*a*). If a cause which he is retained to conduct fails through his negligence, he cannot recover from his client money expended by him subsequently to such negligence (*b*). Where, on a sale of real estate, the solicitor of the vendor receives the deposit as agent of the vendor, he has not, in the absence of any stipulation to that effect, any duty, like that of an auctioneer, to the vendee, but must pay it over to his principal, the vendor, on demand (*c*). He is responsible also, as we have already seen, for the safe investment of all moneys intrusted to, and accepted by, him for investment (*ante*, p. 862). But the town agent of a country solicitor is not responsible to the clients of the latter for money received whilst conducting their causes or legal proceedings. The privity of contract is solely between the town agent and his principal and employer, the country solicitor; he knows nothing of the clients of the latter, and is bound to account only to his principal (see *post*, p. 964). But the court will, as before mentioned, sometimes interfere summarily for the protection of the client. The solicitor must, in general, one month before action against his client, deliver his bill of costs, signed by him, to his client (*d*); and, when his bill has been paid, he is bound to deliver up, if called upon, all documents in his hands belonging to his client, in good order and properly arranged (*e*).

Sheriff's officers, expressly employed by a solicitor to execute process, may maintain an action against the latter for the recovery of such fees as are usually allowed on the taxation of costs by the practice of the courts, and are not bound to resort to the clients of the solicitor for remuneration (*f*), for in that case the solicitor does something more than merely deliver the writ for execution (*g*); but apart from a contract express or implied to pay such fees the law casts no such liability upon the solicitor (*h*).

Estate and house agents.—Where a house agent is employed to let a house it is a question for the jury upon the evidence

(*a*) *Nicholls* v. *Wilson*, 11 M. & W. 106; 12 L.J. Ex. 266; *Underwood* v. *Lewis*, (1894) 2 Q.B. 306; 64 L.J. Q.B. 60.

(*b*) *Lewis* v. *Samuel*, 8 Q.B. 685; 15 L.J. Q.B. 218.

(*c*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7.

(*d*) 6 & 7 Vict. c. 73, s. 37; *Phipps* v. *Daubney*, 16 Q.B. 514; 20 L.J. Q.B. 273; *Smith* v. *Pococke*, 22 L.J. Ch. 545; 2 Drew. 197.

(*e*) *L. & N. W. Ry.* v. *Sharp*, 10 Exch. 451; 24 L.J. Ex. 44; 18 Jur. 964.

(*f*) *Foster* v. *Blakelock*, 5 B. & C. 328; 4 L.J. (O.S.) K.B. 170.

(*g*) *Walbank* v. *Quarterman*, 3 C.B. 94.

(*h*) *Royle* v. *Busby*, 6 Q.B.D. 171; 50 L.J. Q.B. 196.

whether it is part of his retainer to make all necessary inquiries touching the respectability and solvency of the tenant (*i*).

Receipt of money and goods by agents on account of their principals.—It is a settled rule that an agent shall not, after accounting with his principal and receiving money in his capacity of agent, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but for some other person (*k*), unless there has been a mistake and a void payment *ab initio*, so that the money never was in truth received for the principal. But, if the agent effects a contract of sale at a high price by fraud, and receives such price, but is afterwards compelled to refund it to the purchaser, the principal cannot maintain an action for money had and received against the agent, to recover the price, inasmuch as the sale is avoided by the fraud of the agent, and the money received under it becomes the property of the purchaser, and is not money had and received for the use of the principal (*l*). And although an agent has received goods from his principal, or from a third party, to hold them for his principal, he may, under certain circumstances, set up a *jus tertii*. Thus, if an auctioneer has received goods for public sale from a person who is not the owner of them, and has no right to sell them, and the real owner intervenes and forbids the sale, or claims the money realised by the sale, the auctioneer may by the authority of such real owner set up his title against the claims of the fictitious owner from whom he received the goods (*m*). But, although in many cases a bailee may set up the *jus tertii* against a claim by his bailor, yet, if the bailee has accepted the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such a claim as against the bailor (*n*). So, where a wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods, and, after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner, it was held that he was justified in such refusal (*o*).

(*i*) *Heys* v. *Tindall*, 1 B. & S. 296 ; 30 L.J. Q.B. 362. As to commission, see *post*, p. 959.

(*k*) *Dixon* v. *Hamond*, 2 B. & Ald. 310, 313 ; *Edgell* v. *Day*, 35 L.J. C.P. 7 ; L.R. 1 C.P. 80.

(*l*) Parke, B., *Murray* v. *Mann*, 17 L.J. Ex. 256 ; 2 Exch. 538.

(*m*) *Biddle* v. *Bond*, 6 B. & S. 225 ; 34 L.J. Q.B. 137 ; *Hardman* v. *Willcock*, 9 Bing 382 ; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318 ; 60 L.J. Q.B. 187.

(*n*) *Sadler*, *In re*, *Davies*, *Ex parte*, 19 Ch.D. 86.

(*o*) *Hunt* v. *Maniere*, 34 Beav. 157 ; 34 L.J. Ch. 142.

Where a managing owner of a ship, or "ship's husband," employed certain agents for general purposes, and amongst others to receive and pay moneys on account of the ship, and besides his general account there was also a separate account kept by them in his name as managing owner of the ship's disbursements and earnings, and, in order to obtain the freight earned by the vessel from the East India Company, it was necessary that a receipt signed by the managing owner, and by one or more of the other owners also, should be given for the money due, and, upon a receipt of this description, the agents received 2,000*l.*, which was placed by them to the credit of the managing owner in his account with them, it was held that the money was received by the agents as agents of the managing owner, and that the transaction was in effect the same as if the other joint-owners and the managing owner had received the money, and it had been then handed over to the managing owner, who had then placed it in the hands of the agents, as his bankers, on his own account, and that the joint-owners could not treat the agents as their debtors (*p*). But, where the plaintiffs were owners of a ship, and one of them was ship's husband, and the latter instructed the defendant at Quebec to charter the vessel from thence to England, and the defendant effected a charter-party, making the freight payable to himself at Quebec, and received the freight, and claimed to retain it in liquidation of a debt due to him from such ship's husband, it was held that the contract between the ship's husband and the ship agent with respect to the management and chartering of the vessel was a contract which belonged to all the shipowners, and that the defendant was bound to pay over to them the money received under that contract (*q*).

Receipt of money by sub-agents.—Every agent is responsible for money received by a sub-agent employed by him for the purpose of receiving the money, whether the principal had, or had not, reason to suppose that there was any necessity for the employment of a sub-agent. Thus, if the customer of bankers hands them a bill, in order that they may receive the money due upon it, and they send the bill to their correspondents at a distant place, and the bill is presented by them, and the amount paid, the payment to the sub-agents is a payment to the bankers, and the latter are responsible to the customer for the money, although it never reaches their hands and is never passed by

(*p*) *Sims* v. *Brittain*, 4 B. & Ad. 375.

(*q*) *Walshe* v. *Provan*, 8 Exch. 843; 22 L.J. Ex. 355.

them to the credit of the customer (*r*). The sub-agent so employed to receive money is accountable only to the agent, his employer, and cannot be sued for the money by the principal(*s*). But, if he is not strictly a sub-agent, as, for example, if he has received direct instructions from the principal, or is in any respect the agent of the latter, he will be accountable accordingly. Thus, where a creditor employs a country solicitor to recover a debt, and the country solicitor employs a London solicitor to whom the debt is paid, the latter is accountable to the client for the money, and cannot retain it in satisfaction of a debt due to him from his immediate employer, the country solicitor (*t*).

Payment by one agent to another.—Where an agent who receives money for his principal pays it over to another agent of that principal, he is bound to pay it in such a way as shall enable the agent to perform his duty to his principal, *i.e.*, he must pay in cash, and not merely settle it in account between that agent and himself; or, if he does so settle it, he takes it on himself to show an authority from his principal, and that there was an account between the principal and that agent, on which the principal was indebted to the latter (*u*).

Purchases by agent with money of principal.—The property of a principal intrusted to his factor or agent belongs to the principal, notwithstanding any change which the property may have undergone in form, and even though the agent may have mixed the proceeds with his own money. Where, therefore, a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and purchased American securities with it, and absconded, and was taken on his way to America, and surrendered the securities to his principal, it was held that the principal was entitled to the securities so purchased as against the assignees of the broker, who had become bankrupt (*x*). But the rule does not apply where there is no fiduciary relation between the parties (*y*); nor where an agent authorized to receive money has credited his

(*r*) *Mackersay* v. *Ramsays*, 9 Cl. & F. 818.

(*s*) *Ireland* v. *Thompson*, 4 C.B. 149; 17 L.J. C.P. 248; *Stephens* v. *Badcock*, 3 B. & Ad. 354; 1 L.J. K.B. 75; *Cartwright* v. *Hately*, 1 Ves. jun. 292; Story on Agency, s. 203.

(*t*) *Hanley* v. *Cassan*, 11 Jur. 1088; 10 L.T. 189; *Johnson, In re, Edwards, Ex parte*, 8 Q.B.D. 262; 51 L.J. Q.B. 108.

(*u*) Alderson, B., *Hanley* v. *Cassan*, *supra*.

(*x*) *Taylor* v. *Plumer*, 3 M. & S. 562. See *Hallett's Estate, In re, Knatchbull* v. *Hallett*, 13 Ch.D. 696; 49 L.J.Ch. 415; *Harris* v. *Truman*, 51 L.J. Q.B. 338; 9 Q.B.D. 264; *Broad, In re, Neck, Ex parte*, 13 Q.B.D. 740; 54 L.J. Q.B. 79.

(*y*) *New Zealand and Australian Land Co.* v. *Watson*, 7 Q.B.D. 374; 50 L.J. Q.B. 433. See, however, *Kaltenbach* v. *Lewis*, 10 App.Cas. 617; 55 L.J. Ch. 58.

principal with it before in fact receiving it (*z*). If an agent borrows money without the authority of his principal, and the money comes into the possession of the principal who uses it, the latter is liable to the borrower in an action for money had and received (*a*).

Frauds by agents on their principals.—Agents are in a sense trustees, and they owe to their principals a similar duty to that which trustees owe to their *cestui que trust*. Therefore, when two agents concur in a fraud, both are liable in equity, although one of them only has the benefit of the fraud. Where two confidential agents of a partnership conspired together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the firm fraudulently so as to conceal from the partners the true value of their shares, it was held that their misconduct might be treated as a breach of trust (*b*). An agent cannot, without the knowledge of his principal, be allowed to make any profit out of his agency beyond his proper remuneration as agent; and this rule applies with peculiar stringency to the directors of joint-stock companies, who are the agents of the company for effecting the sales or purchases made by the company (*c*).

Payment of commission.—If the amount of commission is named by the principal in his letter of instruction to the agent, and the agent declares that it is quite inadequate, but nevertheless acts upon the instructions, he will be bound by the specified commission, and cannot sue for a reasonable remuneration for his services (*d*). A commission-agent, employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase-money, or on the happening of a certain event, will not be entitled to any commission until the purchase-money has been received, or the event has happened, unless there has been fraudulent delay or wilful neglect on the part of the employer (*e*). In the ordinary course of commercial dealings a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent, the amount being generally governed by the usage of trade; but

(*z*) *Hallett, In re, Blane, Ex parte*, (1894) 2 Q.B. 237; 63 L.J. Q.B. 573.

(*a*) *Reid* v. *Rigby*, (1894) 2 Q.B. 40; 63 L.J. Q.B. 451.

(*b*) *Walsham* v. *Stainton*, 33 L.J. Ch. 68; 1 De G. J. & S. 678. As to the remedy of the principal where the agent has been bribed to induce him to enter into a disadvantageous contract, see *Salford (Mayor)* v. *Lever*, (1891) 1 Q.B. 168; 60 L.J. Q.B. 39; *Grant* v. *Gold Exploration Syndicate of British Columbia*, (1900) 1 Q.B. 233; 69 L.J. Q.B. 150.

(*c*) *Canadian Oil Works Corporation, In re, Hay's Case*, L.R. 10 Ch. 593; 44 L.J. Ch. 721; *Eden* v. *Ridsdale's Co.*, 23 Q.B.D. 368; 58 L.J. Q.B. 579.

(*d*) *Moore* v. *Maxwell*, 2 C. & K. 554.

(*e*) *Bull* v. *Price*, 5 M. & P. 2; 9 L.J. (O.S.) C.P. 78; *Alder* v. *Boyle*, 4 C.B. 635; 16 L.J. C.P. 232.

parties who sell as mortgagees or trustees are not entitled to commission, in the absence of any express contract or agreement to pay them for their services (*f*). The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to the payment of such commission have been reduced into writing (*g*). An authority to sell upon certain terms and for certain commission is revoked by the death of the principal before the authority has been acted upon and executed; and, if the agent sells after the death of the principal, he will not be entitled to the agreed commission, unless the personal representative has renewed the authority with knowledge of the contract (*h*). If the commission is to be paid on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal after deducting all charges and expenses (*i*).

Extra work by agents.—For all work done by the agent in discharge of his business as agent he is paid by his commission, and can make no extra charge; but for work done by order of the principal, beyond his duty as an agent, he is entitled to make an extra charge, provided the work was done under circumstances fairly giving rise to an inference that he was to receive an extra remuneration (*k*).

Commission of ship-brokers.—Ship-brokers are usually entitled, by the custom and usage of trade, to 5*l*. per cent. commission upon the freight payable upon charter-parties obtained and entered into by their aid and exertions; and, if the amount of freight is uncertain, they may, if they think fit, sue for a reasonable remuneration upon a *quantum meruit*. The right to the commission does not depend upon the fact of the ship's earning freight; and the claim is not liable to be cut down by the loss of the vessel, or her failure to get a cargo (*l*). When a ship-broker has introduced the captain of a ship and a merchant to each other, and they by his means enter into some negotiation for a voyage, the broker is, in general, by usage of trade, entitled to his commission if a charter-party is effected between them for that voyage. And, if a broker authorised by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and to the shipowner what the

(*f*) *Ante*, p. 872; *Arnold* v. *Garner*, 2 Ph. 231; 16 L.J. Ch. 329; but see now *Judicial Trustees Act*, 1896 (59 & 60 Vict. c. 35), s. 1 (5), as to remuneration of judicial trustees.

(*g*) *Whitfield* v. *Brand*, 16 M. & W. 282; 16 L.J. Ex. 103.

(*h*) *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 13.

(*i*) *Caine* v. *Horsfall*, 1 Exch. 519; 17 L.J. Ex. 25.

(*k*) *Marshall* v. *Parsons*, 9 C. & P. 656.

(*l*) *Hill* v. *Kitching*, 3 C.B. 299; 15 L.J. C.P. 251.

merchant will give, and names the ship and the parties, so as to identify the transaction, and a charter-party is ultimately effected for that voyage, this broker is entitled to his commission; but, if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other (*m*).

Where a shipowner employed a ship-broker to procure a charter for his ship, and the latter employed another broker, who procured the charter, it was held that in order to render the shipowner responsible upon an implied contract with the second broker, it must be shown that he was cognizant of the employment of the latter, and knew, at the time he accepted the charter, that it had been obtained through his instrumentality (*n*). But it would seem that evidence of a usage of trade is admissible to show that the second broker, who actually procures the charter, is entitled to his commission from the shipowner (*o*). A usage of trade cannot be given in evidence to impose on the party who has entered into the contract a wholly different obligation, and to show that, because he has agreed to consign the ship to the charterer's agents on the outward voyage, he is therefore liable to pay the agent's commission on the homeward cargo (*p*).

Commission of policy brokers.—By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97 (2), the principal is not to be liable to pay the broker's commission upon effecting a policy of sea insurance, or any money paid by the broker, unless the policy is duly stamped; and any sums so paid are to be deemed to have been paid without consideration, and are to remain the property of the principal.

Commission of travellers for orders.—When a commission agent, employed by a manufacturer to obtain orders, is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid sale has been concluded between the manufacturer and the purchaser introduced by such agent, whether or not the goods are at the time in existence, and whether or not the contract is ultimately carried into effect, and whether it turns out to be a bad bargain, productive of loss, or an advantageous transaction (*q*).

Commission of house agents, estate agents, and auctioneers.—If a man having a house or estate to sell or let, places it in the

(*m*) *Burnett* v. *Bouch*, 9 C. & P. 620.
(*n*) *Smith* v. *Boutcher*, 1 Car. & K. 573, and see *Schmaling* v. *Thomlinson*, 6 Taunt. 147.
(*o*) *Smith* v. *Boutcher*, 1 Car. & K. 573.
(*p*) *Phillipps* v. *Briard*, 1 H. & N. 21, 27; 25 L.J. Ex. 233.
(*q*) *Lockwood* v. *Levick*, 8 C.B. N.S. 603; 29 L.J. C.P. 340.

hands of several house agents, with instructions to secure a purchaser or tenant, the successful agent is alone entitled to commission, unless instructions have been given to the other house agents to advertise the house, or render some particular or special services in the matter, entitling them by the custom of the trade to some remuneration (*r*). But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to his commission, although the actual sale was not effected by him (*s*). Where A. promised to pay B. a sum of money if he would procure him a tenant at a certain rent, it was held that B. was entitled to the money as soon as the party introduced by him had been accepted by A., and a binding agreement for the tenancy had been entered into (*t*). In a great number of instances house agents go to a great deal of trouble on the terms that, if they get no purchaser they shall have no claim; and, if upon the contingencies which have happened nothing was to be paid, nothing can of course be recovered (*u*). Where an auctioneer was employed to sell ground-rents by auction, on the terms of receiving one per cent. commission on the sale, and, after he had advertised the sale, but before the day of sale, the employer sold the rents by private contract, it was held that a notorious custom in the trade, for the auctioneer to receive his full commission in such a case, might be engrafted upon the contract (*x*). But such a usage must be so universal that every one in the trade must be taken to know it (*y*).

The right of the agent to be reimbursed upon the revocation of his authority depends upon the terms of the contract by which his services were retained, and the custom of the trade in which he is engaged. When an agent is employed to sell or to let, on the terms that he is to be paid a certain percentage on the price or the rent, the general understanding is that he takes his chance of a large remuneration in case he finds a purchaser or a tenant, but gets nothing if he fails in so doing; but, if trouble and expense have been properly incurred by the agent in endeavouring to carry into effect the instructions of the principal, and the latter revokes the authority, and prevents the agent from reaping the expected reward, the principal is bound to remunerate him for his trouble and expenses in the matter (*z*).

Where an estate agent, employed to sell at a given price,

(*r*) *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33; *Barnett* v. *Brown*, 6 T.L.R. 463.

(*s*) *Green* v. *Bartlett*, 14 C.B. N.S. 681; 32 L.J. C.P. 261; see *Tribe* v. *Taylor*, 1 C.P.D. 505; *Burchell* v. *Gowrie, &c. Collieries Co.*, (1910) A.C. 614; 80 L.J. P.C. 41.

(*t*) *Horford* v. *Wilson*, 1 Taunt. 12.

(*u*) *Green* v. *Mules*, 30 L.J. C.P. 343.

(*x*) *Rainy* v. *Vernon*, 9 C. & P. 559.

(*y*) *Wood* v. *Wood*, 1 *ib.* 59.

(*z*) *Simpson* v. *Lamb*, 17 C.B. 616; 25 L.J. C.P. 113.

succeeds in finding a purchaser, but the principal then declines to sell, the agent is entitled to sue for a reasonable remuneration for his services; and the amount of his commission on the price would seem to be the sum to which he is fairly entitled; but, if the authority is revoked before it is executed and a purchaser has been found, it does not follow that he is entitled to sue upon an implied contract for remuneration for his work and labour in endeavouring to find a purchaser or a tenant (*a*). If it is the practice of house agents to charge a fee for entering property to be let or sold in their register book, and the employer has notice of this, or it is proved to be a known custom of the trade, the employer will be bound to pay this fee, although the authority may be revoked, or the agent may have failed to render any beneficial service. This registration fee is all that the house agent is entitled to charge for ordinary services, in the absence of any special instructions for advertisements (*b*).

When a public company employed a broker to dispose of their shares on the terms that he should be paid 100*l.* down, and 400*l.* in addition upon the allotment of the whole of the shares of the company, and the broker disposed of a considerable number of shares when the company was wound up, it was held that the broker was prevented from earning the 400*l.* by the act of the company, and was therefore entitled to sue them for damages (*c*).

Lien of factors and brokers.—Factors and brokers to whom goods are consigned to be sold have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the moneys realised by the sale of them (*d*). This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists. The lien does not extend to a collateral debt, such as a debt due for the price of other goods sold by the factor for another person to the principal (*e*), nor to goods which have not actually reached the hands of the factor (*f*), nor to goods which have not come into his possession

(*a*) *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33; *Campanari* v. *Woodburn*, 15 C.B. 400, 407; 24 L.J. C.P. 13.

(*b*) *Simpson* v. *Lamb*, *supra*.

(*c*) *Inchbald* v. *Western Neilgherry Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15; *Ogdens, Ltd.* v. *Nelson*, (1903) 2 K.B. 287; 72 L.J. K.B. 767.

(*d*) *Kruger* v. *Wilcox*, Ambl. 252; *Hudson* v. *Granger*, 5 B. & Ald. 27; *Hammonds* v. *Barclay*, 2 East, 227; *Pavy's Patent Felted Co., In re*, 1 Ch.D. 631; 45 L.J. Ch. 318.

(*e*) *Houghton* v. *Matthews*, 3 Bos. & P. 485.

(*f*) *Kinloch* v. *Craig*, 3 T.R. 119.

with the consent and direction of the owner, such as goods left at the factor's place of business by mistake or inadvertence (*g*), or taken possession of by him without the authority of the owner (*h*). And, if the party from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent (*i*). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor (*k*). A factor does not lose his lien by acting under special instructions from his principal to sell the goods at a particular price, and in the principal's name (*l*).

Lien of packers.—A packer is entitled to a general lien on the goods of his customer which are in his hands (*m*), although they do not now so frequently make advances to their customers as they used to do (*n*).

Lien of insurance brokers.—Insurance brokers have also, by the general usage and custom of trade, a lien for the general balance due to them from their employers, where the latter are themselves principals, and in some cases where they are agents, upon all policies effected by them for such employers, and left in their hands, and upon all moneys received by them upon such policies from the underwriters. The lien does not extend to a collateral debt not incurred in respect of brokerage business. If a policy broker is employed by an agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the assurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent as well as for

(*g*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*h*) *Taylor* v. *Robinson*, 8 Taunt. 648; 2 Moore, 730.

(*i*) *Pultney* v. *Keymer*, 3 Esp. 182.

(*k*) *Dixon* v. *Stansfeld*, 10 C.B. 398; *Mildred* v. *Maspons*, 8 App.Cas. 874; 53 L.J. Q.B. 33.

(*l*) *Stevens* v. *Biller*, 25 Ch.D. 31; 53 L.J. Ch. 245.

(*m*) *Deeze*, *Ex parte*, 1 Atk. 228; *Green* v. *Farmer*, 4 Burr. 2214, 2222.

(*n*) *Witt*, *In re*, *Shubrook*, *Ex parte*, 2 Ch.D. 489; 45 L.J. Bankr. 118.

his commission and charges for effecting the policy (*o*). But, if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral (*p*), or a statement that the assurance is to be effected "for a correspondent in the country" (*q*), or that the property to be insured belongs to a merchant abroad, who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading (*r*), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

Lien of solicitors.—Solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, not only for the costs of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients (*s*). But the lien does not attach while the suit is still pending; and the parties may compromise the dispute and thus deprive the solicitor of his lien, if the compromise is *bonâ fide* (*t*). If, however, the money paid by way of compromise is in substance the fruit of the action, the lien of the plaintiff's solicitor attaches, and the defendant or his solicitor is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien for his costs, to pay the sum over to the plaintiff (*u*). The compromise of an action, sanctioned by the court on behalf of an infant, does not in itself prejudice his solicitor's lien for the costs of an action (*x*). By the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, where a solicitor is employed (*y*) to prosecute or defend any suit in any court, the court may charge the client's property (*z*) recovered or preserved (*a*) through the

(*o*) *Mann* v. *Forrester*, 4 Campb. 61; *Westwood* v. *Bell*, *ib.* 349.

(*p*) *Maanss* v. *Henderson*, 1 East, 335.

(*q*) *Swoh* v. *Davidson*, 2 Campb. 218.

(*r*) *Lanyon* v. *Blanchard*, *ib.* 597.

(*s*) *Stevenson* v. *Blakelock*, 1 M. & S. 535; *Lambert* v. *Buckmaster*, 2 B. & C. 616; 2 L.J. (O.S.) K.B. 93; *Blunden* v. *Desert*, 2 Dr. & W. 405; *Friswell* v. *King*, 15 Sim. 191; *Robins* v. *Goldingham*, L.R. 13 Eq. 440; 41 L.J. Ch. 813; *Taylor*, *In re*, *Payne-Collier*, *Ex parte*, (1891) 1 Ch. 590; 60 L.J. Ch. 525.

(*t*) *Sullivan*, *In re*, *Morrison*, *Ex parte*, L.R. 4 Q.B. 153; *S.C.*, *Sullivan* v. *Pearson*, 38 L.J. Q.B. 65; *The Hope*, 8 P.D. 144; 52 L.J. P. 63; *Price* v. *Crouch*, 60 L.J. Q.B. 767; *Margetson*, *In re*, (1897) 2 Ch. 314; 66 L.J. Ch. 619.

(*u*) *Ross* v. *Buxton*, 42 Ch.D. 190; 58 L.J. Ch. 442.

(*x*) *Wright's Trusts*, *In re*, (1901) 1 Ch. 317; 70 L.J. Ch. 119.

(*y*) *Baile* v. *Baile*, L.R. 13 Eq. 497; 41 L.J. Ch. 300.

(*z*) *Berrie* v. *Howitt*, L.R. 9 Eq. 1; 39 L.J. Ch. 119; *Keane*, *In re*, *Lumley* v. *Desborough*, L.R. 12 Eq. 115; 40 L.J. Ch. 617.

(*a*) *Baile* v. *Baile*, L.R. 13 Eq. 497; 41 L.J. Ch. 300; *The Heinrich*, L.R. 3 A. & E. 505; 41 L.J. Adm. 68; *Pierson* v. *Knutsford Estates Co.*, 13 Q.B.D. 666; 53 L.J. Q.B. 181; *Jones* v. *Frost*, L.R. 7 Ch. 773; 42 L.J. Ch. 47; see *Humphreys*, *In re*, (1898) 1 Q.B. 520; 67 L.J. Q.B. 412.

instrumentality (*b*) of the solicitor with the payment of his costs (*c*). If the solicitor discharges himself during the suit he loses his lien, so far, at any rate, as relates to papers necessary for the successful prosecution of the suit; but it is otherwise if he is discharged by his client (*d*). Costs paid under the order of the court, and directed to be refunded by the Court of Appeal, are property recovered within the meaning of this section, and may be charged accordingly (*e*). A solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And, where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished; and it may be superseded altogether by the attorney's taking from the client security for his costs (*f*). A solicitor held the title-deeds of a mortgagor; he was also acting for the mortgagee, and continued to hold the deeds; the mortgagor filed a petition for liquidation, and the solicitor acting for the trustee sold the equity of redemption, and received the purchase-money; it was held that he had a lien upon it for costs due to him from the mortgagor (*g*). A solicitor to a former trustee in a bankruptcy has a lien upon documents, the fruits of his own labour or expense, as against a new trustee (*h*). A solicitor cannot set up the lien of his London agent on the papers of his client against the claims of that client, the client having paid his solicitor's bill (*i*). The London solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business, and disbursements due from the country solicitor, whether in the particular action or in any other proceedings (*k*); but as between the London agent and the client the lien extends only to the costs of the particular action (*l*). And his lien is

(*b*) See *Lwynam* v. *Porter*, L.R. 11 Eq. 181; 40 L.J. Ch. 30.

(*c*) *National Assurance and Investment Assoc., In re, Cross, In re*, L.R. 7 Ch. 221; 41 L.J. Ch. 341. The lien of a solicitor on a fund recovered is confined to the costs of the action in which it is recovered, *Bozon* v. *Bolland*, 4 Myl. & Cr. 354; 9 L.J. Ch. 123. As to a solicitor's lien where there are cross-judgments in a county court, see *Ward* v. *Haddrill*, (1904) 1 K.B. 399; 73 L.J. K.B. 277. As to omission of solicitor to mention his lien on documents on proving in a bankruptcy, see *Safety Explosives, Ltd., In re*, (1904) 1 Ch. 226; 73 L.J. Ch. 184. As to priority of the lien for costs over judgments recovered, see *Ridd* v. *Thorne*, (1902) 2 Ch. 344; 71 L.J. Ch. 624.

(*d*) *Faithfull, In re, L. B. & S. C. Ry., In re*, L.R. 6 Eq. 325.

(*e*) *Guy* v. *Churchill*, 35 Ch.D. 489; 56 L.J. Ch. 670.

(*f*) *Georges* v. *Georges*, 18 Ves. 294; *Balch* v. *Symes*, Turn. & R. 87. See *Taylor, In re, Payne-Collier, Ex parte*, (1891) 1 Ch. 590; 60 L.J. Ch. 525.

(*g*) *Messenger, In re, Calvert, Ex parte*, 3 Ch.D. 317; 45 L.J. Bankr. 134.

(*h*) *Austin, In re, Yalden, Ex parte*, 4 Ch.D. 129; 46 L.J. Bankr. 59.

(*i*) *Andrew, In re*, 7 H. & N. 87; 30 L.J. Ex. 403.

(*k*) See *Hawkes, In re*, (1898) 2 Ch. 1; 67 L.J. Ch. 284; *Jones and Roberts, In re*, (1905) 2 Ch. 219; 74 L.J. Ch. 458.

(*l*) *Lawrence* v. *Fletcher*, 12 Ch.D. 858; *White* v. *Roy. Exch. Assur. Co.*, 1

limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess (*m*).

A solicitor cannot set up a general lien for the balance due to him in respect of services not rendered by him as a solicitor; nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as steward of a manor (*n*), or town clerk (*o*), or for ordinary advances made by him to his client; he cannot set up any lien which is inconsistent with the nature of his employment, or the terms or conditions, or express or implied trust upon which he received the papers (*p*). His right, moreover, is dependent upon the rights of his clients; and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him (*q*). If a solicitor transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds, and writings of one partner in respect of the business done for the firm (*r*).

A solicitor acting for mortgagee as well as mortgagor thereby loses his lien on the deeds for costs due to him from the mortgagor, unless such lien is expressly reserved, even although the mortgagee may have known that the solicitor had such a lien (*s*). Where the plaintiffs in a suit mortgaged their interest in the estate to the defendants with the sanction of the solicitor, and nothing was said about costs, it was held that the solicitor's charge, under 23 & 24 Vict. c. 127, s. 28 (*ante*, p. 963), ought not to be postponed to the mortgage, as the defendants must have known of the rights of the solicitor (*t*). A solicitor preparing a marriage settlement on the instructions of the husband has no

Bing. 20; 7 Moore, 249; *Moody* v. *Spencer*, 2 D. & R. 6; 1 L.J. (O.S.) K.B. 1; *Anon.*, 2 Dick. 802.

(*m*) *Waller* v. *Holmes*, 1 J. & H. 139; 30 L.J. Ch. 24; *Andrew*, *In re*, *supra*; *Beatfield* v. *Barlow*, 38 L.J. Ch. 311; *Edwards*, *Ex parte*, 8 Q.B.D. 262; 51 L.J. Q.B. 108. See *ante*, p. 856.

(*n*) *Champernown* v. *Scott*, 6 Mad. 93.

(*o*) *R.* v. *Sankey*, 5 Ad. & E. 428; 5 L.J. K.B. 255; *Newington Local Board* v. *Eldridge*, 12 Ch.D. 349; *Taylor*, *In re*, *Payne-Collier*, *Ex parte*, (1891) 1 Ch. 590; 60 L.J. Ch. 525.

(*p*) *Lawson* v. *Dickenson*, 8 Mod. 307. See *Faithfull*, *In re*, L.R. 6 Eq. 325; *Simmonds* v. *G. E. Ry.*, L.R. 3 Ch. 797; 38 L.J. Ch. 87.

(*q*) *Hollis* v. *Clarige*, 4 Taunt. 807; *Esdaile* v. *Oxenham*, 3 B. & C. 229; *Lightfoot* v. *Keene*, 1 M. & W. 745; 5 L.J. Ex. 257; *Molesworth* v. *Robbins*, 2 Jones & Lat. 358.

(*r*) *Steadman* v. *Hockley*, 15 M. & W. 553; 15 L.J. Ex. 332; *Turner* v. *Deane*, 3 Exch. 836; 18 L.J. Ex. 343. See *Moss*, *In re*, L.R. 2 Eq. 345; 35 L.J. Ch. 554.

(*s*) *Snell*, *In re*, 6 Ch.D. 105; 46 L.J. Ch. 627.

(*t*) *Faithfull* v. *Ewen*, 7 Ch.D. 495; 47 L.J. Ch. 457; *Dallow* v. *Garrold*, *Adams*, *Ex parte*, 14 Q.B.D. 543; 54 L.J. Q.B. 76; *Cole* v. *Eley*, (1894) 2 Q.B. 350; 63 L.J. Q.B. 682; *The Paris*, (1896) P. 77; 65 L.J. P. 42.

lien upon it against the trustees for their unpaid costs (*u*). A solicitor cannot embarrass proceedings in a court by keeping papers which belong to an estate which is being administered by the court (*x*), or which are necessary in a suit pending (*y*). Where a solicitor takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is *primâ facie* to be deemed to be abandoned (*z*).

Lien of shipmasters.—An agent cannot in general acquire a lien upon the property of his principal for work done by others whom he has employed and paid. But a shipmaster has, so far as the case permits, the same lien for disbursements and liabilities properly made and incurred by him on account of the ship as he has for the recovery of his wages (*a*); and where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses, if the owner adopts the benefit of that contract, he must also bear its burthen (*b*). The shipmaster, however, has no lien on ship or freight for disbursements on account of the ship, but for which he had no authority to pledge the shipowner's credit (*c*). At common law the master has a possessory lien on the cargo, not only for freight, but also for general average (*d*). The captain of a ship or his agent has a lien upon the cargo which he has saved for the expenses of doing so, although such expenditure was not with the cargo owner's consent nor for the purpose of enabling the shipowner to earn freight, but for the purpose of saving the cargo (*e*).

Lien of ship's husband.—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer, and not in the nature of a charge on the freight; and therefore, if he is removed from his office before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners (*f*).

(*u*) *Lawrance, In re, Bowker* v. *Austin*, (1894) 1 Ch. 556; 63 L.J. Ch. 205.

(*x*) *Belaney* v. *Ffrench*, L.R. 8 Ch. 918; 43 L.J. Ch. 312; *Capital Fire Insurance Association, In re*, 24 Ch.D. 408; 53 L.J. Ch. 71. The principle of these cases is discussed and affirmed in *Hawkes, In re, Ackerman* v. *Lockhart*, (1898) 2 Ch. 1; 67 L.J. Ch. 284; see also *Rapid Road Transit Co., In re* (1909) 1 Ch. 96; 78 L.J. Ch. 132.

(*y*) *Galland, In re*, 31 Ch.D. 296; 55 L.J. Ch. 478.

(*z*) *Taylor, In re, Payne-Collier, Ex parte*, (1891) 1 Ch. 590; 60 L.J. Ch. 525; *Douglas-Norman, In re*, (1898) 1 Ch. 199; 67 L.J. Ch. 85.

(*a*) 57 & 58 Vict. c. 60, s. 167.

(*b*) *Bristowe* v. *Whitmore*, 9 H.L.Cas. 391.

(*c*) *The Castlegate*, (1893) A.C. 38; 62 L.J. P.C. 17; *The Orienta*, (1895) P. 49; 64 L.J. P. 32. But see *The Ripon City*, (1897) P. 226; 66 L.J. P. 110; *The Elmville*, (1904) P. 319; *Ceylon Coaling Co.* v. *Goodrich*, (1904) P. 319; 73 L.J. P. 104.

(*d*) *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216; 33 L.J. Ad. 97.

(*e*) *Hingston* v. *Wendt*, 1 Q.B.D. 367; 45 L.J. Q.B. 440.

(*f*) *Beynon* v. *Godden*, 3 Ex.D. 263; 48 L.J. Ex. 80.

Lien of shipwrights.—A shipwright has a lien on a ship in his dock where he is to be paid in ready money as soon as the repairs are finished and no credit is given (*g*), and so has a contractor who agrees to furnish engines, &c., to a ship, and even if part of the price is paid he retains his lien for the remainder (*h*).

Indemnification of agents.—The principal is bound to indemnify his agent in respect of all payments which may be made by the latter in the due course of his employment (*i*). If the agent has necessarily incurred liabilities and expenses in following out his instructions *bonâ fide*, he may sue the principal upon an implied promise of indemnity (*k*); but he cannot resort to the principal for an indemnity against loss which has arisen not in pursuance of his employment or from any wrongful act of the principal (*l*); nor against the consequences of his own default, wrongful act, or want of skill in the execution of his commission (*m*); although a general indemnity against all expenses to which he may be put in executing his commission may have been given to him by his employer (*n*). Nor is he entitled to be indemnified in respect of loss caused not by reason of his having entered into contracts which he was authorised to enter into by his principal, but by reason of his own insolvency (*o*). If the agent, in the execution of his commission, has been compelled to pay money on behalf of the principal, he is entitled to recover the amount from the latter, whether the principal has or has not been relieved from liability by the payment (*p*). Where A. employed B. as a broker to buy shares in a company, according to the rules of the Stock Exchange, for a certain account day, and B., in accordance with such rules, paid for and took a transfer of the shares on that day, it was held that A. was bound to repay B. the amount so paid, although before such account day the company was being wound up under 25 & 26 Vict. c. 89, s. 153, which enacted that every transfer of shares should then be void, unless the court otherwise

(*g*) *Raitt* v. *Mitchell*, 4 Campb. 146; *Franklin* v. *Hosier*, 4 B. & Ald. 341.

(*h*) *Westlake*, *In re*, *Willoughby*, *Ex parte*, 16 Ch.D. 604.

(*i*) *Risbourg* v. *Bruckner*, 3 C.B. N.S. 812; 27 L.J. C.P. 90; *Taylor* v. *Stray*, 2 C.B. N.S. 175; 26 L.J. C.P. 287; *Westropp* v. *Solomon*, 8 C.B. 345, 369; 19 L.J. C.P. 1.

(*k*) *Adamson* v. *Jarvis*, 4 Bing. 66; 5 L.J. (O.S.) C.P. 68; *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1; *Rawlings* v. *Bell*, 1 C.B. 951; 14 L.J. C.P. 265.

(*l*) *Halbronn* v. *International Horse Agency and Exchange*, (1903) 1 K.B. 270; 72 L.J. K.B. 90.

(*m*) *Toplis* v. *Grane*, 5 Bing. N.C. 636, 648; 9 L.J. C.P. 180; *Farebrother* v. *Ansley*, 1 Camp. 343, 347.

(*n*) *Ibbett* v. *De la Salle*, 30 L.J. Ex. 44; 6 H. & N. 233.

(*o*) *Duncan* v. *Hill*, L.R. 8 Ex. 242; 42 L.J. Ex. 179. See, however, *Hartas* v. *Ribbons*, 22 Q.B.D. 254; 58 L.J. Q.B. 187; *Ellis* v. *Pond*, (1898) 1 Q.B. 426; 67 L.J. Q.B. 345.

(*p*) *Brittain* v. *Lloyd*, 14 M. & W. 762; 15 L.J. Ex. 43; *Pettman* v. *Keble*, 9 C.B. 701; 19 L.J. C.P. 325.

ordered (*q*). Where a country stockbroker, instructed to purchase stocks and shares through brokers on the London Stock Exchange, purchased shares of such brokers for a lump sum comprising both the price paid by the brokers to the jobber and the remuneration of the brokers, it was held that he had dealt with the brokers not as agents, but as principals, and therefore not in accordance with his authority, and that he was not entitled to indemnity from his clients (*r*).

Breach of warranty of authority by agents.—Where an agent pretended to be authorised by a specified firm to purchase a ship on their behalf, and it turned out that he had no authority, and the shipowner was obliged to look out for another purchaser of the vessel, and lost 250*l.* on the re-sale, it was held that the 250*l.* was the measure of damage in an action against the agent for a breach of an implied undertaking that the authority which he professed to have did in point of fact exist (*s*). Where an agent pretended to be authorised to grant a lease, and it turned out that he had no such authority, it was held that the intended lessee was entitled to recover the value of the lease and all costs paid and incurred by him in endeavouring to enforce specific performance down to the time when the agent disclosed the fact of his want of authority, but not the damages and costs arising out of an agreement for the re-sale by the intended lessee of the lease (*t*). Where a principal entrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum, and fraudulently appropriates the difference, the principal cannot redeem the securities without paying all that has been lent, although the agent has obtained the loan by fraud, and the lender, though acting *bonâ fide*, did not know or enquire if the agent had authority to borrow (*u*).

Damages for breach of warranty of authority—Costs of previous legal proceedings.—A defendant is responsible in damages for the ordinary consequences of the wrong done. So where a land agent professed to have authority from a landowner to let

(*q*) *Chapman* v. *Shepherd*, L.R. 2 C.P. 228; 36 L.J. C.P. 113; *Biederman* v. *Stone*, L.R. 2 C.P. 504; 36 L.J. C.P. 198.

(*r*) *Johnson* v. *Kearley*, (1908) 2 K.B. 514; 77 L.J. K.B. 904.

(*s*) *Simons* v. *Patchett*, 7 E. & B. 568; 26 L.J. Q.B. 195; *National Coffee Palace Co., In re, Panmure, Ex parte*, 24 Ch.D. 367; 53 L.J. Ch. 57; *Meek* v. *Wendt*, 21 Q.B.D. 126; affirmed by C.A., W.N. 1889, p. 14; and see, further, as to damages recoverable for false representation of authority by agents, *Hughes* v. *Græme*, 33 L.J. Q.B. 335; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *ante*, p. 351.

(*t*) *Spedding* v. *Nevell*, L.R. 4 C.P. 212; 38 L.J. C.P. 133; *Godwin* v. *Francis*, L.R. 5 C.P. 295; 39 L.J. C.P. 121.

(*u*) *Brocklesby* v. *Temperance Building Society*, (1895) A.C. 173; 64 L.J. Ch. 433; and see *Lloyds Bank, Ltd.* v. *Cooke*, (1907) 1 K.B. 794; 76 L.J. K.B. 666.

land, and signed an agreement for a lease, and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit (*x*). Where shipbrokers employed by shipowners to find freight reported that they had done so, but had not in fact done so, and the shipowners, on learning that they had not done so, continued to employ the ship under a current contract at a lower rate, it was held that the shipowners were not entitled to damages for loss of freight but only for the trouble taken, actual outlay, and the expenses of an abortive action against the intended charterers (*y*). No person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority (*z*).

Negligence of bank managers.—It is no breach of duty on the part of the manager of a bank to discount bills for companies in which he is interested, provided the advances are made within the scope of his authority and in the ordinary course of business, and no allegation of *mala fides* can be sustained, nor is he, it seems, under any obligation to disclose to the directors the fact that he is a shareholder in companies keeping accounts with the bank (*a*). So it is the duty of the shareholder who has sold shares to execute a transfer of them, although the company is winding up, and he will be liable to his broker, who has been obliged by the rules of the Stock Exchange to buy other shares for the purpose of delivery to the purchaser accordingly (*b*).

SECTION IV.

CONTRACTS FOR CARRIAGE.

Contracts for carriage of merchandise.—Every person who accepts goods for conveyance to a particular destination for

(*x*) *Collen* v. *Wright*, 7 E. & B. 311; 8 *ib.* 647; 26 L.J. Q.B. 147; 27 *ib.* 215; *Spedding* v. *Nevell*, L.R. 4 C.P. 212; 38 L.J. C.P. 133; *Randell* v. *Trimen*, 18 C.B. 786; 25 L.J. C.P. 307.

(*y*) *Salvesen* v. *Rederi Aktiebolaget Nordstjernan*, (1905) A.C. 302; 74 L.J. P.C. 96.

(*z*) Wightman, J., in *Collen* v. *Wright*, 26 L.J. Q.B 151.

(*a*) *Bank of Upper Canada* v. *Bradshaw*, L.R. 1 P.C. 479.

(*b*) *Biederman* v. *Stone*, L.R. 2 C.P 504; 36 L.J. C.P. 198.

hire agreed to be paid him for the carriage of them, impliedly lets out his labour and care in return for the hire. Such being the nature of the contract between the parties, the carrier may make a breach by negligently or wilfully omitting to take care, and an action may be brought for the breach of contract; or such negligent or wilful act may be treated as a "tort," regarding it as a breach of duty imposed by law upon the carrier. The cases upon the subject are somewhat conflicting (*c*). Of course the parties may, and in most cases practically do, enter into a specific contract of carriage, and their rights are then governed by the express terms of such contract, and the implied terms which the law will infer; but apart from any special contract, there is in every case of carriage for reward a contract between the parties.

Contracts of affreightment Charter-parties.—The execution of a formal contract is not requisite for the contract of affreightment (*d*). But goods to be carried at sea from one place to another are usually shipped under a charter-party or a bill of lading. A charter-party is a contract whereby the shipowner or the shipmaster covenants or agrees for the use of the ship by the charterer for some specified period of time, or for a particular voyage or adventure. The contract derives its name from the Latin *charta partita*, there being anciently as many divided parts of the contract as there were parties to it, each party having his part as a security against fraud or mistake. The customary stipulations on the part of the shipowner or master are, that the ship shall be tight and staunch, well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by a day appointed to receive the cargo, shall wait a certain number of days to take it on board, and, after lading, shall sail without unnecessary delay for the destined port, and there (*e*) deliver the goods in proper order and condition to the order of the charterer. The charterer, on the other hand, usually covenants to load the ship after she shall be ready to receive her cargo, unload her within a certain number of days, and pay freight at so much per ton according to the tonnage of the vessel, or according to the quantity of

(*c*) See *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292; *Marshall* v. *Y. & N. Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201; *Berringer* v. *G. E. Ry.*, 4 C.P.D. 163; 48 L.J. C.P. 400; *Fleming* v. *M. S. & L. Ry.*, 4 Q.B.D. 81; *Foulkes* v. *Met. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361.

(*d*) *Rederi Aktiebolaget Nordstjernan* v. *Salvesen & Co.*, (1903) 6 F. 64; *Lidgett* v. *Williams*, 4 Hare, 456.

(*e*) Or it may be as near thereto as the ship may safely get: *Capper* v. *Wallace*, 5 Q.B.D. 163; 49 L.J. Q.B. 50; *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 411; *Horsley* v. *Price*, 11 Q.B.D. 244; 52 L.J. Q.B. 603.

goods shipped on board, or according to the time of the ship's employment. *Primâ facie*, the law of the place where a contract is made is that which the parties are presumed to have adopted as the footing upon which they dealt. But a contract of affreightment made between a charterer and shipowner of different nationalities in a place where they are both foreigners may, under some circumstances, be construed by the law of the nation of the ship (*f*).

Possession of ship.—Although the shipowner, by the charter-party, expressly grants or demises the vessel to be used by the charterer, the contract will, nevertheless, not amount in general to a demise or bailment of the ship to the charterer, so as to clothe him with the possession of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew (*g*). The important matter to be considered in each case is the language of the charter-party. So, if the intention of the parties appears to have been that the vessel should be absolutely under the control, and subject to the orders and directions, of the charterer; if she was to be employed in warfare, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and to be at his general disposal for any service, the courts may give effect to the contract as a demise of the ship (*h*).

Parties to charter-parties.—If the parties have contracted by deed, the contract is with those who have executed the instrument, and covenanted therein in their own names, or by some known title or description. If the charter-party has been entered into and executed by the owners alone, they alone are liable upon it; whilst, if the master enters into and executes the contract in his own name the contract is with him alone. If the charter-party contains covenants both on the part of the owners and the master for the conveyance of the cargo, and has been executed by both, either the owners or the master are responsible at the election of the covenantee (*i*). Where the master is also part owner of the vessel, negligence on his part exclusively as master will fall within an exception of "neglect and default of master in navigating the ship" (*k*). Shipbrokers

(*f*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; *The Gaetano*, 7 P.D. 137; 51 L.J. P. 67.

(*g*) *Christie* v. *Lewis*, 5 Moore, 253; 2 B. & B. 410; *Saville* v. *Campion*, 2 B. & Ald. 510; *Dean* v. *Hogg*, 4 M. & Sc. 195; 3 L.J. C.P. 113; *Omoa and Cleland Coal and Iron Co.* v. *Huntley*, 2 C.P.D. 464; *Weir* v. *Union S.S. Co.*, (1900) A.C. 525; 69 L.J. Q.B. 809.

(*h*) *Trinity House* v. *Clark*, 4 M. & S. 295, 299; *Hutton* v. *Bragg*, 7 Taunt. 14.

(*i*) *Repetto* v. *Millar's Karri and Jarrah Forests, Ltd.*, (1901) 2 K.B. 306, 310; 70 L.J. K.B. 561.

(*k*) *Westport Coal Co.* v. *McPhail*, (1898) 2 Q.B. 130; 67 L.J. Q.B. 674.

contracting as agents, though in fact they had no principals and were themselves the principals, have been held entitled to sue upon the contract entered into by them (*l*).

When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, and the vessel is employed by the latter as a general ship for the conveyance of merchandise, the charterer becomes the carrier of the goods shipped, and the master is his servant and agent whilst procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the shipowners; the latter, consequently, cannot be made responsible for the loss of, or injury to, the goods shipped under such contract (*m*). So the master may be agent of the charterer for some purposes and agent of the shipowners for other purposes, and in respect of his acts in the latter capacity the shipowners will be bound (*n*). So the contract may provide that the shipowner is not to be liable for the master's negligence (*o*). If the charter-party operates merely as a contract between the charterer and the shipowners for the conveyance by the latter of goods and merchandise to be shipped by the charterer, the shipowners are the carriers of the goods, and will be responsible to the charterer for the non-conveyance of them. If the ship is put up as a general ship, without any intimation that she is under charter, and third parties ship goods and take bills of lading from the master, the owners will be responsible for the proper stowage and safe carriage of the goods so shipped. In such a case if the master refuses to sign bills of lading, except "as per charter-party," the shipper cannot be compelled to accept such bills, but may insist on having his goods returned (*p*). Although the shipowners are not parties to a charter-party, entered into by the master in his own name on their behalf, yet they are responsible for a breach of those duties and obligations which attach to them in their character of carriers, independently of the charter-party. Thus, where the owners of a vessel employed an unskilful master, through whose negligence the cargo was lost, they were held responsible for the loss, although the shipment was under a charter-party executed by the master, who cove-

(*l*) *Harper & Co.* v. *Vigers Bros.*, (1909) 2 K.B. 549; 78 L.J. K.B. 876.

(*m*) *James* v. *Jones*, 3 Esp. 27; *Major* v. *White*, 7 C. & P. 41; *ante*, p. 341; *Colvin* v. *Newberry*, 1 Cl. & F. 283, 297.

(*n*) *Turner* v. *Haji Goolam Mahomed Azam*, (1904) A.C. 826; 74 L.J. P.C. 17.

(*o*) *Krüger & Co.* v. *Moel Tryvan Ship Co.*, (1907) A.C. 272; 76 L.J. K.B. 985.

(*p*) *Peek* v. *Larsen*, L.R. 12 Eq. 378; 40 L.J. Ch. 763; see *Jones* v. *Hough*, 5 Ex.D. 115; 49 L.J. Ex. 211; *Rayner* v. *Rederiaktiebolaget Condor*, (1895) 2 Q.B. 289; 64 L.J. Q.B. 540.

nanted to convey the cargo to its destination (*q*). Where there is a breach of the contract of affreightment, an action for the breach of such contract, and of the implied promises and engagements resulting from the acceptance of goods to be carried for hire, lies either against the owners who appoint the master to the command of the vessel, and constitute him their agent for the employment of the ship, or against the master who has accepted the goods to be carried, whether the contract is expressed to be made, or whether the goods have been accepted by the master, in his own name only, or for and on behalf of his principals and employers; but, when the plaintiff has elected to proceed against and has sued one, the other is discharged (*r*). An agent is not ordinarily liable upon simple contracts entered into by him in a representative character on behalf of his principal; but the master of a ship is considered to be something more than a mere agent, and is made responsible accordingly (*s*).

Performance of terms and conditions of contract.—If, by a charter-party, a shipowner agrees that his ship shall sail to a "safe port" to take in a cargo, the naming of a "safe port" is a condition precedent to the shipowner's liability to send out the vessel (*t*). The voyage begins from the time the vessel breaks ground to proceed to her place of loading; so that, if the charter-party contains the usual exception of dangers and accidents of seas, rivers, and navigation during the voyage, and the vessel is delayed or hindered by foul weather in getting there, the delay is within the exception (*u*). Where by the terms of a charter-party the cargo was to be loaded from the shore "at ship's risk," and, through one of the perils excepted, a part of the cargo was lost between the shore and the ship, it was held that the words "ship's risk" did not mean absolute risk, but that the risk was subject to the same exceptions as if the goods were loaded on board (*x*). If the shipowner agrees that the vessel shall leave England on or before a particular day to bring back a cargo from a foreign port, or that she shall arrive at a foreign port by a particular day and shall be ready to receive cargo, the departure or arrival of the vessel at the time

(*q*) *Leslie* v. *Wilson*, 6 Moore, 429; 3 Br. & B. 171; *Fletcher* v. *Braddick*, 2 Bos. & P. N.R. 186; *Fenton* v. *Dublin St. P. Co.*, 8 Ad. & E. 843; 8 L.J. Q.B. 28.

(*r*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L.J. Ex. 172.

(*s*) *Boson* v. *Sandford*, 1 Show. 101, 104; *Morse* v. *Slue*, 1 Ventr. 190, 238; *Liver Alkali Co.* v. *Johnson*, L.R. 9 Ex. 38; 43 L.J. Ex. 216.

(*t*) *Rae* v. *Hackett*, 12 M. & W. 724; 13 L.J. Ex. 216.

(*u*) *Barker* v. *M'Andrew*, 18 C.B. N.S. 759; 34 L.J. C.P. 191; *The Carron Park*, 15 P.D. 203; 59 L.J. P. 74; *Traae and Lennard, In re* (*S.S. Rikard Nordraak*), (1904) 2 K.B. 377; 73 L.J. K.B. 553.

(*x*) *Nottebohn* v. *Richter*, 18 Q.B.D. 63; 56 L.J. Q.B. 35.

specified may constitute a condition precedent to the freighter's liability to provide the cargo, and use the ship, and pay freight (*y*). Whether it will do so or not depends on the intention of the parties, to be gathered from the language they have used, and that intention may be inferred from the consequences of the breach; so that, if the delay entirely defeats the object of the freighter in taking up the vessel, the agreement for departure or arrival by a certain day will be a condition precedent (*z*). The phrase "load in regular turn" usually refers to the regulations of the port of loading, but may have a different meaning, *e.g.*, load in regular turn of a particular colliery (*a*). Where, by charter-party, the freighter covenanted to pay freight at a specified rate, so much of the freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days after arrival there, and the remainder at stated periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight (*b*). The contract may provide for alternative modes of performance; but where a bill of lading provided that goods were to be taken from the ship by the consignees (at their expense) immediately after arrival and as fast as steamer can deliver, or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods, that was held not to deprive the shipowner of his ordinary remedy for breach of the bill of lading (*c*). A shipowner by entering into a charter-party impliedly undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charter-party (*d*); and if the ship is not so fit, and cannot be made so in such a time as not to frustrate the object of the voyage, the charterer may decline to put a cargo on board, and may maintain an action against the shipowner (*e*). No cargo-carrying steamship can be considered to be seaworthy

(*y*) *Glaholm* v. *Hays*, 2 Sc. N.R. 471; 10 L.J. C.P. 98; *Shadforth* v. *Higgin*, 3 Campb. 385; *Lovatt* v. *Hamilton*, 5 M. & W. 644; *Oliver* v. *Fielden*, 4 Exch. 135; 18 L.J. Ex. 353; *Crockewit* v. *Fletcher*, 1 H. & N. 912; 26 L.J. Ex. 153; *Behn* v. *Burness*, 3 B. & S. 759; 32 L.J. Q.B. 204.

(*z*) *McAndrew* v. *Chapple*, L.R. 1 C.P. 843; 35 L.J. C.P. 281.

(*a*) *Barque Quilpué, Ltd.* v. *Brown*, (1904) 2 K.B. 264; 73 L.J. K.B. 596.

(*b*) *Graves* v. *Legg*, 9 Exch. 717; 23 L.J. Ex. 231.

(*c*) *The Arne*, (1904) P. 154; 73 L.J. P. 34.

(*d*) *Cohn* v. *Davidson*, 2 Q.B.D. 455; 46 L.J. Q.B. 305; *Queensland National Bank* v. *P. & O. S. Navigation Co.*, (1898) 1 Q.B. 567; 67 L.J. Q.B. 402; *Rathbone Bros.* v. *McIver, Sons & Co.*, 72 L.J. K.B. 703; *McFadden* v. *Blue Star Line*, (1905) 1 K.B. 697; 74 L.J. K.B. 423; *Nelson Line (Liverpool)* v. *Jas. Nelson & Sons*, (1908) A.C. 16; 77 L.J. K.B. 82.

(*e*) *Stanton* v. *Richardson*, L.R. 9 C.P. 390; 43 L.J. C.P. 230; *Tully* v. *Howling*, 2 Q.B.D. 182; 46 L.J. Q.B. 388.

if she cannot have on board such an equipment of coal as will be sufficient to take her to the port of destination (*f*). Where plaintiffs chartered defendants' ship to load a full and complete cargo and owing to defendants taking on board at the first port of discharge bunker coal intended for use on a prospective voyage and in consequence the ship had to be lightened at the next port of discharge in order to get over the bar, the defendants were held liable to recoup the plaintiffs the expense incurred by them in lightening the ship (*g*). The unseaworthiness of the ship must be the proximate cause of the damage, however, and damage sustained by a cargo owner from a peril of the sea excepted in the contract of affreightment cannot be claimed for on the ground of the unseaworthiness (*h*). Where certain dangers during the voyage were excepted, and by a separate clause the charterers were to have the option of cancelling the charter-party if the ship did not arrive ready to load on a certain date, and the ship arrived at the date, but in consequence of the excepted dangers was not ready to load, it was held that the exception clause applied only to the voyage, and not to the readiness to load, and that the charterers might cancel the charter-party (*i*). Provisions in a charter-party made "for owners' and charterers' equal benefit" must be construed with reference to what each has contributed towards securing the benefit (*k*).

Representations in charter-parties.—If a vessel is described in a charter-party as A 1, it is a warranty that she is A 1 at the time the description is given, but not that she shall continue so, or retain the same letter on her arrival at the port of loading (*l*). A representation in a charter-party that the ship is "now at sea, having sailed three weeks ago," is a warranty (*m*); and describing her as "the steamship H." is a warranty that the principal motive power is steam (*n*); but a representation that she is 180 tons when she is 200 is mere description and not a warranty (*o*). A statement in a charter-

(*f*) *The Vortigern*, (1899) P. 140, 153; 68 L.J. P. 49. It makes no difference that the charterer is to provide and pay for the coal: *McIver & Co.* v. *Tate Steamers*, (1903) 1 K.B. 362; 72 L.J. K.B. 253.

(*g*) *Darling* v. *Raeburn*, (1907) 1 K.B. 846; 76 L.J. K.B. 570.

(*h*) *The Europa*, (1908) P. 84; 77 L.J. P. 26.

(*i*) *Smith* v. *Dart & Son*, 14 Q.B.D. 105; 54 L.J. Q.B. 121. As to the duration of a voyage, see *The Accomac*, 15 P.D. 208; 59 L.J. P. 91.

(*k*) *Booker & Co.* v. *Pocklington S.S. Co.*, (1899) 2 Q.B. 690; 69 L.J. Q.B. 10.

(*l*) *Hurst* v. *Usborne*, 18 C.B. 144; 25 L.J. C.P. 209; *Routh* v. *Macmillan*, 33 L.J. Ex. 38; 2 H. & C. 750; *French* v. *Newgass*, 3 C.P.D. 163; 47 L.J. C.P. 361.

(*m*) *Ollive* v. *Booker*, 1 Exch. 416; 17 L.J. Ex. 21.

(*n*) *Fraser* v. *Telegraph Construction Co.*, L.R. 7 Q.B. 566; 41 L.J. Q.B. 249.

(*o*) *Barker* v. *Windle*, 6 E. & B. 675; 25 L.J. Q.B. 349.

party that the ship is expected to be at Alexandria about the 15th December is a warranty that she is then in such a place and under such engagement as that she may reasonably be expected to be at Alexandria about the day named (*p*). Whenever a descriptive statement in a charter-party is intended to be a substantive part of the contract, it will be construed as a warranty. In some cases, non-performance by the party making it will entitle the other party to repudiate the contract *in toto;* in other cases, it will only give a claim to compensation in damages for a breach of contract (*q*).

Where the charter-party stipulated that the ship should load "a cargo of ore, say about 2,800 tons," and the ship could carry 2,880 tons, it was held that charterer fulfilled his contract by loading 2,840 tons (*r*). Where it was provided that the ship should load "a cargo of sleepers and timbers," the charterer to "have the option of shipping 100 to 200 tons of general cargo," and the owners guaranteed "the ship to carry at least about 90,000 cubic feet, or 1,500 tons dead weight of cargo," it was held that the latter clause did not amount to a warranty to carry 90,000 cubic feet of sleepers and timbers, but only to a warranty of the carrying capacity of the ship (*s*).

Substantial performance of conditions precedent.—Where the plaintiff let his ship to the defendants to take a cargo on board and make delivery thereof at Naples to the agents of the defendants, and then to receive on board a return cargo, and the defendants, in consideration of the premises, agreed to provide a complete homeward cargo and pay freight, but the cargo received was seized on arrival by the Neapolitan Government, it was held that the material part of the agreement was the letting of the ship and the making of the voyage, which had been performed, and that the defendants were bound to provide the return cargo and pay the freight (*t*). And so, whenever a covenant is not a condition precedent to the liability of the defendants but a distinct and independent covenant, the plaintiffs will be liable in damages for the breach of it (*u*).

Time of performance.—If the vessel is to proceed to a par-

(*p*) *Corkling* v. *Massey*, L.R. 8 C.P. 395; 42 L.J. C.P. 153.

(*q*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204; *Neill* v. *Whitworth*, 34 L.J. C.P. 155; 18 C.B. N.S. 435; *Mackill* v. *Wright Brothers*, 14 App.Cas. 106; *Bentsen* v. *Taylor*, (1893) 2 Q.B. 274; 63 L.J. Q.B. 15.

(*r*) *Miller* v. *Borner*, (1900) 1 Q.B. 691; 69 L.J. Q.B. 429; cp. *Morris* v. *Levison*, 1 C.P.D. 155; 45 L.J. C.P. 409.

(*s*) *Carnegie* v. *Connor*, 24 Q.B.D. 45; 59 L.J. Q.B. 122.

(*t*) *Storer* v. *Gordon*, 3 M. & S. 308.

(*u*) *Fothergill* v. *Walton*, 8 Taunt. 576; 2 Moore, 630; *Stavers* v. *Curling*, 3 Sc. 740; 6 L.J. C.P. 41; *Pust* v. *Dowie*, 34 L.J. Q.B. 127; 5 B. & S. 33; *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204; and *supra*, note (*q*).

ticular port and there load a full cargo, the loading must be completed or be capable of being completed within a reasonable time (*x*); and, if extraordinary circumstances arise preventing the merchant from doing what he has undertaken to do, he must make compensation in damages, as he ought to have provided against the unforeseen contingency by his contract (*y*). A delay will not be considered unreasonable, however, which has arisen from a contingency the possibility of which was known to and in the contemplation of both parties to the contract (*z*). Where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other (*a*). An engagement to load with "the usual dispatch of the port" is absolute, and admits of no qualification to dispense with performance even where the performance is hindered by a casualty which the charterer could not prevent (*b*). Such an engagement covers the whole period from the time when the vessel is placed at the disposal of the charterer at the port in a condition to receive her cargo (*c*). If parties by advertisement hold out that they are ready to guarantee that a vessel shall sail on a particular day, and an intending passenger takes a berth on the strength of the assurance, the time named will be of the essence of the contract (*d*). But this is not the case, if merchandise is taken on board, and the vessel carries it to the place of destination. Where, by charter-party, the plaintiff covenanted that the vessel should sail with the *next* wind on a voyage to Cadiz, and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much by way of freight for the voyage, the substance of the covenant was considered to be that the ship should perform the intended voyage, and not merely that she should sail with the next wind, which might change every hour (*e*). As to abandon-

(*x*) *The Savona*, (1900) P. 252; 69 L.J. P. 95. As to what is a reasonable time, see *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486, 491; 67 L.J. Q.B. 795.

(*y*) *Adams* v. *Royal Mail St. P. Co.*, 5 C.B. N.S. 497; 28 L.J. C.P. 33; *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; 39 L.J. Q.B. 188; *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 511. See *post*, p. 1002.

(*z*) *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486; 67 L.J. Q.B. 795; *Barque Quilpué, Ltd.* v. *Brown*, (1904) 2 K.B. 264; 73 L.J. K.B. 596; *Jones, Ltd.* v. *Green & Co.*, (1904) 2 K.B. 275; 73 L.J. K.B. 601.

(*a*) *Cunningham* v. *Dunn*, 3 C.P.D. 443; 48 L.J. C.P. 62; *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; 39 L.J. Q.B. 188.

(*b*) *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L.J. Ex. 1.

(*c*) *Ashcroft* v. *Crow Orchard Colliery Co.*, L.R. 9 Q.B. 540; 43 L.J. Q.B. 194. See, however, the cases *post*, p. 1004.

(*d*) *Cranston* v. *Marshall*, 5 Exch. 395; 19 L.J. Ex. 340.

(*e*) *Constable* v. *Cloberie*, Palm. 397; *Bornmann* v. *Tooke*, 1 Campb. 377; *Davidson* v. *Gwynne*, 12 East, 380; *Hall* v. *Cazenove*, 4 East, 477; *Havelock* v. *Geddes*, 10 East, 564.

ment of the charter-party on the ship not being got fit within a reasonable time, see *ante*, p. 974.

If a shipowner covenants generally that a ship shall sail to a particular port, and there take on board a cargo to be provided by the charterer, the sailing of the vessel direct and without any deviation or delay to the appointed port is not a condition precedent to the charterer's liability to provide and ship the cargo; but, if the delay has been unreasonable, and the charterer has thereby lost all the benefit of the voyage, and been prevented from procuring the cargo, he will then be released from his liability upon the contract (*f*). As to limitation of time for discharge of cargo, see *post*, p. 1002.

Mode of performance—Complete cargo.—The performance of a contract that a vessel shall sail to a foreign port, and there load a particular cargo, is to be regulated, as regards the loading of the cargo, by the custom and usage of the port where the cargo is to be taken on board (*g*). But neglect to load is one thing and failure to provide a cargo to load is another and different thing, and if the latter kind of breach of contract has occurred where there was an absolute obligation to furnish a stipulated cargo the charterers will not be excused by reason of obstacles imposed by regulations of the port (*h*). At the same time, when the source from which a cargo is to come is expressly defined, no time being fixed for loading, the charterer may not always be absolutely bound to have the cargo ready for loading whenever it may be reasonably expected that there will be a berth for the ship (*i*). If the charterer has agreed to load the ship with a full and complete cargo (*k*), he is bound, in certain cases, to fill up the interstices with broken stowage (*l*). The obligation to supply any ballast that may be necessary for the safe navigation of the ship rests, however, on the shipowner (*m*).

(*f*) *Clipsham* v. *Vertue*, 5 Q.B. 265; 13 L.J. Q.B. 2; *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L.J. Ex. 26; *Hurst* v. *Usborne*, 18 C.B. 144; 25 L.J. C.P. 209; *Jackson* v. *Union Mar. Ins.*, L.R. 10 C.P. 125; 44 L.J. C.P. 27; *Dahl* v. *Nelson*, 6 App.Cas. 38, 53; 50 L.J. Ch. 511.

(*g*) *Cuthbert* v. *Cumming*, 11 Exch. 408; 24 L.J. Ex. 310; *Hudson* v. *Clementson*, 18 C.B. 213; 25 L.J. C.P. 234.

(*h*) *Ardan S.S. Co.* v. *Andrew Weir & Co.*, (1905) A.C. 501; 74 L.J. P.C. 143.

(*i*) *Per* Vaughan Williams, L.J., in *Jones, Ltd.* v. *Green & Co.*, (1904) 2 K.B. 275, 280; 73 L.J. K.B. 601; distinguishing *Grant* v. *Coverdale*, 9 App.Cas. 470; 53 L.J. Q.B. 462.

(*k*) This must be interpreted with reference to the nature of the cargo shipped: see *S.S. Isis Co.* v. *Bahr*, (1900) A.C. 340; 69 L.J. Q.B. 660. As to what is reasonable performance of the obligation to provide a cargo, see *Morris* v. *Levison*, 1 C.P.D. 155; 45 L.J. C.P. 409; *Dobell* v. *Green & Co.*, (1900) 1 Q.B. 526; 69 L.J. Q.B. 454; *Miller* v. *Borner & Co.*, (1900) 1 Q.B. 691; 69 L.J. Q.B. 429; *Jardine, Mathieson & Co.* v. *Clyde Ship. Co.*, (1910) 1 K.B. 627; 79 L.J. K.B. 634.

(*l*) *Cole* v. *Meek*, 15 C.B. N.S. 795; 33 L.J. C.P. 183. The stowage of coals with machinery is not proper stowage: *Mackill* v. *Wright Bros.*, 14 App.Cas. 106.

(*m*) *Moorsom* v. *Page*, 4 Campb. 103; *Irving* v. *Clegg*, 1 Bing. N.C. 53; 3 L.J. C.P. 265; *Weir* v. *Union S.S. Co.*, (1900) A.C. 525; 69 L.J. Q.B. 809.

It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do; but he is not responsible to the charterer, when the stevedore is appointed by the latter, although it is provided that he is to act under the master's orders; for such a provision only means that the master is to have a general control over the stevedore, so as to secure the proper trim and safety of the ship (*n*).

Impossibility of performance.—It is a rule of law that, whenever a party enters into an absolute and unqualified contract to do some particular act, impossibility of performance occasioned by inevitable accident, or by some unforeseen occurrence over which he has no control, will not release him from his contract (*o*). So, if a shipowner has covenanted to procure and ship a cargo of guano, corn, or timber at a specified port, the circumstance that no guano, corn, or timber was procurable at that port (*p*), or that its exportation had been prohibited (*q*), or that there were insufficient facilities for the loading of it (*r*), or that the loading of it was prevented by an embargo (*s*), or by the existence of a strike (*t*), or by want of water (*u*), or by the plague (*x*), will not constitute an answer to an action for the non-performance of the contract. But where both parties were aware that circumstances might render performance impossible, they may be taken to have intended that non-performance through the occurrence of such circumstances should be excused (*y*). Where a charter-party excepts certain matters and also "other causes beyond charterer's control," the latter words will be construed to refer to matters *ejusdem generis* with the antecedent exceptions (*z*), but it will not be so where the words are "of what kind soever" (*a*). The doctrine of constructive loss does not apply to contracts between shipowner and charterer but only as between the underwriter and the assured; therefore, where a shipowner who had agreed that his ship "shall proceed" to a certain port put into another port for repairs, and then abandoned the voyage without the consent of the charterer, he was held liable for damages unless it could be shown either to

(*n*) *Blaikie* v. *Stembridge*, 6 C.B. N.S. 909; 28 L.J. C.P. 329.

(*o*) See *ante*, p. 147.

(*p*) *Hills* v. *Sughrue*, 15 M. & W. 261; *Kirk* v. *Gibbs*, 1 H. & N. 815; 26 L.J. Ex. 209.

(*q*) *Blight* v. *Page*, 3 Bos. & P. 295, n.

(*r*) *Ardan S.S. Co.* v. *Andrew Weir & Co.*, (1905) A.C. 501; 74 L.J. P.C. 143.

(*s*) *Sjoerds* v. *Luscombe*, 16 East, 201.

(*t*) *Dobell* v. *Green & Co.*, (1900) 1 Q.B. 526; 69 L.J. Q.B. 454.

(*u*) *Schilizzi* v. *Derry*, 4 E. & B. 886; 24 L.J. Q.B. 193.

(*x*) *Barker* v. *Hodgson*, 3 M. & S. 267; *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 487; 14 L.J. Ex. 95.

(*y*) *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486; 67 L.J. Q.B. 795.

(*z*) *Richardsons and Samuel & Co., In re*, (1898) 1 Q.B. 261; 66 L.J. Q.B. 868; *Thorman* v. *Dowgate S.S. Co.*, (1910) 1 K.B. 410; 79 L.J. K.B. 287.

(*a*) *Larsen* v. *Sylvester & Co.*, (1908) A.C. 295; 77 L.J. K.B. 993.

be physically impossible to complete the voyage or so unreasonable as to be impossible from a business point of view (*b*). Where a vessel after sailing under charter with coals put into a port of refuge and after necessary repairs were completed the shipowner refused to reload the coal because in fact it could not safely be reshipped the charterer was held not entitled to recover for breach of contract, the shipowner not being obliged to wait an indefinite period until there should be no further risk (*c*).

Authority of agents of ship-charterers.—The agent of the charterer of a ship, to whom the ship is addressed for loading under a charter-party, has no implied authority to substitute a different voyage from that which is stipulated for by the charter-party, and cannot by agreement with the shipmaster substitute a different port of loading, or a different quality or description of cargo, from that prescribed by the charter-party (*d*).

Carriage of merchandise under bills of lading.—When the use of an entire vessel, or a certain amount of stowage therein, is not contracted for, but the merchant or owner of goods merely sends certain parcels or packages of goods on board, to be conveyed to the port of destination, the master or commander of the vessel, or some person acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two and sometimes three parts of a bill of lading (*ante*, p. 589), of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination: that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security (*e*). The bill of lading is a written or printed memorandum, signed by the master, acknowledging the shipment of the goods, and promising to deliver them at the port of destination to the consignee named, or his assigns, on payment of freight, primage, and average, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." The master, who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement; and the shipowner or charterer, who receives the fruit and earnings of the ship, is also liable upon

(*b*) *Assicurazioni Generali* v. *Bessie Morris S.S. Co.*, (1892) 2 Q.B. 652; 61 L.J. Q.B. 754.

(*c*) *The Sarona*, (1900) P. 252; 69 L.J. P. 95.

(*d*) *Sickens* v. *Irving*, 7 C.B.N.S. 165; 29 L.J. C.P. 25.

(*e*) Abbott on Shipping, 469 (ed. 14); but see remarks of Ld. Blackburn in *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App.Cas. 591, 605.

the bill of lading, although he is not named therein (*f*). It is the master's duty before signing the bills to see that the dates of shipment are correctly stated in them, and the employment by the ship's owners of brokers to arrange the terms upon which the cargo is to be carried does not relieve him from this duty (*g*). Delivery to the shipowner's servants alongside the vessel is equivalent to a delivery on board (*h*). The duty to deliver the goods under a bill of lading arises on presentment of the bill; and, if it is not presented to the master on the arrival of the ship at her place of destination, the master is not bound to keep the goods for an indefinite time on board his ship, but may deliver them to any trustworthy person to be kept until the bill of lading is presented (*i*). A bill of lading signed by the master in his own name is not conclusive upon the shipowner as to the shipment of the goods mentioned therein (*k*), provided the latter can prove affirmatively that the whole or some part of the goods were not in fact shipped (*l*). But shipowners have been held to be estopped from denying the truth of the master's statement in the bill of lading "shipped in good order and condition," where the purchasers had altered their position and acted to their own prejudice on the faith of that representation (*m*). The charter-party may provide that the bill of lading shall be conclusive evidence of the quantity shipped (*n*). And it is so in the hands of a consignee or indorsee for valuable consideration, as against the master or other person signing the same, notwithstanding such goods, or some part thereof, may not have been shipped, unless the holder of the bill of lading had actual notice at the time of receiving it, that the goods were not in fact on board. The master or other person signing may, however, exonerate himself in respect of such misrepresentation by showing that it was caused without default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims (*o*).

(*f*) *Cannan* v. *Meaburn*, 8 Moore, 127; 2 L.J. (O.S.) C.P. 60.

(*g*) *Stumore, Weston & Co.* v. *Breen*, 12 App.Cas. 698; 56 L.J. Q.B. 401.

(*h*) *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Co., Ltd.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 237.

(*i*) *Howard* v. *Shepherd*, 19 L.J. C.P. 255; 9 C.B. 321; and see the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 493, *post*, p. 992.

(*k*) *Grant* v. *Norway*, 10 C.B. 687; 20 L.J. C.P. 93; *Hubbersty* v. *Ward*, 8 Exch. 334; 22 L.J. Ex. 113; *Jessel* v. *Bath*, L.R. 2 Ex. 267; 36 L.J. Ex. 149; *Brown* v. *Powell Duffryn Coal Co.*, L.R. 10 C.P. 562; 44 L.J. C.P. 289; *Cox* v. *Bruce*, 18 Q.B.D. 147; 56 L.J. Q.B. 121.

(*l*) *Smith & Co.* v. *Bedouin St. Nav. Co.*, (1896) A.C. 70; 65 L.J. P.C. 8.

(*m*) *Compania Naviera Vasconzada* v. *Churchill and Sim*, (1906) 1 K.B. 237; 75 L.J. K.B. 94.

(*n*) *Lishman* v. *Christie*, 19 Q.B.D. 333; 56 L.J. Q.B. 538.

(*o*) 18 & 19 Vict. c. 111, s. 3. See *Parsons* v. *New Zealand Shipping Co.*, (1901) 1 Q.B. 548; 70 L.J. K.B. 404.

The person actually putting the goods on board is the shipper, and the expression "wholly," &c., only means that the master or other persons signing must not in any way be mixed up with the fraud (*p*). The consignee has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board (*q*).

Countermand of the shipment—Re-delivery to the consignor. When goods have been shipped by a charterer or consignor to be carried and delivered to the consignee, pursuant to a contract of sale, or under bills of lading, or under any contract by which the ownership and right of property in the goods have been transferred to the consignee or some third party, the consignor's power over the goods is gone, and he cannot lawfully countermand the consignment and require the goods to be delivered back to him. He cannot, after he has ceased to be owner of them, stop them *in transitu*, and prevent their delivery to the consignee, unless the latter has become bankrupt (*ante*, p. 608). But, if the goods are merely addressed to the consignor's agent for sale, or under circumstances which do not divest the consignor of his ownership and right of property in the goods, he may countermand the consignment and require the goods to be returned to him, subject to the following qualifications and restrictions. The goods must be demanded back a convenient time before the period appointed for the ship's sailing, and the demand must be accompanied by a tender of the freight, and of the reasonable costs and charges of the re-shipment and re-delivery of the goods, and the demand must appear to have been made at a time when it was reasonably in the power of the master to comply with it, without injury to the cargo or the property of other parties on board, and without creating delay in sailing (*r*). An owner of goods shipped to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster, whereby the goods are damaged so much that they cannot be profitably carried to their destination (*s*).

Loss or damage by the way.—Whenever a party has absolutely contracted to carry cargoes or merchandise from one place to another, subject to certain express exceptions, he has impliedly contracted to carry them safely (*t*); and the circum-

(*p*) *Valieri* v. *Boyland*, L.R. 1 C.P. 382; 35 L.J. C.P. 215.

(*q*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289; *ante*, pp. 63, 591.

(*r*) *Thompson* v. *Small*, 1 C.B. 328; 14 L.J. C.P. 157.

(*s*) *Blasco* v. *Fletcher*, 14 C.B. N.S. 147; 32 L.J. C.P. 284.

(*t*) *Rogers* v. *Head*, Cro.Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.

stance that he has been prevented from fulfilling his contract by some casualty or inevitable accident, *e.g.*, by seizure by revenue authorities, will constitute no answer to an action brought against him for the recovery of damages for the breach of contract, if the casualty has not been expressly provided against by the contract (*u*). If the vessel becomes disabled, and gets to port in a sinking state, the master is bound to tranship and forward the cargo, if he has the means of transhipment at hand (*x*), and is allowed a reasonable time to do so (*y*); but, if the vessel is wrecked, and the master has no means of transhipment (*z*), and no prospect of obtaining any, or if the cargo is of a perishable nature, and cannot be transhipped and forwarded to the place of destination without risk of serious injury or total destruction, he is then clothed with an implied authority from the owners of such cargo to do the best he can with it for their benefit; and if, being unable to communicate with the owner, he acts *bonâ fide* with ordinary diligence, forethought, and prudence, he exempts his employers, the shipowners, from all liability for the loss (*a*). But where there is no urgent necessity for selling the goods, and the master can communicate with the owners, he must not sell without leave of the owners (*b*), or such sale will be void (*c*). There is a duty on the master of a ship as representing the shipowner to take reasonable care of the goods entrusted to him, both so as to preserve them on board the ship during the ordinary incidents of the voyage, and also so as when reasonably practicable under all the circumstances to check the loss resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading; and for neglect of this duty by the master, the shipowner is responsible to the shipper (*d*). He must exercise his discretion whether he can carry on the cargo without risk to the ship (*e*), but he is not entitled to carry on goods in an unfit state against the express

(*u*) *Spence* v. *Chodwick*, 10 Q.B. 517; 16 L.J. Q.B. 313; *Evans* v. *Hutton*, 5 Sc. N.R. 670; 12 L.J. C.P. 17; *Gosling* v. *Higgins*, 1 Campb. 451. As to the form of bringing an action *in rem* for damage to cargo, see *The Assunta*, (1902) P. 150; 71 L.J. P. 75.

(*x*) *Cannan* v. *Meaburn*, 8 Moore, 127; 2 L.J. (O.S.) C.P. 60.

(*y*) *The Soblomsten*, L.R. 1 A. & E. 293; 36 L.J. Adm. 5.

(*z*) As to the duty of the master to tranship and forward the goods, see *Shipton* v. *Thornton*, 9 Ad. & E. 337; 8 L.J. Q.B. 73; *Gibbs* v. *Grey*, 2 H. & N. 30; 26 L.J. Ex. 286; *Mathews* v. *Gibbs*, 2 E. & E. 282; 30 L.J. Q.B. 55; but see *The Hamburg*, 32 L.J. Adm. 161.

(*a*) *The Gratitudine*, 3 Rob. 261; *Ireland* v. *Thompson*, 4 C.B. 168; 17 L.J. C.P. 241; *Australasian Steam Co.* v. *Morse*, L.R. 4 P.C. 222.

(*b*) *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Q.B. 566.

(*c*) *Atlantic Mutual Ins. Co.* v. *Huth*, 16 Ch.D. 474.

(*d*) *Notara* v. *Henderson*, L.R. 7 Q.B. 225; 41 L.J. Q.B. 158; *S.S. City of Lincoln* v. *Smith*, (1904) A.C. 250; 73 L.J. P.C. 45.

(*e*) *The Savona*, (1900) P. 252; 69 L.J. P. 95.

wish of the shippers in order to earn the freight (*f*). If a ship is greatly infested by rats which do serious damage to the cargo, the undertaker of the work of carrying is responsible for the injury, although he may have kept cats on board for the express purpose of destroying the rats (*g*). So, if a ship is rendered unseaworthy by being so laden as to become top-heavy, the shipowner is liable where deck cargo has been lost in consequence (*h*). Where after a disaster at sea the shipowner in the interests of the whole adventure, and before he has elected to abandon the ship, incurs reasonable and necessary expenses in landing a perishable cargo and carrying it to a place of safety, the expenses so reasonably and necessarily incurred are either a general average charge or a charge against cargo or against cargo and freight as the case may be (*i*).

Implied promise to carry safely.—Whenever goods have been bailed by one man to another upon the faith of an express or implied undertaking by the latter to carry them to a distant part, and an action is brought to recover damages for the breach of this engagement, it is no answer to say that the goods were lost by the way, the loss itself affording *primâ facie* evidence of neglect and want of care (*k*). If the goods have been stolen, or consumed by fire, or destroyed by accident, without fault or want of care on the part of the undertaker of the work, the latter stands excused, and may avail himself of the robbery or the unavoidable accident as an answer to an action brought against him for the non-delivery of the goods to the consignee. "He is only," observes Holt, C.J., "to do the best he can; and if he be robbed, &c., it is a good account; for it would be unreasonable to charge him with a trust further than the nature of the thing puts it into his power to perform it" (*l*). A loss by theft or secret purloining of goods is *primâ facie* evidence of negligent keeping; and the carrier must rebut this presumption by showing that he had taken all such precautions as appeared to be necessary to guard against it (*m*). In the contract of a shipowner to carry goods shipped on board his vessel there is an implied warranty that the vessel shall be seaworthy and this warranty attaches when she sets sail with the cargo on

(*f*) *Notara* v. *Henderson*, L.R. 7 Q.B. 225; 41 L.J. Q.B. 158.

(*g*) *Laveroni* v. *Drury*, 8 Exch. 170; 22 L.J. Ex. 2; *Kay* v. *Wheeler*, L.R. 2 C.P. 302; 36 L.J. C.P. 180.

(*h*) *S.S. City of Lincoln* v. *Smith*, (1904) A.C. 250; 73 L.J. P.C. 45.

(*i*) *Rose* v. *Bank of Australasia*, (1894) A.C. 687; 63 L.J. Q.B. 504.

(*k*) *Parry* v. *Roberts*, 3 Ad. & E. 120; 4 L.J. K.B. 189; *The Pearlmoor*, (1904) P. 286, 292; 73 L.J. P. 50.

(*l*) Holt, C.J., *Coggs* v. *Bernard*, 1 Smith's L.C. 173 (ed. 11).

(*m*) *Hodgson* v. *Fullarton*, 4 Taunt 787; *Hatchwell* v. *Cooke*, 6 Taunt. 577; *Queensland National Bank* v. *P. & O. S. Navigation Co.*, (1898) 1 Q.B. 567; 67 L.J. Q.B. 402.

board (*n*). A clause by which the shipowner is not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise" will not cover a defect which was obvious at the commencement of the voyage (*o*).

Limitation of liability by special contract.—Generally speaking, it is not competent to a party to enter into a contract for the performance of a particular duty, and by the same contract to stipulate that he shall be exempt from *all* legal responsibility if he neglects to do what he has undertaken to perform (*p*). We cannot, observes Lord Ellenborough, construe a contract for the carriage of goods between the owners of vessels carrying goods for hire and the persons putting the goods on board, so as to make the owners say "We will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious; for this would in effect be saying, 'We will be at liberty to receive your goods on board a vessel, however leaky; we will not be bound even to provide a crew equal to the navigation of her; and, if through these defaults on our part the goods are lost, we will pay nothing'" (*q*). But an exemption in general terms will not be sufficient to relieve from liability for loss or damage caused by negligence; the intention so to relieve from liability must be manifested by express terms (*r*). And the shipowner will not be relieved from his implied duty to take care where the agreement alleged to absolve him is so ill expressed that it is impossible to gather from it the real intention of the parties (*s*).

A stipulation in a bill of lading that the shipowner is not to be accountable for leakage or breakage absolves him from responsibility for leakage and breakage the result of mere accident, where no blame is imputable, or for leakage the result of bad stowage, where the shippers have themselves superintended the stowage (*t*), but not from the obligation which the

(*n*) *Kopitoff* v. *Wilson*, 1 Q.B.D. 377; 45 L.J. Q.B. 436; *Cohn* v. *Davidson*, 2 Q.B.D. 455; 46 L.J. Q.B. 305; *Rathbone Bros.* v. *M'Iver, Sons & Co.*, 72 L.J. K.B. 703; *M'Fadden & Co.* v. *Blue Star Line*, (1905) 1 K.B. 697; 74 L.J. K.B. 423; but in *Schloss* v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 211, the contrary was held (although it was admitted that an action would lie for negligence).

(*o*) *S.S. Waikato* (*Cargo Owners of*) v. *New Zealand Shipping Co.*, (1899) 1 Q.B. 56; 68 L.J. Q.B. 1.

(*p*) *Sutton* v. *Ciceri*, 15 App.Cas. 144; *Nelson Line* (*Liverpool*) v. *Jas. Nelson & Sons*, (1908) A.C. 16; 77 L.J. K.B. 82.

(*q*) *Lyon* v. *Mells*, 5 East, 438; *Ellis* v. *Turner*, 8 T.R. 531; see, however, *The Duero*, L.R. 2 A. & E. 293; 38 L.J. Adm. 69.

(*r*) *Price* v. *Union Lighterage Co.*, (1904) 1 K.B. 412; 73 L.J. K.B. 222; *The Pearlmoor*, (1904) P. 286; 73 L.J. P. 50; *Elderslie S.S. Co.* v. *Borthwick*, (1905) A.C. 93; 74 L.J. K.B. 338. For an instance of a shipowner's liability being limited even in case of loss through negligence, see *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.*, (1908) 1 K.B. 796; 77 L.J. K.B. 417.

(*s*) *Nelson Line* (*Liverpool*) v. *Jas. Nelson & Sons*, *supra*.

(*t*) *Ohrloff* v. *Briscall*, L.R. 1 P.C. 231; 35 L.J. P.C. 63.

law imposes upon him of taking reasonable care of goods entrusted to him to be carried (*u*). So an exception in a bill of lading of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever," absolves from liability where cargo is damaged through the closing of ventilators necessitated by stress of weather (*x*), though not from liability for damage arising from a collision caused by gross negligence of the ship's master and crew (*y*). And where shipowners were by the bill of lading exempted from liability for loss arising from the default of their stevedores in the loading, stowing or discharging of the ship, they lost the benefit of that exemption through deviation of the ship even although the damage sustained occurred entirely at the port of discharge (*z*). Where a bill of lading exempted the shipowner from liability for negligence of pilot or other person in service of the ship, &c., "whether in navigating the ship or otherwise; loss or damage arising from rain, storage, or contact with other goods being excepted," and the goods were exposed to rain and contact with other wet goods, and were thereby injured, it was held that the words "or otherwise" referred to negligence in bringing about the excepted loss other than loss caused in navigating the ship, and, therefore, that the shipowner was not liable (*a*). A clause providing that a shipowner shall not be responsible for any loss to a passenger's luggage from any default of his servants will protect him against loss occasioned by the felonious acts of his servants (*b*). An exception of loss by thieves means *primâ facie* persons outside the ship, and not belonging to it (*c*). Where a charter-party contained an exemption from liability for negligence of master or crew in the navigation of the ship, and in the ordinary course of the voyage, it was held that this did not protect the shipowner from liability for injury to the cargo caused by the negligence of one of the officers of the ship after she had arrived at the wharf but before her cargo was discharged (*d*).

Loss by the act of God, dangers and accidents of the seas,

(*u*) *Phillips* v. *Clark*, 2 C.B. N.S. 164; 26 L.J. C.P. 168; *Czech* v. *General Steam Navigation Co.*, L.R. 3 C.P. 14; 37 L.J. C.P. 3.

(*x*) *The Thrunscoe*, (1897) P. 301; 66 L.J. P. 173.

(*y*) *Lloyd* v. *Gen. Iron Screw Col. Co.*, 3 H. & C. 284; 33 L.J. Ex. 269.

(*z*) *Thorley* v. *Orchis S.S. Co.*, (1907) 1 K.B. 660; 76 L.J. K.B. 595.

(*a*) *Norman* v. *Binnington*, 25 Q.B.D. 475; 59 L.J. Q.B. 490; *Baerselman* v. *Bailey*, (1895) 2 Q.B. 301; 64 L.J. Q.B. 707.

(*b*) *Marriott* v. *Yeoward Bros.*, (1909) 2 K.B. 987; 79 L.J. K.B. 114.

(*c*) *Taylor* v. *Liverpool & G. W. Steam Co.*, L.R. 9 Q.B. 546; 43 L.J. Q.B. 205; *Steinman* v. *Angier Line*, (1891) 1 Q.B. 619; 60 L.J. Q.B. 425.

(*d*) *The Accomac*, 15 P.D. 208; 50 L.J. P. 91. As to negligence of a stevedore, see *The Ferro*, (1893) P. 38; 62 L.J. P. 48.

rivers, and navigation.—From losses occasioned by the act of God, the King's enemies, and the dangers and perils of the sea and of navigation, the carrier by water is, and always has been, exempt by the common law; but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him, from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct, or want of skill of the persons whom he has entrusted with the navigation of the vessel (*e*). The expression "act of God" denotes natural accidents, such as lightning, earthquake, and tempest; if the loss could not be prevented by any reasonable precaution the carrier will be exempt (*f*). And the term "dangers and accidents of the sea and of navigation" denotes the dangers and accidents peculiar to the ocean and to navigation from port to port which no human care or skill can guard against or surmount, such as accidents resulting from the irresistible violence of the winds and waves, and from tides and currents (*g*); the destruction of a perishable cargo or of living animals from the rolling of a ship in a storm (*h*); jettison of goods from irresistible necessity to lighten the ship and save her from foundering (*i*); the grounding of a vessel on the hard and uneven bottom of a dry harbour, in which she had been obliged to take refuge (*k*); or on a sunken rock or sandbank not generally known, and not marked on the ordinary charts or maps; irresistible attacks by pirates (*l*); the accidental breaking of tackle by which the vessel is moored in port (*m*); or accidental collisions in fogs or storms, where no blame is imputable to either of the vessels striking together (*n*); or where the collision is caused by the negligence of the other vessel (*o*). If a *primâ facie* case of perils of the seas is made out and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests (*p*).

Loss occasioned by negligence or misconduct.—The general rule in insurance that the immediate and not the remote cause of loss is to be considered does not apply as between the owner and carrier of goods. If a vessel deviates from its proper course, and sails unnecessarily through dangerous straits and channels,

(*e*) Mansfield, C.J., in *Hotham* v. *East India Co.*, 1 Doug. 272, 278; *Siordet* v. *Hall*, 1 Moo. & P. 561; 6 L.J. (O.S.) C.P. 137.

(*f*) *Nugent* v. *Smith*, 1 C.P.D. 423, 434; 45 L.J. C.P. 697. See *post*, p. 1027.

(*g*) *Hodgson* v. *Malcolm*, 2 B. & P. N.R. 336.

(*h*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 110.

(*i*) *Bird* v. *Astock*, 2 Bulst. 280.

(*k*) *Fletcher* v. *Inglis*, 2 B. & Ald. 315.

(*l*) *Pickering* v. *Barclay*, Styles, 132.

(*m*) *Laurie* v. *Douglas*, 15 M. & W. 746.

(*n*) *Buller* v. *Fisher*, 3 Esp. 67.

(*o*) *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 18 Q.B.D. 17; 56 L.J. Q.B. 38.

(*p*) *The Northumbria*, (1906) P. 292; 75 L.J. P. 101.

or into seas infested with pirates, and is wrecked or plundered in consequence of such deviation, the loss, though proximately caused by what is usually termed "a peril of the sea," is deemed to have been occasioned by the misconduct of the master or commander (*pp*). So the carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers is a breach of duty to them and will render liable in damages for delay of delivery caused by seizure of the ship (*q*). A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in a bill of lading (*r*). If the cargo is seriously damaged or destroyed by rats, the loss is not the result of a danger or an accident of the seas, but of neglect and want of care on the part of the master and crew (*s*). But if rats gnaw a hole in any part of the ship whereby sea water is let in and damages the cargo, that is a peril of the sea within the exception (*t*). So, if sea water is allowed to enter the tank in which the goods are being carried through negligent opening of a valve by the engineer, this is a damage arising from "improper navigation" of the ship (*u*). And if hooks are used recklessly by stevedores employed by the ship and there is short delivery of the cargo in consequence, that is a loss by accident caused by negligence of the servants of the owner otherwise than in the management or navigation of the vessel (*x*). If a vessel becomes unseaworthy, and the owner neglects to avail himself of an opportunity to repair her, and thereby causes the loss of the cargo, the loss is the result of negligence (*y*). If the vessel at the time of the commencement of the voyage is unseaworthy—if the hull is worm-eaten or gnawed by rats, or the timbers are rotten, if she has been so laden as to become unseaworthy through being made top-heavy, or if, in the case of a steamship, she starts with an insufficient equipment of coal, the loss though proximately caused by violence of the winds and waves, has not, in contemplation of law, been occasioned by perils of the seas, but by the negligence

(*pp*) *Internat. Guano, &c.* v. *Macandrew*, (1909) 2 K.B. 360; 78 L.J. K.B. 691.

(*q*) *Dunn* v. *Bucknall Bros.*, (1902) 2 K.B. 614; 71 L.J. K.B. 963.

(*r*) *Grill* v. *General Iron Screw Col. Co.*, L.R. 3 C.P. 476; 37 L.J. C.P. 205. See *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q.B.D. 521; 52 L.J. Q.B. 220.

(*s*) *Laveroni* v. *Drury*, 8 Exch. 170; 22 L.J. Ex. 2.

(*t*) *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 12 App.Cas. 518; 57 L.J. Q.B. 24.

(*u*) *Carmichael* v. *Liverpool Association*, 19 Q.B.D. 243; 56 L.J. Q.B. 428; *The Cressington*, (1891) P. 152; 60 L.J. P. 25; *Blackburn* v. *Liverpool and River Plate S. N. Co.*, (1902) 1 K.B. 290; 71 L.J. K.B. 177.

(*x*) *The Torbryan*, (1903) P. 194; 72 L.J. P. 76; cp. *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Assoc.*, 23 Q.B.D. 342; 58 L.J. Q.B. 462.

(*y*) *Worms* v. *Storey*, 11 Exch. 450; 25 L.J. Ex. 1; *The Vortigern*, (1899) P. 140; 68 L.J. P. 49; *The Schwan*, (1899) A.C. 450; 78 L.J. P. 112.

and misconduct of the owner of the ship, who is responsible to the owner of the cargo for the loss of the goods shipped on board (*z*). When, on the other hand, from the rolling and labouring of a ship in a storm a number of horses, though properly stowed and secured on board at the commencement of the tempest, broke loose and kicked each other to death in the hold of the vessel, the loss, though proximately caused by their own hoofs, was deemed to have been occasioned by peril of the sea (*a*). In the case of cargoes shipped in the United States, the Act of Congress known as the Harter Act is sometimes incorporated in the bills of lading, and will exempt shipowners from liability for faults or errors in navigation or in the management of the vessels (*b*).

If a ship perish in consequence of striking a rock or shallow, the circumstances under which that event has taken place must be ascertained in order to decide whether it happened by a peril of the sea, or by the fault of the owner, carrier, or master (*c*). In order to determine whether the loss has or has not been occasioned by the negligence or want of skill of the servants of the shipowner, the established rules of nautical practice, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the master and crew, and all other circumstances bearing upon the conduct and management of the vessel must be considered (*d*). If a carrier by water overloads his vessel, and so causes it to founder in a gale of wind, the loss is occasioned by the negligence of man; but it is otherwise, if the boat has not been overloaded, but sinks solely through the violence of the winds and waves (*e*). If a hoyman shoots a bridge in tempestuous weather, or at a dangerous period of the tide, and the hoy is sunk, the loss is occasioned by the negligence of the hoyman; but, if he has shot the bridge at a proper time and in proper weather, but the hoy has been taken aback by a sudden gust of wind, and has been driven against the abutments of the bridge and sunk, and the goods on board lost, the loss is deemed to have been occasioned by the act of God, and

(*z*) *Hunter* v. *Potts*, 4 Campb. 202; *Rathbone Bros.* v. *M'Iver, Sons & Co.*, 72 L.J. K.B. 703; *S.S. City of Lincoln* v. *Smith*, (1904) A.C. 250; 73 L.J. P.C. 45; *The Vortigern*, *ante*, p. 988. But the loss must be traceable to the unseaworthiness and not be due purely to peril of the sea: *The Europa*, (1908) P. 84; 77 L.J. P. 26.

(*a*) *Gabay* v. *Lloyd*, 3 B. & C. 793 3 L.J. (O.S.) K.B. 116.

(*b*) See *The Glenochil*, (1896) P. 10; 65 L.J. Adm. 1; *The Rodney*, (1900) P. 112; 69 L.J. P. 29; *Rowson* v. *Atlantic Transport Co.*, (1903) 2 K.B. 666; 72 L.J. K.B. 811.

(*c*) Abbott, 613 (ed. 14).

(*d*) Abbott, 603 *et seq.* (ed. 14); *Tuff* v. *Warman*, 5 C.B. N.S. 573; 27 L.J. C.P. 322.

(*e*) 22 Assiz. 41; *Williams* v. *Lloyd*, Jones's Rep. 180.

the carrier, consequently, is exempt from responsibility in respect thereof (*f*).

Loss by fire—Limitation of responsibility of shipowners by statute.—The exception of fire in a charter-party enures for the protection of the charterer as well as the shipowner (*g*). By the Merchant Shipping Act, 1894 (*h*), s. 502, no owner of any sea-going ship or share therein shall be liable to make good any loss or damage which may happen, without his fault or privity, to any goods or merchandise taken on board such ship by reason of any fire (*i*) happening on board, or to any gold, silver, diamonds, watches, jewels or precious stones taken on board, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles (*k*). And by s. 503, the owners of a ship, whether British or foreign (*l*), shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say:—(1) where any loss of life or personal injury is caused to any person being carried in the ship; (2) where any damage or loss is caused to any goods, merchandise, or other things whatsoever (*m*) on board the ship; (3) where any loss of life or personal injury is caused to any person carried in any vessel by reason of the improper navigation of the ship; (4) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship, be liable to damages beyond the following amounts, viz., in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding 15*l.* for each ton of their ship's tonnage; and in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding 8*l.* for

(*f*) *Amies* v. *Stevens*, 1 Str. 128.

(*g*) *Barrie* v. *Peruvian Corporation*, 2 Com.Cas. 50; *Newman and Dale S.S. Co. and British and South American S.S. Co., In re*, (1903) 1 K.B. 262; 72 L.J. K.B. 110.

(*h*) 57 & 58 Vict. c. 60.

(*i*) Damage by smoke and water in putting out a fire is damage by reason of fire within the meaning of the statute: *The Diamond*, (1906) P. 282; 75 L.J. P. 90. This provision however, does not apply to claims on general average: *Greenshields & Co.* v. *Stephens & Sons*, (1908) A.C. 431; 77 L.J. K.B. 985.

(*k*) The nature of the articles must be described, and their money value stated: *Williams* v. *African S.S. Co.*, 1 H. & N. 300; 26 L.J. Ex. 69.

(*l*) *The Amalia*, 32 L.J. Adm. 191; *The Andalusian*, 3 P.D. 182; 46 L.J. P. 77.

(*m*) This includes passengers' luggage: *The Stella*, (1900) P. 161; 69 L.J. P. 70.

each ton of the ship's tonnage (*n*). By sect. 508, nothing contained in the Act is to take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman.

The limitation of liability under the Act does not, it seems, extend to the owner of any lighter, barge, boat, or vessel, used solely in rivers or inland navigation, or to any ship or vessel not duly registered (*o*). The Act embraces two descriptions of losses, the one a loss or damage to the cargo laden on board the ship occasioned by the negligence of the master or mariners, and rendering the shipowner liable *ex contractu*, at common law, to the extent of the value of such cargo; and the other a loss or damage to the ship or cargo of some third party, occasioned by the negligence or misconduct of the master, in respect of which the owner is liable *ex delicto*, but not upon any contract. To an action *ex delicto* in respect of an injury to the property of a third party, both the shipowner and the master are liable—the owner, as the employer, for the wrongful act done by the servant in the course of his employment, and the master as the party actually committing the injury; and it is this liability *ex delicto* to which sect. 508 of the Act refers. If the master be a part owner, his responsibility, if he is sued (*ex delicto*) in his character of master, and not as one of several part owners, will not be limited by the Act; but, if he is sued as one of the part owners with the other part owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part owners the protection which the statute intended to give them (*p*). If the ship is sunk by a collision with another vessel, the shipowner is not released from liability by the loss of his vessel (*q*).

Losses occasioned by negligence of licensed pilots.—The Merchant Shipping Act, 1894, by sect. 633, further exempts the owner and master of a ship from liability in respect of losses or damage occasioned by the neglect or incapacity of a licensed pilot in charge of the vessel. Shipowners are not responsible when they take a pilot by compulsion; but in all other cases they are responsible for the acts of the pilot (*r*). "It is the duty of the master to look after the pilot in the case of his

(*n*) As to the meaning of "tonnage" in this section, see *The Petrel*, (1893) P. 320; 62 L.J. P. 92; *The Zanzibar*, (1892) P. 233; 61 L.J. P. 81; and sect. 503 (2).

(*o*) *Morewood* v. *Pollok*, 22 L.J. Q.B. 250; 1 E. & B. 743.

(*p*) Bayley, J., *Wilson* v. *Dickson*, 2 B. & Ald. 13.

(*q*) *Brown* v. *Wilkinson*, 15 M. & W. 391; 16 L.J. Ex. 34; *The Mellona*, 12 Jur. 271; 3 Rob. 7.

(*r*) *The Energy*, L.R. 3 A. & E. 48; 39 L.J. Adm. 25; *The Ocean Wave*, L.R. 3 P.C. 205; *The Calabar*, L.R. 2 P.C. 238; *The Lion*, L.R. 2 P.C. 525; 38 L.J. Adm. 51.

palpable incompetency, or intoxication, or of the loss of his faculties. The taking of a pilot under the Act does not relieve the shipowner from the ordinary legal consequences resulting from the negligence of the master and crew" (*s*).

Delivery of goods by shipowners.—There is an implied engagement on the part of every undertaker of the work of carrying, to proceed by the ordinary course to the place of delivery without delay, and without unnecessary deviation (*t*). If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from all responsibility by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them (*u*). The Merchant Shipping Act, 1894, by sect. 493, empowers the shipowner to enter and land goods in default of entry and landing by the owner; and, notwithstanding the landing, the shipowner may, by giving notice for that purpose, preserve his lien for freight. But the Act creates no personal liability for freight in a consignee who takes delivery of goods so deposited with a warehouseman by the shipowner merely as agent for the owner of the goods (*x*). After part of the goods have been landed by the shipowner, the consignee may interfere and claim the remainder, if the shipowner can deliver the remainder to him without any further loss or injury than would have been the case if the consignee had been ready before any of the goods were discharged (*y*). The Act also provides for the sale by warehousemen of goods not claimed by the owners (*z*).

Losses on board lighters conveying goods from ship to shore.

(*s*) *Per* Dr. Lushington, *The Eden*, 10 Jur. 298; 2 Rob. 442; *The Duke of Manchester*, 10 Jur. 865; *The Iron Duke*, 9 Jur. 476; 2 Rob. 377; *The Iona*, L.R. 1 P.C. 426; *The Velasquez*, L.R. 1 P.C. 494; 36 L.J. Adm. 19; *The Queen*, L.R. 2 A. & E. 354; 38 L.J. Adm. 39.

(*t*) *Davis* v. *Garrett*, 4 Moo. & P. 540; 8 L.J. (O.S.) C.P. 253; *Thorley* v. *Orchis S.S. Co.*, (1907) 1 K.B. 660; 76 L.J. K.B. 595.

(*u*) *Bourne* v. *Gatliff*, 3 Sc. N.R. 44; 8 *ib.* 604; 11 Cl. & Fin. 45. As to delivery "free of ship's tackle" see *Chartered Bk. of India &c.* v. *Brit. Ind. St. Nav. Co.*, (1909) A.C. 369; 78 L.J. P.C. 111.

(*x*) *White & Co.* v. *Furness, Withy & Co.*, (1895) A.C. 40; 64 L.J. Q.B. 161.

(*y*) *Wilson* v. *London, Italian and Adriatic St. Nav. Co.*, L.R. 1 C.P. 61; 35 L.J. C.P. 9.

(*z*) 57 & 58 Vict. c. 60, s. 497; *Beresford* v. *Montgomerie*, 17 C.B. N.S. 379; 34 L.J. C.P. 41; *Wilson* v. *London, Italian and Adriatic St. Nav. Co.*, *supra.*

—When the vessel is not able to discharge at a wharf, but the goods are placed in lighters to be conveyed from the ship to the shore, and are lost on their passage through the neglect or want of skill of the lighterman, the loss will fall on the owner of the goods, if the lighterman is paid and employed by him (*a*); but, if he is employed and paid by the shipowner or carrier, he is then the servant of the latter, expediting the goods in the further prosecution of the voyage to their place of destination, and the carrier, consequently, must make good the loss. Generally speaking, the task of discharging the cargo in the port of London is accomplished through the medium of public lightermen licensed and regulated by the port authority (*b*). The lightermen are responsible, in their character of common carriers, to the merchant or owner of the goods who employs them; and the shipowner is discharged as soon as the goods have been safely loaded on board their lighters. But he is not, by the custom of the river Thames, exonerated from liability until the loading is complete; and he is bound to take care of the lighter and its contents until it is fully laden, and is ready to leave the side of the ship (*c*). The protection afforded by sect. 502 of the Merchant Shipping Act, 1894 (*ante*, p. 990), to owners of sea-going vessels in respect of loss or damage by fire to goods or merchandise shipped on board, does not extend to the case of a fire happening on board lighters employed by the shipowner in carrying goods from the shore to be laden on board the vessel (*d*). Therefore, if goods are set on fire by reason of the negligence of such lightermen, the shipowners are responsible for the damage. Where cargo is to be taken from alongside the ship at charterers' risk and expense, any custom of the port notwithstanding, the shipowner will only be bound to deliver over the ship's rail and the extra expenses due to a custom to do work outside the ship will fall on the charterer (*e*).

Payment of freight or hire.—If a charter-party amounts to a demise of the ship to the charterer for a certain term at a certain hire, and the vessel is bailed to him pursuant to the contract, he is responsible for the payment of the hire at the expiration of the term of hiring, although the vessel may have been lost; but, if the shipowner merely grants the use of the vessel, retain-

(*a*) *Sparrow* v. *Carruthers*, 2 Str. 1236; *Strong* v. *Natally*, 1 Bos. & P. N.R. 16.

(*b*) See Port of London Act, 1908, 8 Edw. 7, c. 68, s. 11.

(*c*) *Catley* v. *Wintringham*, 1 Peake, 202; *Robinson* v. *Turpin*, *ib.*, 203, n. (*a*).

(*d*) *Morewood* v. *Pollok*, 22 L.J. Q.B. 250; 1 E. & B. 743.

(*e*) *Brenda S.S. Co.* v. *Green*, (1900) 1 Q.B. 518; 69 L.J. Q.B. 445; *Northmoor S.S. Co.* v. *Harland & Woolf, Ltd.*, (1903) 2 Ir. R. 657.

ing the possession of it through the medium of his own seamen and servants, the shipowner loses his right to the hire, at the same time that the charterer is deprived of the use and enjoyment of the vessel. When the charter-party amounts merely to a contract by the shipowner or shipmaster for the conveyance of merchandise to a specified destination, the fulfilment of the covenant or undertaking to carry the goods, on the shipowner's readiness and willingness to fulfil it, is a condition precedent to the payment of the hire, so that the plaintiff must of necessity show the work done, or that he was ready and willing to do it, and was hindered from doing it by the defendant, before he can demand the money (*f*). Ordinarily, the right to the freight does not arise until the goods are not only conveyed to their destination, but also delivered (*g*); or, in the case of a charter-party, until the charterers have had the full use of the ship for the purposes for which they chartered her (*h*). The freight may, however, by the special contract of the parties, be made payable on the delivery of the goods on board (*i*), on the sailing (*k*), or on the final sailing of the vessel from the port of loading (*l*) prior to the performance of the voyage, or at any other period of time which they may choose to appoint; but, in all cases of doubtful construction, the courts will adhere to the maxim that the freight is not due until it has been earned by the performance of the work for which it is to be paid (*m*). So freight was held not to be payable where the agreement was that it should be paid "within three days after the arrival of the ship and before delivery of any portion of the goods," and the ship arrived in port, but was sunk and the goods destroyed within the three days (*n*); and again where part of the cargo was justifiably sold for repairs before arrival at the port of destination, for more than it would fetch at that port, and the proceeds paid to the charterer, it was yet held that freight could not be claimed in respect of such part of the cargo (*o*). But

(*f*) *Tate* v. *Meek*, 2 Moore, 291; *Campion* v. *Colvin*, 3 Bing. N.C. 17; 5 L.J. C.P. 317; *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216; *The Soblomsten*, L.R. 1 Adm. 293; 36 L.J. Adm. 5.

(*g*) *Cato* v. *Irving*, 5 De G. & S. 210, 224; 21 L.J. Ch. 675.

(*h*) *Brown* v. *Tanner*, L.R. 3 Ch. 597; 37 L.J. Ch. 923.

(*i*) *Andrew* v. *Moorhouse*, 5 Taunt. 438; 1 Marsh. 122; *De Silvale* v. *Kendall*, 4 M. & S. 42; *Allison* v. *Bristol Marine Ins. Co.*, 1 App.Cas. 209.

(*k*) *Thompson* v. *Gillespy*, 5 E. & B. 209; 24 L.J. Q.B. 340; *Hudson* v. *Bilton*, 6 E. & B. 565; 26 L.J. Q.B. 27.

(*l*) *Roelandts* v. *Harrison*, 9 Exch. 444; 23 L.J. Ex. 169. As to the meaning of "port," see *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 15 Q.B.D. 580; 56 L.J. Q.B. 38; *Hunter* v. *Northern Marine Ins. Co.*, 13 App.Cas. 717; *Price* v. *Livingstone*, 9 Q.B.D. 679; 53 L.J. Q.B. 118; *Leonis S.S. Co.* v. *Rank*, (1908) 1 K.B. 499; 77 L.J. K.B. 224.

(*m*) *Mashiter* v. *Buller*, 1 Campb. 84; *Manfield* v. *Maitland*, 4 B. & Ald. 582, 585; *Vlierboom* v. *Chapman*, 13 M. & W. 230; 13 L.J. Ex. 384.

(*n*) *Duthie* v. *Hilton*, L.R. 4 C.P. 138; 38 L.J. C.P. 93; *Asfar* v. *Blundell*, (1896) 1 Q.B. 123; 65 L.J. Q.B. 138.

(*o*) *Hopper* v. *Burness*, 1 C.P.D. 137; 45 L.J. C.P. 377; as to freight where

where goods were carried under a through bill of lading covering both land and sea transit and some of the goods were lost during the sea transit, the lien given to the shipowner on payment by him of the inland charges for the carriage of such goods was held enforceable by him against the goods actually delivered (*p*). If freight is paid in advance and the cargo is lost, the freight so paid cannot be recovered back (*q*), unless the loss has been occasioned by negligence, or misconduct, or want of skill in the navigation of the vessel (*r*). Where, by a charter-party, hire was to cease during detention by average accidents and the ship had to put back for repairs, it was held that the charterer was liable as from the time when the ship was again in working order though it would take some time to get back to the place where the accident happened (*s*). Detention in quarantine has been held not to be "a detention of princes and rulers" (*t*). If by the occurrence of an accident on the voyage delay is occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transhipping it into another vessel (*u*).

When the use of the entire vessel is bargained for (*x*), and the charterer covenants or agrees to provide and ship a full cargo, and pay freight therefor at so much a ton, and the shipowner sends out the vessel, the circumstance that the lading has been prevented by some unforeseen cause or inevitable accident does not release the charterer from his contract. And, when the goods have been put on board, the charterer cannot abandon them and refuse to pay the freight on the ground that they have been damaged or destroyed by perils of the sea (*y*), or by the fault of the master and crew (*z*); nor can he deduct from the freight the value of missing articles (*a*). When the charterer merely covenants to pay freight at the rate of so much a ton, &c., for the goods actually shipped on board, and does not

part of cargo has been burnt, see *Aitken, Lilburn & Co.* v. *Ernsthausen*, (1894) 1 Q.B. 773; 63 L.J. Q.B. 559; and as to advance freight in such circumstances, see *Weir* v. *Girvin*, (1900) 1 Q.B. 45; 69 L.J. Q.B. 168.

(*p*) *The Hibernian*, (1907) P. 277; 76 L.J. P. 122.

(*q*) *Saunders* v. *Drew*, 3 B. & Ad. 450; *Byrne* v. *Schiller*, L.R. 6 Ex. 319; 40 L.J. Ex. 177; *Allison* v. *Bristol Marine Ins. Co.*, 1 App.Cas. 209. See *Smith* v. *Pyman*, (1891) 1 Q.B. 742; 60 L.J. Q.B. 621; *Oriental S.S. Co.* v. *Tylor*, (1893) 2 Q.B. 518; 63 L.J. Q.B. 128.

(*r*) See *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67; 56 L.J. Q.B. 202; *Dufourcet* v. *Bishop*, 18 Q.B.D. 373; 56 L.J. Q.B. 497.

(*s*) *Vogemann* v. *Zanzibar S.S. Co.*, 7 Com.Cas. 254.

(*t*) *Aktieselskabat Lina* v. *Turnbull & Co.*, (1907) S.C. 507.

(*u*) *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216.

(*x*) As to putting cargo on deck, see *Neill* v. *Ridley*, 9 Exch. 680; and in the cabin, see *Mitcheson* v. *Nicol*, 7 Exch. 929; 21 L.J. Ex. 323.

(*y*) Abbott on Shipping, 608 *et seq.* (ed. 14).

(*z*) *Dakin* v. *Oxley*, 15 C.B. N.S. 646; 33 L.J. C.P. 115.

(*a*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289.

covenant to furnish any particular quantity of goods, he is only liable for the quantity of goods actually shipped; but, if he contracts for the use of the entire ship, or part of a ship, or for a certain specified tonnage, the payment of freight must be proportioned to the amount of tonnage space, or accommodation he has contracted for (*b*). If he covenants to ship on board a full and complete cargo, and to pay so much a ton for every ton loaded on board, he is bound to put on board and to pay freight for as much as the ship will hold and safely carry, whatever may be the amount of the burthen and tonnage of the vessel mentioned in the charter-party (*c*). A misdescription of the ship's burthen does not in such a case exonerate the charterer from the liability to ship and pay freight for a full and complete cargo, provided the charterer has had an opportunity of examining the ship, and forming his own judgment of her capacity, and there has been no fraudulent misrepresentation or concealment of the truth (*d*). Although the charterer has taken the whole ship, and covenanted to provide and put on board, and pay freight for, a "full and complete cargo," yet the shipowner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, and does not interfere with the proper shipment and carriage of the cargo (*e*).

Calculation of freight.—When freight is covenanted to be paid at the rate of so much per ton the freight is to be calculated and paid on that quantity alone which is put on board, carried throughout the whole voyage, and delivered, at the end of it, to the merchant. If, therefore, a cargo of corn increases in bulk and weight during the voyage, or after the cargo is taken out of the vessel, the freight is payable only on the quantity actually put on board, and not on the increased quantity delivered; for such a cargo may be increased in bulk and deteriorated in quality by the negligence of the master and crew during the voyage (*f*). And so, though freight has been made payable on the intake measure of quantity delivered, where part of the cargo has been lost on the voyage, freight will be payable on the measurement figures as ascertained at

(*b*) As to this, see *London Transport Co.* v. *Trechmann Bros.*, (1904) 1 K.B. 635; 73 L.J. K.B. 253.

(*c*) *Miller* v. *Borner*, (1900) 1 Q.B. 691; 69 L.J. Q.B. 429; cp. *Morris* v. *Lerison*, 1 C.P.D. 155; 45 L.J. C.P. 409

(*d*) *Hunter* v. *Fry*, 2 B. & Ald. 424; *Thomas* v. *Clarke*, 2 Stark. 450; *Barker* v. *Windle*, 6 E. & B. 675; 25 L.J. Q.B. 349.

(*e*) *Towse* v. *Henderson*, 4 Exch. 890; 19 L.J. Ex. 163. As to ballast necessary for the proper navigation of the ship, see *Weir* v. *Union S.S. Co.*, (1900) A.C. 525; 69 L.J. Q.B. 809. As to dead freight, see *Kish* v. *Taylor*, (1910) 2 K.B. 309; 79 L.J. K.B. 1113.

(*f*) *Gibson* v. *Sturge*, 10 Exch. 622; 24 L.J. Ex. 121; *Buckle* v. *Knoop*, L.R. 2 Ex. 125, 333; 36 L.J. Ex. 49, 223.

the port of shipment and not by reference to the quantity delivered measured at the port of discharge (*g*). Where part of a uniform cargo has been lost, the reduction in the amount of freight payable may be arrived at by taking the proportion that the cargo undelivered bore to the quantity specified in the bill of lading (*h*).

Payment pro ratâ.—If the covenant or agreement of the shipowner or master be entire for the conveyance of a full cargo of merchandise for a specific sum, the charterer is not bound to accept and pay for half a cargo; but, if the charterer loads less than a full cargo, or if part of the cargo is lost without any default on the part of the shipowner, the whole of the sum is payable (*i*). And, if he agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him (*k*). He must pay, also, in all cases, for such goods as he actually accepts; and, if he voluntarily accepts goods short of the port of destination, so as to raise an inference that further carriage of the goods was dispensed with (*l*), he is liable upon an implied contract to pay *pro ratâ itineris peracti*. This apportionment usually happens when the ship, by reason of some disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage (*m*). The shipowner is not entitled to freight *pro ratâ* where goods have been sold on the voyage at an intermediate port without leave from the owners, where such leave was obtainable (*n*).

Time freight.—Where the charterer engages to pay so much per month, week, or day of the voyage, or of the ship's employment, and no time is fixed for the commencement of the computation, his liability to freight will begin on the day that the ship breaks ground and commences the voyage, and will continue during all unavoidable delays for provisions, repairs, &c., not occasioned by the negligence or misconduct of the master or owners (*o*). The month is always understood to be a calendar, and not a lunar, month (*p*); and the freight becomes due in

(*g*) *Spaight* v. *Farnworth*, 5 Q.B.D. 115; 49 L.J. Q.B. 346.

(*h*) *Spaight* v. *Farnworth*, *supra*; *Mediterranean and New York S.S. Co.* v. *Mackay*, (1903) 1 K.B. 297; 72 L.J. K.B. 147.

(*i*) *Robinson* v. *Knights*, L.R. 8 C.P. 465; 42 L.J. C.P. 211; *The Norway*, 3 Moo. P.C. N.S. 245; Br. & L. 404; *Merchant Shipping Co.* v. *Armitage*, L.R. 9 Q.B. 99; 43 L.J. Q.B. 24; *Blanchet* v. *Powell's Llantivit Coll. Co.*, L.R. 9 Ex. 74; 43 L.J. Ex. 50.

(*k*) *Christy* v. *Row*, 1 Taunt. 314; *Ritchie* v. *Atkinson*, 10 East, 295, 310.

(*l*) *The Soblemsten*, L.R. 1 Adm. 293; 36 L.J. Adm. 5. As to when this inference arises, see *Metcalfe* v. *Britannia Iron Works Co.*, 2 Q.B.D. 423; 46 L.J. Q.B. 443.

(*m*) *Vlierboom* v. *Chapman*, 13 M. & W. 230; 13 L.J. Ex. 384.

(*n*) *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Ex. 566.

(*o*) *Havelock* v. *Geddes*, 10 East, 566; *Ripley* v. *Scaife*, 5 B. & C. 169.

(*p*) *Jolly* v. *Young*, 1 Esp. 186.

general at the expiration of each month, or other interval of time limited by the parties for its payment, whether the ship does or does not ultimately arrive at her place of destination. But, where the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover *any* freight (*q*).

Shipowner's lien for freight—Payment of freight by consignee (*r*).—If the shipowners have by the charter-party divested themselves of the possession of the vessel in favour of the charterer, they have, of course, no lien upon the goods put on board, and cannot take possession of them and detain them as a security for the rent or hire agreed to be paid for the use of the vessel (*s*). But, if the charter-party does not amount to a bailment of the ship, but the shipowners keep possession of the vessel, and merely contract to carry merchandise for the charterer for a certain freight, the delivery of the goods and the payment of the freight constitute mutual conditions to be performed at the same time, so that the shipowner may retain the cargo until he is tendered payment of the freight (*t*). The right of lien may, however, only be exercised for sums due and not for sums accruing due (*u*); and where, by the terms of the contract, credit is given for the payment of the freight, as, for instance, if it is to be paid a month or three months after the arrival of the ship, the carrier must forthwith deliver the goods, and rely on the charterer's contract to pay (*x*): and, if the charterer becomes bankrupt prior to the arrival of the vessel at the port of destination, the indorsee of the bill of lading is entitled to demand the goods, and the shipowners cannot claim any lien upon them for freight (*y*). So, a lien on subfreight can only be exercised before payment thereof to the charterer or his agent and confers no right on the shipowner to follow it after it has been paid (*z*). But a lien may be

(*q*) *Gibbon* v. *Mendez*, 2 B. & Ald. 17; *Smith* v. *Wilson*, 8 East, 437.

(*r*) 57 & 58 Vict. c. 60, s. 494.

(*s*) *Hutton* v. *Bragg*, 7 Taunt. 14.

(*t*) *Saville* v. *Campion*, 2 B. & Ald. 503; *Campion* v. *Colvin*, 3 Bing. N.C. 17; 5 L.J. C.P. 317; *Tate* v. *Meek*, 2 Moore, 291; *Paynter* v. *James*, L.R. 2 C.P. 348.

(*u*) *Wehner* v. *Dene S.S. Co.*, (1905) 2 K.B. 92; 74 L.J. K.B. 550.

(*x*) *Alsager* v. *St. Kath. Dock Co.*, 14 M. & W. 794; 15 L.J. Ex. 34.

(*y*) *Tamvaco* v. *Simpson*, L.R. 1 C.P. 363; 35 L.J. C.P. 196.

(*z*) *Tagart, Beaton & Co.* v. *James Fisher & Sons*, (1903) 1 K.B. 391; 72 L.J. K.B. 202.

given to a shipowner in respect of goods carried under a through bill of lading covering both land and sea transit which will be enforceable against goods actually delivered in respect of the inland charges for the carriage of goods lost in sea transit and not delivered (*a*). The consignee is *primâ facie* the owner of the goods, and as such is liable for the freight; but where the master delivers the goods to the consignee, and the latter afterwards refuses to pay the freight, or pays the master by a bill of exchange which turns out to be worthless, the master may resort to the consignor or shipper for payment (*b*), unless he has for his own convenience and accommodation preferred a bill when he might have had cash (*c*). Payment to the shipowners on their demand is a discharge against any claim by the master, and, on the other hand, payment to the master, in the absence of any notice from the owners to withhold it, is a valid payment as against them (*d*).

If the consignee be not the owner, he is not liable for freight simply as consignee, but if the goods have always been delivered on payment of freight by the defendant, that is reasonable evidence that in the particular case he agreed to pay the freight (*e*).

Liability for freight resulting from acceptance of goods under bills of lading.—If a person receives goods under a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, that is evidence of an agreement on the part of such person to pay the freight (*f*). The law does not, however, imply any contract for the payment of the freight from the delivery and acceptance of less than the whole cargo (*g*), or from the acceptance of goods by a sub-contractee with whom there is no privity of contract (*h*). The words "he paying freight" are not essential; "freight for the said goods" are sufficient (*i*). Though freight may not be payable in respect of a man's own goods conveyed in his own ship, yet it becomes so if he makes third persons consignees of the goods under the bill of lading (*k*). If the consignee receives the goods without any disclaimer of his liability, and there is no reference on the

(*a*) *The Hibernian*, (1907) P. 277; 76 L.J. P. 122.

(*b*) *Tapley* v. *Martens*, 8 T.R. 453; *Shepard* v. *De Bernales*, 13 East, 572; *Domett* v. *Beckford*, 5 B. & Ad. 521; 3 L.J. K.B. 10.

(*c*) *Strong* v. *Hart*, 6 B. & C. 160.

(*d*) *Smith* v. *Plummer*, 1 B. & Ald. 575; *Atkinson* v. *Cottesworth*, 3 B. & C. 648.

(*e*) *Coleman* v. *Lambert*, 5 M. & W. 502; 9 L.J. Ex. 43.

(*f*) *Cock* v. *Taylor*, 13 East, 399; *Wilson* v. *Kymer*, 1 M. & S. 157; *Bell* v. *Kymer*, 5 Taunt. 477; *Gumm* v. *Tyrie*, 34 L.J. Q.B. 124; 6 B. & S. 298.

(*g*) *Young* v. *Moeller*, 5 E. & B. 762; *S.C.* nom. *Möller* v. *Young*, 25 L.J. Q.B. 94.

(*h*) *Zwilchenbart* v. *Henderson*, 9 Exch. 722; 23 L.J. Ex. 234.

(*i*) *Weguelin* v. *Cellier*, L.R. 6 H.L. 286; 42 L.J. Ch. 758.

(*k*) *Weguelin* v. *Cellier supra.*

face of the bill of lading to any charter-party whereby the consignor has contracted to pay the freight, the presumption is that the consignee has agreed to pay it; but, when the bill of lading provides for the payment of the freight as per charter-party, and the consignor has contracted by such charter-party for the payment of the freight, it does not necessarily follow that the consignee, by accepting the goods under the bill of lading, has himself contracted to pay it, although he is generally considered so to do. The contract for the payment of the freight inserted in the charter-party is not transferred with the property in the goods so as to throw the burden of performance upon the parties into whose hands the goods come by indorsement of the bill of lading; but it has been so much the practice for the indorsee of the bill of lading to pay the freight which the consignor or charterer has, by the charter-party, contracted with the shipowner to pay, that the acceptance of the goods by such indorsee without any disclaimer of his liability is evidence of a new contract and a new agreement for the payment of the freight mentioned therein (*l*); and, then, the remedy for the freight on the bill of lading against the consignee or his assignee co-exists with the remedy against the original consignor or charterer upon the charter-party (*m*). Where a charter-party, stipulating for freight in a lump sum of 2,800*l.* in full of all charges, contained the following clause, "The captain to sign bills of lading at any rate of freight without prejudice to this charter," it was held that, so long as the goods shipped remained the property of the charterers or of their agents, they were liable to the lump freight, and the shipowners had a lien for it, but that the shipowners might be bound to deliver the goods to a *bonâ fide* holder for value of the bill of lading upon payment of the freight mentioned in the bill of lading (*n*). The master has no authority to draw bills of lading making the freight payable otherwise than to the owner (*o*). If the amount of the freight is specified on the face of the bill of lading, it is in general conclusive between the parties (*p*). Where therefore a mere nominal rate of freight was provided to be paid by the bill of lading, the shipowner being also owner of the cargo, it was held that a subsequent mortgagee of the ship and freight could not charge the assignee of the bill of lading the current rate of freight,

(*l*) *Sanders* v. *Vanzeller*, 4 Q.B. 295; 12 L.J. Q.B. 497; *Kemp* v. *Clark*, 12 Q.B. 647; 17 L.J. Q.B. 305.

(*m*) *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East, 565.

(*n*) *Gledstanes* v. *Allen*, 12 C.B. 202; cp. *Calcutta S.S. Co.* v. *Weir*, (1910) 1 K.B. 759; 79 L.J. K.B. 401.

(*o*) *Reynolds* v. *Jex*, 34 L.J. Q.B. 251; 7 B. & S. 83.

(*p*) *Foster* v. *Colby*, 3 H. & N. 715; 28 L.J. Ex. 81; *Shand* v. *Sanderson*, 4 H. & N. 389; 28 L.J. Ex. 278.

but was confined to the nominal freight specified on the face of the bill of lading (*q*). If the receiver of the goods appears on the face of the bill of lading to be an agent acting on behalf of a known principal who is the consignee, the principal, and not the agent, is then liable for the freight (*r*). But, if the agency is undisclosed, and the principal has given the agent no authority to pledge his credit for the payment of the freight, and the goods never reach the hands of the principal, the latter cannot be made responsible for the amount of the freight (*s*); and the agent who actually received the goods under the bill of lading is then the party to be proceeded against (*t*). Where the consignee of goods indorsed the bill of lading to A., "looking to him for all freight, dead freight, and demurrage, without recourse to us," and the shipowner accepted the indorsement, and in pursuance of it delivered the goods to A., the consignee was exonerated from liability for freight (*u*); but the consignee, at all events where A. is his agent, is bound to prove an assent on the part of the shipowner discharging him from liability; and he does not prove such an assent by showing that the indorsement was on the bill when presented to the captain without also showing that the captain in fact assented to it (*x*). Where a bill of lading represented the freight of goods to have been paid, when in fact it had not been paid, it was held by the court that, though such representation was not conclusive as between the shipper of the goods and the shipowner, yet, as against an indorsee for value of the bill of lading without notice, the freight must be held to have been paid (*y*).

If the charter-party is in the ordinary form and does not amount to a demise of the ship, and subsequently the ship is sub-chartered and bills of lading are signed by the captain, the contracts are with the owner of the ship, who, or the captain as his agent, is entitled to collect the freight and to deduct any charter-party hire owing (*z*). But where, by the charter-party, the ship is demised to the charterers, who are to pay a lump freight for the whole voyage, and the master is to make bills of lading at any rate and payable in any manner the charterers may choose, this gives to the charterers the direct management as

(*q*) *Brown* v. *North*, 8 Exch. 1; 22 L.J. Ex. 49.

(*r*) *Amos* v. *Temperley*, 8 M. & W. 805; 11 L.J. Ex. 183.

(*s*) *Tobin* v. *Crawford*, 9 M. & W. 718; 12 L.J. Ex. 490.

(*t*) *Dougal* v. *Kemble*, 3 Bing. 383; L.J. (O.S.) C.P. 103.

(*u*) *Lewis* v. *McKee*, L.R. 2 Ex. 37; 36 L.J. Ex. 6.

(*x*) *Lewis* v. *McKee*, L.R. 4 Ex. 58; 39 L.J. Ex. 62.

(*y*) *Howard* v. *Tucker*, 1 B. & Ad. 712; *Kirchner* v. *Venus*, 12 Moo. P.C. 399.

(*z*) *Wehner* v. *Dene S.S. Co.*, (1905) 2 K.B. 92; 74 L.J. K.B. 550.

to the terms on which the bills of lading are to be signed, and they are entitled to recover the freight under the general authority which the shipowners have conferred upon them (*a*).

Payments in lieu of freight extinguishing right of lien.—When it is stipulated that a certain specified sum of money shall be paid in respect of goods shipped within a certain specified period after the sailing of the vessel, whether the goods shall then have been conveyed to their place of destination or not, or whether they shall ever be so conveyed or not, and to secure this arrangement the amount is made payable by the shipper, the sum stipulated to be paid is not freight, but a payment in lieu of freight. In this case there is no lien upon the goods to secure the payment, neither the consignee nor his goods being liable for the payment of the sum stipulated to be paid(*b*). But parties who have by special contract superseded the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the contract into which they have entered, and that, either by express conditions in the contract itself, or by agreement that, in case of failure of performance of that contract, the right of lien for what is due shall subsist as if there had been an agreement for freight; and the usage of the place where the contract was made may be annexed to the contract so as to create a lien, provided both parties were cognizant of the usage at the time they made their contract (*c*).

Time for discharge of cargo.—A charter-party may specify the number of days to be occupied in the discharge or it may state that the cargo is to be discharged with customary dispatch or at the rate of so many tons per working day, &c. If a fixed limit of time is intended, the language used must be precise in its terms, for customary dispatch will not be translated to mean so many days and hours (*d*). Where the charter-party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and there is no implied contract by the shipowner to allow his vessel to be kept there

(*a*) *Marquand* v. *Banner*, 6 E. & B. 245; 25 L.J. Q.B. 313; *Kern* v. *Deslandes*, 10 C.B. N.S. 205; 30 L.J. C.P. 297.

(*b*) *How* v. *Kirchner*, 11 Moo. P.C. 25.

(*c*) *Kirchner* v. *Venus*, 12 Moo. P.C. 398; *Fisher* v. *Smith*, 4 App.Cas. 1; 48 L.J. Ex. 411.

(*d*) *Lyle Shipping Co.* v. *Cardiff Corporation*, (1900) 2 Q.B. 638; 69 L.J. Q.B. 889; *Hulthen* v. *Stewart*, (1903) A.C. 389; 72 L.J. K.B. 917. Fractions of a day are not as a general rule to be taken into consideration: *Houlder* v. *Weir*, (1905) 2 K.B. 267; 74 L.J. K.B. 729. The charter-party may, however, permit of fractions of a day being taken into account: *Yeoman* v. *The King*, (1904) 2 K.B. 429; 72 L.J. K.B. 904.

the usual time, if, by reasonable diligence on the part of the merchant, the cargo might be sooner taken away; and no implied contract by the merchant to take the cargo out within such usual time, if he could not by reasonable diligence do so. The contract implied is that each should use reasonable dispatch in performing his part (*e*). Where, therefore, delay happens without fault on either side, the loss must remain where it falls (*f*); *e.g.*, where delay is caused by a necessity to take in ballast during the process of discharge to safeguard the ship and the cargo remaining on board (*g*). Reasonable diligence means reasonable under the actual circumstances (*h*). A strike of dock labourers, for which neither the shipowner nor the charterer was responsible, may therefore be taken into consideration where no express limit of time is imposed (*i*). And delay due to a contingency the probability of the occurrence of which must have been known to and in the contemplation of both parties cannot be considered unreasonable (*k*). But reasonable despatch is a requirement which must be satisfied *de die in diem*, and a consignee cannot by working extra hard on one day entitle himself to idle on another day (*l*).

Payment of demurrage on charter-parties and bills of lading.—The charterer usually covenants or promises to load or unload the vessel within a certain time, or, if he fails to do so, to pay so much *per diem* during the delay. This payment, as well as the delay itself, is called in mercantile and legal phraseology, demurrage. The charterer cannot escape from liability upon his express covenant or promise to pay demurrage by showing that the delay was occasioned by some unforeseen event not provided for by the contract, such as the delays of other consignees in unloading (*m*), the crowded state of the docks, the delays of Custom-house officers, or the inclemency of the weather (*n*), or bad weather (*o*), or a strike of dock labourers (*p*),

(*e*) There must be reasonable dispatch even where the charter-party provides for discharge "as customary at port of discharge": *Aberdeen Glen Line* v. *Macken* (*S.S. Gairloch*), (1899) 2 Ir.R. 1.

(*f*) *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; 39 L.J. Q.B. 188; *Cunningham* v. *Dunn*, 3 C.P.D. 443; 48 L.J. C.P. 62.

(*g*) *Houlder* v. *Weir*, (1905) 2 K.B. 267; 74 L.J. K.B. 729.

(*h*) *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486, 491; 67 L.J. Q.B. 795; *Lyle Shipping Co.* v. *Cardiff Corporation*, (1900) 2 Q.B. 638; 69 L.J. Q.B. 889; *Hulthen* v. *Stewart*, (1903) A.C. 389, 391; 72 L.J. K.B. 917.

(*i*) *Hick* v. *Raymond*, (1893) A.C. 22; 62 L.J. Q.B. 98.

(*k*) *Barque Quilpué, Ltd.* v. *Brown*, (1904) 2 K.B. 264; 73 L.J. K.B. 596.

(*l*) *Aberdeen Glen Line* v. *Macken* (*S.S. Gairloch*), (1899) 2 Ir.R. 1, 13.

(*m*) *Straker* v. *Kidd*, 3 Q.B.D. 223; 47 L.J. Q.B. 365; *Porteus* v. *Watney*, 3 Q.B.D. 534; 47 L.J. Q.B. 643.

(*n*) *Blight* v. *Page*, 3 B. & P. 295, n.; *Barrett* v. *Dutton*, 4 Campb. 333.

(*o*) *Thiis* v. *Byers*, 1 Q.B.D. 244; 45 L.J. Q.B. 11.

(*p*) *Budgett* v. *Binnington*, (1891) 1 Q.B. 35; 60 L.J. Q.B. 1; *Elswick S.S. Co.* v. *Montaldi*, (1907) 1 K.B. 626; 76 L.J. K.B. 672; even where there may have been an exception of strikes in a

or even a permanent obstacle (*q*), or the neglect of the holders of the bill of lading to present it and claim the goods (*r*). And even where the cause of the delay has been excepted but would not have operated except for the dilatoriness of the defendant, the latter will not be excused (*s*). Nor can the defendant shelter himself under a clause such as this: "goods to be taken from the ship by the consignees (at their expense) immediately after arrival and as fast as steamer can deliver, or the same will be transhipped into lighters or landed or warehoused at the expense and risk of the proprietors of such goods," the shipowners not being deprived by the latter alternative of their ordinary remedy for breach of the bill of lading (*t*). If the delay is caused by the wrongful and unauthorised interference of the shipowner himself, the detention is not then the detention of the charterer, and the shipowner cannot claim demurrage in respect thereof (*u*). The terms of the charter-party must be consulted in order to determine whether the time occupied in getting to the actual loading berth is to be treated as part of the lay days, or as part of the time before the ship is an arrived ship (*x*). If the loading berth is particularly specified, there is no difficulty (*y*); but if the named place describes a port or wide district in several parts of which a ship can unload the ship will be considered to be an arrived ship when it has reached the spot which by custom is indicated by the place named though she may not be in the particular part of the port or district in which the particular cargo is to be discharged (*z*). If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port (*a*), and he is not bound to wait an unreasonable time till the port is cleared (*b*). But where by a charter-party a vessel is to deliver her cargo at any safe berth

special colliery guarantee: *Saxon S.S. Co.* v. *Union S.S. Co.*, 69 L.J. Q.B. 907.

(*q*) *Dahl* v. *Nelson*, 12 Ch.D. 568; 6 App.Cas. 38; 50 L.J. Ch. 414.

(*r*) *Erichsen* v. *Barkworth*, 3 H. & N. 894; 28 L.J. Ex. 95.

(*s*) *Tyne and Blyth Shipping Co.* v. *Leech, Harrison and Forwood*, (1900) 2 Q.B. 12; 69 L.J. Q.B. 353; *Elswick S.S. Co.* v. *Montaldi*, (1907) 1 K.B. 626; 76 L.J. K.B. 672.

(*t*) *The Arne*, (1904) P. 154; 73 L.J. P. 34.

(*u*) *Benson* v. *Blunt*, 1 Q.B. 870; 10 L.J. Q.B. 333.

(*x*) *Leonis S.S. Co.* v. *Rank*, (1908) 1 K.B. 499; 77 L.J. K.B. 224.

(*y*) *Murphy* v. *Coffin*, 12 Q.B. D. 87.

(*z*) *Davies* v. *McVeagh*, 4 Ex.D. 265; 48 L.J. Ex. 686; *Dahl* v. *Nelson*, 6 App. Cas. 38; 50 L.J. Ch. 414; *Leonis S.S. Co.* v. *Rank*, (1908) 1 K.B. 499; 77 L.J. K.B. 224.

(*a*) *Tapscott* v. *Balfour*, L.R. 8 C.P. 46; 42 L.J. C.P. 16; *Ashcroft* v. *Crow Colliery Co.*, L.R. 9 Q.B. 540; 43 L.J. Q.B. 194; *Murphy* v. *Coffin*, 12 Q.B. D. 87; *Sanders* v. *Jenkins* (1897) 1 Q.B. 93; 66 L.J. Q.B. 40; *Leonis S.S. Co.* v. *Rank*, (1908) 1 K.B. 499; 77 L.J. K.B. 224.

(*b*) *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 414. See *Pyman* v. *Dreyfus*, 24 Q.B.D. 152; 59 L.J. Q.B. 13.

as ordered, and owing to the crowded state of the dock the vessel is prevented from being berthed in the ordered berth, the shipowner cannot claim demurrage till she is berthed (*c*). Where the charter-party provided that the vessel was to unload at a certain port, or so near thereto as she might safely get at all times of tide and always afloat, and she was prevented, by the state of the tide, for some days from reaching that port, it was held that the charterers were liable for demurrage (*d*). A stipulation that the vessel shall proceed to A., and there load a cargo "in the usual and customary manner," applies to the mode of loading, whether by a lighter or at the wharf, and not to the place to which the shipowner undertakes that the ship shall proceed (*e*). Where a charter-party provided that the cargo should be "discharged with all dispatch according to the custom of the port," and the custom was to unload by lighters in turn, and delay arose while waiting for the turn, it was held the jury were rightly directed, that if the defendants had used the existing means at the port with reasonable dispatch, according to the custom, the jury were to find for the defendants (*f*); such a custom is not inconsistent with a charter-party providing that the timber shall be taken from alongside at merchant's expense (*g*). When neither the shipowner nor the charterer is to blame for delay, the number of days runs from the time when the ship is in a dischargeable state; and, if no period is mentioned, the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering (*h*). Where demurrage was stipulated to be paid, "to reckon from the time of the vessel being ready to unload, and in turn to deliver," it was held that the words "in turn to deliver" applied to the public rules and regulations of the port of discharge, and that the charterers were not liable

(*c*) *Tharsis Sulphur Co.* v. *Morel Bros.*, (1891) 2 Q.B. 647; 61 L.J. Q.B. 11; disapproving *The Carisbrook*, 15 P.D. 98; 59 L.J. P. 37; and commenting on *Davies* v. *McVeagh*, 4 Ex.D. 265; 48 L.J. Ex. 686. See also *Hulthen* v. *Stewart*, (1903) A.C. 389; 72 L.J. K.B. 917.

(*d*) *Horsley* v. *Price*, 11 Q.B.D. 244; 52 L.J. Q.B. 603; and see *Allen* v. *Coltart*, 11 Q.B.D. 782; 52 L.J. Q.B. 686.

(*e*) *Tapscott* v. *Balfour*, L.R. 8 C.P. 46; 42 L.J. C.P. 16; *Coverdale* v. *Grant*, 9 App.Cas. 470; 53 L.J. Q.B. 462; *Kay* v. *Field*, 10 Q.B.D. 241; 52 L.J. Q.B. 17.

(*f*) *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; 49 L.J. Ex. 630; *Lyle Shipping Co.* v. *Cardiff Corporation*, (1900) 2 Q.B. 638; 69 L.J. Q.B. 889; *The Alnholme*, (1893) P. 173; 62 L.J. P. 51; *Castlegate S.S. Co.* v. *Dempsey*, (1892) 1 Q.B. 854; 61 L.J. Q.B. 620; *The Jaederen*, (1892) P. 351; 61 L.J. P. 89; *Good* v. *Isaacs*, (1892) 2 Q.B. 555; 61 L.J. Q.B. 649; *Hulthen* v. *Stewart*, (1903) A.C. 389; 72 L.J. K.B. 917. There must always be, however, reasonable dispatch: *Aberdeen Glen Line* v. *Macken* (*S.S. Gairloch*), (1899) 2 Ir.R. 1.

(*g*) *Aktieselskab Helios* v. *Ekmann*, (1897) 2 Q.B. 83; 66 L.J. Q.B. 538; *Brenda S.S. Co.* v. *Green*, (1900) 1 Q.B. 518; 69 L.J. Q.B. 445.

(*h*) *Brown* v. *Johnson*, 10 M. & W. 331; 11 L.J. Ex. 373.

for the payment of demurrage until their "turn to deliver" had come, in conformity with the regulations of the port (*i*). If, after the loading has been completed, the vessel is detained by a sudden frost (*k*), or by foul weather and contrary winds, no right to demurrage arises by reason of such detention (*l*). Demurrage is, however, an elastic term, and delays which occur after the voyage may sometimes give rise to a claim in the nature of demurrage, and give a lien for demurrage within the terms of the charter-party (*m*).

The days mentioned in the clause of demurrage are understood, it is said, by the custom of the port of London, to be working days, and consequently do not include Sundays and Custom-house holidays (*n*). There is not, however, apparently any general custom to this effect (*o*). The expression "weather working day" ordinarily means a day on which the work of loading or discharging is not prevented by bad weather, and unless the charter-party expressly refers to the custom of the port of discharge to attach to the expression a different meaning evidence of such different meaning will not be admissible (*p*). The lay days allowed will be reckoned from the time of the ship's arrival at the usual place of discharge, and not from her arrival at the entrance of the port, although for the purposes of navigation she may have discharged a portion of her cargo at the entrance of the port (*q*). The consignee may, however, show that there is a custom at the port of unloading that the lay days commence at some particular period (*r*). If the parties, by mutual consent, substitute a new port for the port mentioned in the contract of affreightment, the freighter will be entitled to the lay days, and the shipowner to the demurrage, stipulated for by the original contract (*s*). And if a charter-party excepts Sundays and holidays, but work is done on a Sunday, the inference may be that the parties had agreed to

(*i*) *Robertson* v. *Jackson*, 2 C.B. 412; 15 L.J. C.P. 28; *Taylor* v. *Clay*, 9 Q.B. 713; 16 L.J. Q.B. 44; *Leidemann* v. *Schultz*, 14 C.B. 51; 23 L.J. C.P. 17; *The Cordelia*, (1909) P. 27; 78 L.J. P. 48; but see *Lawson* v. *Burness*, 1 H. & C. 396.

(*k*) *Pringle* v. *Mollett*, 6 M. & W. 83; 9 L.J. Ex. 148.

(*l*) *Jamieson* v. *Laurie*, 6 Bro. P.C. 474.

(*m*) *Harris* v. *Jacobs*, 15 Q.B.D. 247; 54 L.J. Q.B. 492.

(*n*) *Cochran* v. *Retberg*, 3 Esp. 121; where "dispatch-money" was to be paid on time saved in loading, and nine days were saved, it was held that these days were of 24 and not 12 hours each: *Laing* v. *Hollway*, 3 Q.B.D. 437; 47 L.J. Q.B. 512.

(*o*) *Brown* v. *Johnson*, 10 M. & W. 334; 11 L.J. Ex. 373. See *Neilsen* v. *Wait*, 16 Q.B.D. 67; 55 L.J. Q.B. 87.

(*p*) *Bennetts* v. *Brown*, (1908) 1 K.B. 490; 77 L.J. K.B. 515; *Bristol, &c., Shipping Co.* v. *Lockett Brothers*, (1911) 1 K.B. 264.

(*q*) *Brereton* v. *Chapman*, 7 Bing. 559; *Kell* v. *Anderson*, 10 M. & W. 498; 12 L.J. Ex. 101; *Bastifell* v. *Lloyd*, 1 H. & C. 388; 31 L.J. Ex. 413.

(*r*) *Norden S.S. Co.* v. *Dempsey*, 1 C.P.D. 654; 45 L.J. C.P. 764.

(*s*) *Jackson* v. *Galloway*, 6 Sc. 792; 8 L.J. C.P. 29.

include that day among the lay days (*t*). In the case of demurrage, a fraction of a day counts as a day (*u*). If a consignee accepts goods under a bill of lading, upon which is a memorandum that the ship is to be cleared within a certain time, and that demurrage is to be paid after such time, he will be liable for such demurrage, and may be sued therefor by the master (*x*); but he is not responsible to the master for demurrage if no such clause is contained in the bill of lading (*y*), or if the delay is caused by the master's improperly refusing to deliver the whole cargo (*z*). Where, by the bill of lading, the vessel is to be unloaded in her regular turn, the consignor is liable for her detention beyond her regular turn, although there is no express contract for demurrage in the bill of lading (*a*).

Where the phrase in the charter-party is general, viz., "the charterer's liability to cease when the cargo is shipped," this includes all liability as well past as future (*b*); but where the clause is that the liability shall cease "as soon as the cargo is shipped, loading excepted," the charterer will be liable for delay in loading (*c*). Where the stipulation is that the ship is to be brought to a particular place, "or as near thereto as she may safely get," this refers to any permanent obstacle as well as to anything endangering her safety (*d*).

It is not unusual for the charter-party to give the shipowner a lien on the cargo for demurrage, and to provide that the charterer's responsibility is to cease on shipment of the cargo. Such an agreement will relieve the charterer from responsibility for demurrage at the port of loading as well as at that of discharge (*e*). But the intention of the parties must be quite clear (*f*); and unless the cesser clause is expressed in terms which prohibit such a conclusion, the lien given will be con-

(*t*) *Whittall & Co.* v. *Rahtken's Shipping Co.*, (1907) 1 K.B. 783; 76 L.J. K.B. 538; *Nelson & Sons* v. *Nelson Line, Liverpool, Ltd.*, (1907) 2 K.B. 705; 76 L.J. K.B. 531; reversed on facts, (1908) A.C. 108; *Roy. Mail St. Packet Co., &c., In re*, (1910) 1 K.B. 600; 79 L.J. K.B. 673.

(*u*) *Commercial S.S. Co.* v. *Boulton*, L.R. 10 Q.B. 346; 44 L.J. Q.B. 219.

(*x*) *Jessen* v. *Solly*, 4 Taunt. 54; *Stindt* v. *Roberts*, 17 L.J. Q.B. 166; 12 Jur. 518; *Wegener* v. *Smith*, 15 C.B. 285; 24 L.J. C.P. 25.

(*y*) *Brouncker* v. *Scott*, 4 Taunt. 1; *Smith* v. *Sieveking*, 5 E. & B. 589; 24 L.J. Q.B. 257; *Chappel* v. *Comfort*, 10 C.B. N.S. 802; 31 L.J. C.P. 58.

(*z*) *Young* v. *Moeller*, 5 E. & B. 762; *S.C.* nom. *Möller* v. *Young*, 25 L.J. Q.B. 94.

(*a*) *Cawthron* v. *Trickett*, 15 C.B. N.S. 754; 33 L.J. C.P. 182; and see *Shadforth* v. *Cory*, 32 L.J. Q.B. 379.

(*b*) *Bannister* v. *Breslauer*, L.R. 2 C.P. 497; 36 L.J. C.P. 195; *Kish* v. *Cory*, L.R. 10 Q.B. 553; 44 L.J. C.P. 205; *French* v. *Gerber*, 1 C.P.D. 737; 2 C.P.D. 247.

(*c*) *Lister* v. *Van Haansbergen*, 1 Q.B.D. 269; 45 L.J. Q.B. 495.

(*d*) *Dahl* v. *Nelson*, 12 Ch.D. 568; 6 App.Cas. 38; 50 L.J. Ch. 414. See *Capper* v. *Wallace*, 5 Q.B.D. 163; 49 L.J. Q.B. 350.

(*e*) *Bannister* v. *Breslauer*, L.R. 2 C.P. 497; 36 L.J. C.P. 195; *Kish* v. *Cory*, L.R. 10 Q.B. 553; 44 L.J. Q.B. 205; *Sanguinetti* v. *Pacific Steam Nav. Co.*, 2 Q.B.D. 238; 46 L.J. Q.B. 105.

(*f*) *Gullischen* v. *Stewart*, 13 Q.B.D. 317; 53 L.J. Q.B. 173.

sidered as commensurate with the release of liability, and will not be construed so as to release the charterer, if in that way the shipowner will be left without any remedy for a breach of contract which has occurred (*g*). Even where the charterer is discharged, it does not necessarily follow that the responsibility is transferred to the holder of the bill of lading (*h*). A bill of lading which incorporates the terms of a charter-party must receive a reasonable construction. It is a document regulating the rights and liabilities of the consignees, and only those clauses of the charter-party which are consistent with the bill of lading are incorporated in it (*i*). The inclusion in a bill of lading of the words "all other conditions as per charter-party" is insufficient to fix a person taking it in the ordinary course of business with notice of all the contents of the charter-party, the equitable doctrine of constructive notice not being applicable to commercial transactions (*k*).

Primage and average.—There are certain customary charges called primage and average which a freighter whose merchandise has been conveyed to the port of destination is also liable to pay. The first is a small customary payment to the master for his trouble, and the second consists of several petty charges, such as towage, beaconage, pilotage, &c. (*l*).

General average.—A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo (*m*), and the obligation to contribute, which by the common law is impliedly entered into by the shipowners and owners of the cargo, is called general or gross average; and the parties subject thereto are bound to contribute rateably according to the value of their several proportions of the property saved. There can be no contribution where the same person is owner of both ship and cargo. The

(*g*) *Clink* v. *Radford*, (1891) 1 Q.B. 625; 60 L.J. Q.B. 388; *Dunlop* v. *Balfour*, (1892) 1 Q.B. 507; 61 L.J. Q.B. 354; *Hanson* v. *Harrold*, (1894) 1 Q.B. 612; 63 L.J. Q.B. 744.

(*h*) The words "paying freight as per charter-party" were held in *Chappel* v. *Comfort*, 10 C.B. N.S. 802; 31 L.J. C.P. 58, not to make the holder of the bill of lading liable for demurrage (cp. *Smith* v. *Sieveking*, 4 E. & B. 945; 24 L.J. Q.B. 257); and in *Fry* v. *Chartered Bk. of India*, L.R. 1 C.P. 689; 35 L.J. C.P. 306, not to make the holder of the bill of lading of a part of the cargo liable for the entire freight. In *Wegener* v. *Smith*, 15 C.B. 285; 24 L.J. C.P. 25, words making the goods "deliverable to order against payment of the agreed freight *and other conditions* as per charter-party," were held to make the consignee liable for demurrage at the port of delivery. But see *S.S. County of Lancaster* v. *Sharp*, 24 Q.B.D. 158; 59 L.J. Q.B. 22.

(*i*) *Gullischen* v. *Stewart*, 13 Q.B.D. 317; 53 L.J. Q.B. 173; *Gray* v. *Carr*, L.R. 6 Q.B. 522; 40 L.J. Q.B. 257; *Gardner* v. *Trechmann*, 15 Q.B.D. 154; 54 L.J. Q.B. 515; *Serraino* v. *Campbell*, (1891) 1 Q.B. 283; 60 L.J. Q.B. 303; *Diederichsen* v. *Farquharson*, (1898) 1 Q.B. 150; 67 L.J. Q.B. 103; *Repetto* v. *Millar's Karri Jarrah Forests*, (1901) 2 K.B. 306; 70 L.J. K.B. 561.

(*k*) *Manchester Trust* v. *Furness*, (1895) 2 Q.B. 539; 64 L.J. Q.B. 766; *The Draupner*, (1910) A.C. 450; 79 L. J. P. 88.

(*l*) Abbott, 655 (ed. 14).

(*m*) *Per* Bowen, L.J., in *Svensden* v. *Wallace*, 13 Q.B.D. 69, at p. 84.

claim for average contribution is part of the law of the sea, and arises in consequence of an act done by the captain as agent, not for the shipowner only, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo (*n*). To constitute a general average loss so as to be the subject of a general average contribution, two things at least must co-exist: (*a.*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (*b.*) such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution (*o*). The right of contribution, however, does not belong to wrongdoers who have brought about the loss (*p*), but where the loss is caused by the negligence or wrongdoing of persons for whom the shipowner is not responsible his right to contribution remains unaffected (*q*). Where damage is caused to a cargo in extinguishing fire, the shipper is not prevented, in the absence of default on his part, from claiming a general average contribution by reason of the fire having arisen from the inherent vice of the cargo (*r*).

Everything saved pays contribution according to its value; the shipowner contributes in proportion to the value of the ship and furniture, except the provisions of the passengers and crew (*s*), and the passengers and owners of goods shipped in proportion to the value of the property they save, excepting the clothes on their backs, but not excepting their wearing apparel and jewels deposited on board. The freight and earnings of the ship, after deducting the wages of the master and crew and other expenses of the voyage, likewise form the subject of contribution and general average; and, if a ship be chartered out and home for one entire and indivisible sum, the entire freight for the outward and homeward voyage must, when ultimately earned, contribute to the loss, whether this has occurred upon the outward or upon the homeward voyage (*t*). Goods stowed

(*n*) *Burton* v. *English*, 12 Q.B.D. 223; 53 L.J. Q.B. 133, *per* Bowen, L.J., where the words "at merchant's risk" were held not sufficiently to indicate an intention to exempt from general average.

(*o*) *Per* Smith, L.J., in *Iredale* v. *China Traders Insurance Co.*, (1900) 2 Q.B. 515, 519; 69 L.J. Q.B. 783.

(*p*) *Strang, Steel & Co.* v. *Scott*, 14 App.Cas. 601; 59 L.J. P.C. 1; *Kish* v. *Taylor*, (1911) 1 K.B. 625.

(*q*) *The Carron Park*, 15 P.D. 203; 59 L.J. P. 74; *Milburn* v. *Jamaica Fruit Co.*, (1900) 2 Q.B. 540; 69 L.J. Q.B. 860.

(*r*) *Greenshields & Co.* v. *Stephens & Sons*, (1908) A.C. 431; 77 L.J. K.B. 985.

(*s*) *Brown* v. *Stapyleton*, 4 Bing. 119.

(*t*) *Williams* v. *London Assurance*, 1 M. & S. 325; *S.S. Carisbrook Co.* v. *Lond. & Prov. Mar. Ins. Co.*, (1902) 2 K.B 681; 71 L.J. K.B. 978.

upon the deck of the vessel, and thrown overboard during a storm, are excluded from the benefit of general average and contribution. Where goods were loaded on deck with the consent of their owner on a general ship, and there was no alleged custom bearing upon the case (*u*), the other cargo-owners were held not liable as for general average in respect of jettison of the deck cargo (*x*). If the goods are so loaded without the consent of their owner, the shipowner is himself liable (*y*); and if it is agreed between the cargo-owner and the shipowner that a deck cargo shall be carried, and the shipowner and cargo-owner get the whole of the benefit from the jettison, the shipowner will be liable (*z*).

Shipowners allowed the stowing of goods on deck in violation of their contract with the shipper. Some of the bills of lading of some cotton contained the words "under deck" and all of them exceptions in favour of "jettison." On the voyage the cotton was properly jettisoned. In an action by the indorsees of the bills of lading against the shipowners, it was held that the cotton was carried on deck in breach of contract, and was not within the exception, which had exclusive reference to goods safely stowed under hatches; that the cause of damage was not too remote; and that the shipowners were liable (*a*). A sale of the cargo at a port of refuge for the safety of the common adventure after the danger has ceased does not give rise to a claim for general average (*b*).

If the goods have been washed out of the ship by the violence of the waves, or have been damaged or destroyed by lightning or tempest, or have been unnecessarily cast overboard by the master, or crew, or passengers, the loss will not support a claim for general average (*c*). If masts and cables have been cut away for the purpose of preventing shipwreck, the owners of the cargo must contribute towards the loss of the shipowner; but, if they have been blown away, or injured in consequence of the necessity of carrying a great and unusual press of canvas to escape a threatening danger, or if the ship was not seaworthy at the commencement of the voyage, and the loss was occasioned by reason of such unseaworthiness, the loss is not the subject of

(*u*) See *Miller* v. *Titherington*, 30 L.J. Ex. 217; 31 L.J. Ex. 363.

(*x*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643.

(*y*) *Ib.*; this case practically overrules *Milward* v. *Hibbert*, 3 Q.B. 120; 11 L.J. Q.B. 137.

(*z*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643; *Johnson* v. *Chapman*, 19 C.B. N.S. 563; 35 L.J. C.P. 23.

(*a*) *Royal Exchange Shipping Co.* v. *Dixon*, 12 App.Cas. 11; 56 L.J. Q.B. 266.

(*b*) *Iredale* v. *China Traders Ins. Co.*, (1900) 2 Q.B. 515; 69 L.J. Q.B. 783.

(*c*) *Mouse's Case*, 12 Co. 63; *Dobson* v. *Wilson*, 3 Campb. 486.

contribution and general average (*d*). If, in endeavouring to refloat a steamship stranded in a perilous position, the engines are worked for the common safety at too high pressure, the damage so caused to them as well as the value of the coal consumed in working them form the subject of a general average contribution (*e*). If at the time when a mast is cut away with a view to saving the whole adventure, it is certain to be lost in any event, then there is no "sacrifice" of the mast, and therefore no claim for general average (*f*). If a ship accidentally runs foul of another ship in a fog or storm, and the master is compelled to cut away his rigging in order to preserve the ship and cargo, and is obliged to put into port to repair and renew that which has been sacrificed, the expense of re-landing and warehousing the cargo, of pilotage, and of the repairs, so far as they are absolutely necessary to enable the cargo to be forwarded, form the subject of general average (*g*). So where a ship loaded with cattle sprang a leak, and the master for the safety of all concerned put into an infected port for repairs, and the cattle could not be landed in England, but had to be sold elsewhere at a lower price, it was held that the depreciation in value of the cattle being the direct and immediate consequence of the average act of putting into port for repairs was a loss recoverable in general average (*h*). But where a ship has been stranded through the negligence of her master, and it has become necessary to jettison part of the cargo, although the innocent owners of the jettisoned cargo will be entitled to general average, the shipowners will not unless their ordinary relations to the shippers have been varied by contract (*i*). An extraordinary expenditure incurred is as much a sacrifice, as if, instead of money being expended, money's worth were thrown away (*k*). If part of the cargo has been taken out and put into lighters, to enable a stranded vessel to be got afloat and sent

(*d*) *Birkley* v. *Presgrave*, 1 East, 220; *Covington* v. *Roberts*, 2 B. & P. N.R. 378; *Power* v. *Whitmore*, 4 M. & S. 149; *Schloss* v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 211; *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.*, (1902) 1 K.B. 734; 71 L.J. K.B. 467.

(*e*) *The Bona*, (1895) P. 125; 64 L.J. P. 62.

(*f*) *Shepherd* v. *Kottgen*, 2 C.P.D. 585; 47 L.J. C.P. 67.

(*g*) *Plummer* v. *Wildman*, 3 M. & S. 482, qualified by *Hallett* v. *Wigram*, 9 C.B. 601; 19 L.J. C.P. 288; *Hall* v. *Janson*, 4 E. & B. 500; 24 L.J. Q.B. 97; *Harrison* v. *Bank of Australasia*, L.R. 7 Ex. 39; 41 L.J. Ex. 36; *Atwood* v. *Sellar*, 5 Q.B.D. 286; 49 L.J. C.P. 515. See, however, as to this case and the expenses of reshipping the cargo, *Svendsen* v. *Wallace*, 10 App.Cas. 404; 54 L.J. Q.B. 497; *Rose* v. *Bank of Australasia*, (1894) A.C. 687; 63 L.J. Q.B. 504.

(*h*) *Anglo-Argentine Live Stock Agency* v. *Temperley*, (1899) 2 Q.B. 403; 68 L.J. Q.B. 900; cp. *Iredale* v. *China Traders Insurance Co.*, (1900) 2 Q.B. 515; 69 L.J. Q.B. 783.

(*i*) *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; 59 L.J. P.C. 1.

(*k*) *Per* Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L.J. Q.B. 233.

into port for repairs, the whole expense of the operation, which is for the common benefit of ship, goods, and freight, forms the subject of general average (*l*); but not, as a general rule, expenses incurred, after the cargo has been safely discharged and warehoused, for the purpose of saving the ship alone (*m*). So long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; so loss of time freight resulting from detention under repair of general average damage is not allowed in general average (*n*); but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, chargeable against all the subjects in jeopardy saved by this expenditure (*o*). So also the expense of hiring extra hands to pump (*p*), and the burning of spars and cargo as fuel for the engine to work the pump (*q*), and throwing water on the cargo in case of fire (*r*), has been held to be general average. But the fact that the shipowners have become bound to pay a sum of money for the preservation of the ship and cargo through the reasonable conduct of the master does not make the whole sum necessarily chargeable to general average (*s*).

Salvage paid to recaptors, money or goods given as a composition to pirates to save the rest, and expenses incurred in reclaiming the ship, or defending a suit in a foreign court of Admiralty, and obtaining her discharge from an unjust capture or detention, are all the proper subjects of general contribution (*t*). It has been held that the expenditure of ammunition in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded, are not the subject of contribution; but the correctness of this decision may be doubted, opposed as it is to the opinions of some of the most eminent writers on maritime law (*u*). A practice formerly prevailed in this country to value the goods at their invoice price or prime cost, if the loss happened before half the voyage was performed; but, if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination. The last valuation is now adopted in

(*l*) *Moran* v. *Jones*, 7 E. & B. 533; 26 L.J. Q.B. 187.

(*m*) *Job* v. *Langton*, 6 E. & B. 792; 26 L.J. Q.B. 97; *Walthew* v. *Marrojani*, L.R. 5 Ex. 116; 39 L.J. Ex. 81; *Royal Mail Co.* v. *English Bank of Rio*, 19 Q.B.D. 362; 57 L.J. Q.B. 31.

(*n*) *The Leitrim*, (1902) P. 256; 71 L.J. P. 108.

(*o*) *Per* Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L.J. Q.B. 233.

(*p*) *Wilson* v. *Bank of Victoria*, L.R. 2 Q.B. 203; 36 L.J. Q.B. 89.

(*q*) *Robinson* v. *Price*, 2 Q.B.D. 295; 46 L.J. Q.B. 551.

(*r*) *Whitecross Wire Co.* v. *Savill*, 8 Q.B.D. 653; 51 L.J. Q.B. 426.

(*s*) *Tritton* v. *Ocean Steamship Co.*, 10 App.Cas. 107; 54 L.J. Q.B. 192.

(*t*) Marshall on Insurance (ed. 4), by Shee, J., p. 425.

(*u*) *Taylor* v. *Curtis*, 6 Taunt. 608; *ib.* 638—643; Phillips on Insurance, 1337; Benecke, 280.

all cases where the average is adjusted after the ship's arrival at the place of destination. But, if the ship is compelled to return to its lading port, and the average is immediately adjusted, the goods only contribute according to the invoice price (*x*), or even less, if in all probability they would have arrived in a damaged state; the general rule being that the value of goods jettisoned is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment (*y*).

The adjustment of average should be at the port of destination, if reached; but where the voyage is interrupted by some supervening cause, which necessitates or justifies its termination at some intermediate place, that place is the proper place of adjustment (*z*). As soon as the average has been calculated and the exact amount of contribution ascertained, an action may be brought for its recovery (*a*). Each owner of jettisoned goods becomes a creditor of the ship and cargo saved, and has a direct claim against the owners of both for a *pro ratâ* contribution, recoverable either by direct action, or, through the shipmaster as his agent for the purpose, by exercising a lien on each parcel of goods salved for its proportionate liability (*b*). The obligation to make general average contribution arises from the relation between ship and cargo, and not from an antecedent collision, so that the shipowner cannot recover from the wrongdoing ship the amount of general average contribution which he has had to pay (*c*).

Where there has been a general average loss, the shipowner must take such steps as are necessary upon his part to procure an adjustment of the general average and secure its payment (*d*). He is not bound to employ an average-stater but may make out his own average statement (*e*). He cannot, however, insist as a condition for the delivery of the cargo that the consignee shall pay a deposit upon which the shipowner may draw to discharge claims forming part of the general average expenses (*f*).

Transfer of bills of lading.—The contract evidenced by a bill of lading is transferred by the indorsement and delivery of the

(*x*) Abbott, 798 (ed. 14).

(*y*) *Fletcher* v. *Alexander*, L.R. 3 C.P. 375; 37 L.J. C.P. 193.

(*z*) *Per* Cockburn, C.J.: *Mavro* v. *Ocean Marine Ins. Co.*, L.R. 10 C.P. 414; 44 L.J. C.P. 229.

(*a*) *Birkley* v. *Presgrave*, 1 East, 220; see the old form of declaration, *Schloss* v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 214.

(*b*) *Strang, Steel & Co.* v. *Scott*, 14 App.Cas. 601; 59 L.J. P.C. 1.

(*c*) *The Marpessa*, (1891) P. 403; 61 L.J. P. 9.

(*d*) *Crooks* v. *Allan*, 5 Q.B.D. 38; 49 L.J. Q.B. 201.

(*e*) *Wavertree Sailing Ship Co.* v. *Love*, (1897) A.C. 373; 66 L.J. P.C. 77.

(*f*) *Huth* v. *Lamport*, 16 Q.B.D. 735; 55 L.J. Q.B. 239.

instrument to the indorsee, so as to enable the latter to maintain an action, or be sued, upon it (*g*). But where bills of lading were indorsed by the shipper in blank and deposited with the indorsees as security for a loan, and the indorsees did not take possession or deal with the goods, it was held that the property in the goods did not pass to the indorsees so as to make them liable in an action by the shipowner for freight (*h*). If the consignor under a bill of lading, making the goods deliverable to order or assigns, indorses the bill in blank, and deposits it as a security for an advance of money, and on repayment of the advance the bill is re-indorsed and re-delivered to him, he is remitted to all his rights under the original contract as against the shipowners, and may sue them for a breach, whether occurring before or after the re-indorsement (*i*).

Damages for breach of charter-parties.—The measure of damages for the breach of the ordinary contract or covenant in a charter-party to procure and ship a cargo and pay freight (*ante*, p. 970) is to be ascertained by calculating the freight to be earned, and deducting the expense which the shipowner would have been put to, but did not incur, in earning it, and also what the ship earned (if anything) during the period which would have been occupied in performing the voyage if the charter-party had been fulfilled (*k*). If, subsequently to the breach of contract, the shipmaster has been offered a cargo and has refused it, or has neglected an opportunity of receiving cargo and earning freight, the measure of damages will be the amount of freight agreed to be paid, minus what the shipmaster might have earned if he had thought fit (*l*). When goods shipped on board have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the shipper is not entitled to claim the price they might have realised at the port of delivery unless the ship and cargo arrive there in safety (*m*).

Carriage of dangerous goods.—By the Merchant Shipping Act, 1894 (*n*), s. 448 (1), the master or owner of any vessel may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact. By sect. 448 (2), where any

(*g*) 18 & 19 Vict. c. 111 ; 24 Vict. c. 10, s. 6 ; see *Smurthwaite* v. *Wilkins*, 13 C.B. N.S. 842 ; 31 L.J. C.P. 214 ; *Dracachi* v. *Anglo-Egyptian Navigation Co.*, L.R. 3 C.P. 190 ; 37 L.J. C.P. 71 ; *The Figlia Maggiore*, L.R. 2 A. & E. 106 ; 37 L.J. Adm. 52 ; *The Freedom*, L.R. 3 P.C. 594.

(*h*) *Sewell* v. *Burdick*, 10 App.Cas. 74 ; 54 L.J. Q.B. 156.

(*i*) *Short* v. *Simpson*, L.R. 1 C.P. 248 ; 35 L.J. C.P. 147.

(*k*) *Smith* v. *M'Guire*, 3 H. & N. 567 ; 27 L.J. Ex. 465 ; *Wilson* v. *Hicks*, 26 L.J. Ex. 242 ; *Aitken* v. *Ernsthausen*, (1894) 1 Q.B. 773 ; 63 L.J. Q.B. 559.

(*l*) *Harries* v. *Edmonds*, 1 C. & K. 686.

(*m*) *Atkinson* v. *Stephens*, 21 L.J. Ex. 329 ; 7 Exch. 567.

(*n*) 57 & 58 Vict. c. 60.

dangerous goods (*o*), or any goods which, in the judgment of the master or owner of the vessel are of a dangerous nature, have been sent or brought aboard any vessel without being marked or without notice being given as required by the Act (*p*), the master or owner of the vessel may cause such goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel will be subject to any liability in respect of such throwing overboard.

Carriage of passengers and merchandise by land—Injuries to passengers and goods.—All persons who undertake the work of carrying passengers by land for hire impliedly warrant their vehicles, horses, and equipments to be roadworthy, and reasonably sufficient in strength for the accomplishment of the journey, so far as that condition of things can be secured by the exercise of skill; but the carrier does not warrant that they shall be perfect for their purpose; and, therefore, while he ought reasonably to examine the vehicle (*q*), and will be liable for a breakdown which the exercise of reasonable care would have prevented (*r*), he is not responsible for a defect in it, the existence of which no skill could have detected (*s*). As the work of driving is a work of skill, the carrier impliedly undertakes, if he drives himself, that he will exercise competent skill in driving, or, if he accomplishes the work through agents, that he will provide fit persons to execute the office. If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses, or if he passes unnecessarily along unsafe parts of the road, or through narrow gateways or dangerous passages, or takes the wrong side of the road, and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passengers (*t*). And if, from the negligence of the driver, or defects in the carriage or equip

(*o*) That is, aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, 38 & 39 Vict. c. 17, or any other goods of a dangerous nature (sect. 446 (3)). See also *post*, p. 1023.

(*p*) By sect. 446 (1), the nature of the goods must be marked on the outside of the package, and written notice of their nature and of the name and address of the sender or carrier must be given at or before the time of shipment.

(*q*) *Richardson* v. *G. E. Ry.*, L.R. 10 C.P. 486, reversed on the findings on appeal, 1 C.P.D. 342.

(*r*) *Hyman* v. *Nye*, 6 Q.B.D. 685; an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid does not imply negligence: *Wing* v. *London Gen. Omnibus Co., Ltd.*, (1909) 2 K.B. 652; 78 L.J. K.B. 1063.

(*s*) *Christie* v. *Griggs*, 2 Campb. 81; *Sharp* v. *Grey*, 9 Bing. 457; 2 L.J. C.P. 45; *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; *Francis* v. *Cockerell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291; *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*t*) *Aston* v. *Heaven*, 2 Esp. 535; *Bremner* v. *Williams*, 1 C. & P. 414.

ments, the passenger is placed in so perilous a situation as to render it advisable for him to leap to the ground to avoid a greater peril reasonably to be apprehended, and he sustains an injury in so doing, the coach proprietor is responsible (*u*). Railway carriers of passengers contract that all persons connected with the carrying and with the means of the carrying, such as the carriages, the road, or signalling, shall use care; but they do not contract that other railway companies who may be entitled to use the railway shall not be guilty of negligence in the management of their trains (*v*). In determining the question of negligence in cases of collision, the law or custom of the road as to passing vehicles is to be taken into consideration; but "circumstances may frequently arise, where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary" (*x*).

Every carrier of passengers for hire, whether he be or be not a common carrier, is bound to exercise the greatest care for securing the safety of his passengers, and is answerable for the smallest negligence on his own part, or on the part of his servants and agents (*y*), but not for unforeseen accidents and misfortunes, which care could not have prevented (*z*). He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety" (*a*). But the breaking down or overturning of a coach is *primâ facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident" (*b*). When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers (*c*); and by the 31 & 32 Vict. c. 119, s. 22, to provide in certain cases for means of communication between the passengers and the guard. But the company is not bound, at its peril, to provide a roadworthy carriage, and will

(*u*) *Jones* v. *Boyce*, 1 Stark. 493.

(*v*) *Wright* v. *Midland Ry.*, L.R. 8 Ex. 137; 42 L.J. Ex. 89. And see *post*, p. 1070.

(*x*) *Wayde* v. *Carr* (*Lady*), 2 D. & R. 256; 1 L.J. (O.S.) K.B. 63.

(*y*) *Jackson* v. *Tollett*, 2 Stark. 38; *Dudley* v. *Smith*, 1 Campb. 169.

(*z*) *E.g.*, where a woman was injured by being pushed off the platform by the pressure of an orderly crowd: *M'Callum* v. *N. B. Ry.*, (1908) S.C. 415.

(*a*) *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*b*) *Crofts* v. *Waterhouse*, 3 Bing. 321; 4 L.J. (O.S.) C.P. 75; *Sharp* v. *Grey*, 9 Bing. 457; 2 L.J. C.P. 45; *Harris* v. *Costar*, 1 C. & P. 637.

(*c*) As to overcrowding on platform causing injury, see *Fraser* v. *Caledonian Ry.*, (1903) 5 F. 41.

not be responsible to a passenger, if the defect in the carriage is such that it could be neither guarded against in the process of construction, nor discovered by subsequent examination (*d*). Every person who receives goods to be carried from one place to another is bound to provide proper covering to protect the goods from injury by rain (*e*).

If the driver of a railway-engine drives at a dangerous speed, or from negligence causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages that may have been sustained by the passengers (*f*). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences (*g*).

A railway company will be responsible, at all events in the absence of fraud on the part of the mother, for an injury sustained by a child between the ages of three and twelve, travelling with her, although no separate fare was paid for the child, and the company cannot shield itself under the contract with the mother (*h*). The contract seems to be made by the invitation to take the seat in the train and the acceptance of it, and it is immaterial whether the traveller himself took a ticket or paid the fare (*i*). But where a servant has taken a ticket for himself, the master cannot sue, because the tort arises out of a contract to which the master is not a party, and there is no duty towards the master (*k*). Where part of the ordinary luggage of a servant which he is taking with him as a passenger by a railway is the property of his master, and it is injured whilst in the custody of the railway company by their misfeasance—as, by being negligently overturned in front of a train—the master can maintain an action of tort against the company for the amount of the damage, notwithstanding that the contract of carriage is with the servant alone. Where a servant is a passenger by a railway that is bound to carry the ordinary luggage of a passenger free of charge, his livery is such luggage, although

(*d*) *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379 ; 38 L.J.Q.B. 169 ; *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396 ; 70 L.J. P.C. 63. And see *ante*, p. 1016.

(*e*) *Webb* v. *Page*, 6 M. & Gr. 196 ; 12 L.J. C.P. 327.

(*f*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 984 ; 20 L.J. Q.B. 411 ; *Skinner* v. *L. B. & S. C. Ry.*, 5 Exch. 787.

(*g*) *Latch* v. *Rumner Ry.*, 27 L.J. Ex. 155.

(*h*) *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442 ; 36 L.J. Q.B. 201.

(*i*) *Marshall* v. *Y. & N. Ry.*, 11 C.B. 655 ; 21 L.J. C.P. 34 ; *Austin* v. *G. W. Ry.*, *supra*.

(*k*) *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213 ; 34 L.J. C.P. 292.

the property of his master (*l*). It seems, however, that where the servant has taken a ticket from one company and has been injured by the negligence of another, the master may sue that company with whom neither has contracted (*m*). The *ratio decidendi* seems to be that, though generally speaking an action against a railway company for a tort in form is substantially for a breach of contract, where there is a contract express or implied between the parties, yet there is, beyond the contract, a duty which the law imposes upon all, namely, to do no act to injure another (*n*).

Primâ facie *evidence of negligence.*—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *primâ facie* proof of negligence on the part of such company, or its officers, and throws upon them the burden of showing that it occurred without any fault or neglect of duty on their part (*o*). And where other companies have running powers over the line, it must be shown affirmatively that it was through the negligence of such other companies that the accident occurred (*p*). But if the accident is *primâ facie* caused by the negligence of some third person, for whom the defendants are not responsible, *e.g.*, a contractor engaged for some third person, or a passenger in the train, it must be shown that the accident resulted from, or might not have occurred but for, the defendants' omitting to take some precaution usually adopted (*q*). If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (*ante*, p. 1017), there will be nothing to establish even a *primâ facie* case of negligence against the company (*r*). But if the railway bridges or viaducts have not been properly constructed, or have not been carefully repaired, so as to enable them to resist the violence of storms and

(*l*) *Meux* v. *G. E. Ry.*, (1895) 2 Q.B. 387; 64 L.J. Q.B. 657.

(*m*) *Berringer* v. *G. E. Ry.*, 4 C.P.D. 163; 48 L.J. C.P. 400.

(*n*) *Fleming* v. *M. S. & L. Ry.*, 4 Q.B.D. 81; *Foulkes* v. *Met. Dist. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361.

(*o*) *Carpue* v. *L. & B. Ry.*, 5 Q.B. 747; 13 L.J. Q.B. 133; *Latch* v. *Rumner Ry.*, *ante*, p. 1017; see *Scott* v. *London Dock Co.*, 3 H. & C. 596; 34 L.J. Ex. 220; as to interrogatories in cases of collision, see *Bechervaise* v. *G. W. Ry.*, L.R. 6 C.P. 36; 40 L.J. C.P. 8.

(*p*) *Ayles* v. *S. E. Ry.*, L.R. 3 Ex. 146; 37 L.J. Ex. 104.

(*q*) *Daniel* v. *Metropolitan Ry.*, L.R. 3 C.P. 591; 37 L.J. C.P. 280; L.R. 5 H.L. 45; 40 L.J. C.P. 121; *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*r*) *Bird* v. *G. N. Ry.*, 28 L.J. Ex. 3.

floods which may be expected occasionally to occur, and injuries are thereby caused to passengers (*s*), the railway company will be responsible in damages, the mere fact that they may have employed competent engineers and workmen, and have used the best materials in the work, not relieving them of responsibility (*t*).

Loss of goods or money by the way.—A person who receives things to be carried by him for hire to a certain destination cannot set up a mere loss of them by the way as an answer to an action for the non-delivery of them according to his contract (*ante*, p. 982). The law will even imply a promise from the defendant "safely to convey," although he is not a common carrier, and although no sum certain has been agreed to be paid him as the price of the carriage (*u*). Where a traveller hired a cab for the conveyance of himself and his luggage to a railway station, and the luggage was placed on the outside of the cab, it was held that the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, implied a promise "safely and securely" to carry, and that the cabman was responsible for the loss of a portion of the luggage by the way (*x*). This promise to carry safely, which the law implies from all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be delivered safe at all events, but that they shall be kept safe from all such contingencies as can be guarded against by the exercise of vigilance or skill. The contract is "a contract to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods;" and the carrier therefore is not liable for losses by robbers, or any taking by force; but he is *primâ facie* responsible for a secret theft of them, unless he can prove his own care and watchfulness and blamelessness in the matter (*y*). If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not responsible for the loss (*z*).

Who is to be deemed a common carrier.—Every person who plies with a carriage by land, or with a boat or vessel by water, between different places, and professes openly to carry passengers and goods, is a CARRIER, and every person who undertakes for hire or reward to transport the goods of such as choose

(*s*) *Gt. West., &c. of Canada* v. *Fawcett*, 1 Moo. P.C. N.S. 101.

(*t*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 255

(*u*) *Rogers* v. *Head*, Cro.Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.

(*x*) *Ross* v. *Hill*, 2 C.B. 877; 15 L.J. C.P. 182.

(*y*) *De Rothschild* v. *R. M. St. P. Co.*, 7 Exch. 734; 21 L.J. Ex. 273; and see *ante*, p. 1026.

(*z*) *Brind* v. *Dale*, 8 C. & P. 209, 211; 2 Moo. & R. 80; see also cases as to passenger's luggage, *post*, p. 1035.

to employ him from place to place is a *common carrier* (*a*). Common carriers are railway companies who profess to carry goods or merchandise, stagecoach and waggon proprietors, lightermen, hoymen, barge owners, canal boatmen and the owners and masters of ships or steamboats employed as general ships trading regularly from port to port for the transportation of goods (*b*). The owner of a carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cabdriver or hackney coachman, for example, is not a common carrier (*c*), nor is a furniture remover (*d*); but a barge-owner is, although he does not ply between any fixed *termini*, and only lets his barges for a single voyage to one person at a time, if he lets out his vessels for the conveyance of the goods of any person who applies to him (*e*). When goods are in the custody of persons as wharfingers and not as carriers, and such persons do not undertake to carry the goods of any who ask them, they are not common carriers, and are not liable, in the absence of negligence, for damage arising to the goods (*f*). Railway companies are, apart from statute law or special contract, common carriers (though not of passengers (*g*)), and the Railways Clauses Act, 1845 (*h*), provides that they shall not be liable to any greater extent than common carriers; but their rights and liabilities are further regulated and limited, as we shall see, both by statute and by special contracts. By many of the railway Acts it is expressly enacted that railway companies shall act as common carriers, that they shall convey passengers and goods by locomotive engines, and that they shall provide for all persons conveying and sending goods by their railway every reasonable convenience and facility for the loading and unloading of goods (*i*). So one

(*a*) Story on Bailments, s. 495; adopted by Wilde, C.J., in *Benett* v. *P. & O. S.S. Co.*, 6 C.B. 775, 787; and see Brett, J., in *Nugent* v. *Smith*, 1 C.P.D. 19, 27; 45 L.J. C.P. 697.

(*b*) *Lovett* v. *Hobbs*, 2 Show. 127; *Dale* v. *Hall*, 1 Wils. 281; *Trent Navigation Proprietors* v. *Wood*, 3 Esp. 127; *Crouch* v. *L. & N. W. Ry.*, 14 C.B. 255; 23 L.J. C.P. 73. A railway company is not liable as a common carrier of passengers independently of negligence: *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176, 185; 56 L.J. Q.B. 111; *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*c*) *Brind* v. *Dale*, 8 C. & P. 207; 2 Moo. & R. 80; *Ross* v. *Hill*, 2 C.B. 887; 15 L.J. C.P. 182.

(*d*) *Scaife* v. *Farrant*, L.R. 10 Ex. 358; 44 L.J. Ex. 234, *post*, p. 1033.

(*e*) *Liver Alkali Co.* v. *Johnson*, L.R. 9 Ex. 338; 43 L.J. Ex. 216; *Hill* v. *Scott*, (1895) 2 Q.B. 713; 65 L.J. Q.B. 87.

(*f*) *Chattock* v. *Bellamy*, 64 L.J. Q.B. 250; *Consol. Tea, &c. Co.* v. *Oliver's Wharf*, (1910) 2 K.B. 395; 79 L.J. K.B. 810.

(*g*) *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176, 185; 56 L.J. Q.B. 111; *East Indian Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*h*) 8 & 9 Vict. c. 20, s. 89.

(*i*) *Pegler* v. *Monmouth Ry.*, 6 H. & N. 644; 30 L.J. Ex. 249. As to the obligation of railway companies to

who is not a common carrier by trade may by some particular warranty or undertaking to carry goods safely place himself in the situation of a common carrier (*k*). It is the duty of all who hold themselves out to the world as common carriers to carry, for every person who tenders them the proper charge, all goods which they have convenience for carrying, and in respect of which they hold themselves out as carriers, without subjecting the person tendering the goods to any unreasonable or unusual conditions (*l*).

Duties of common carrier.—Whenever a man undertakes the public office of a common carrier of goods he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach of such an office, under pain of an action against him (*m*). He is bound to accept and carry all things which he publicly professes to carry for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey (*n*); and he is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm (*o*). A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go (*p*). If he journeys by a particular roundabout road between one place and another, he is not bound to carry by a shorter route; but he is bound to use reasonable dispatch and to deliver within a reasonable time (*q*). If he limits his business to the carriage of particular classes of chattels, he can only be compelled to carry the things he publicly professes to carry, and is in the habit of carrying. If the carriage of certain commodities is attended with inconvenience or some peculiar risk, he may refuse to receive and

carry mails and post office servants in charge of them, see Railways (Conveyance of Mails) Act, 1838, 1 & 2 Vict. c. 98, ss. 1—6, 16; Regulations of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 36; Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, ss. 18, 19; and see *Postmaster-General* v. *Highland Ry.*, 2 Ry. & Can.Tr.Cas. 34; *Waterford, Limerick and Western Ry.* v. *Postmaster-General*, 11 Ry. & Can.Tr.Cas. 77; *G. W. Ry.* v. *Postmaster-General*, 12 Ry. & Can.Tr.Cas. 11. As to conveyance of mails in charge of a servant going as an ordinary passenger, see Railway Regulation Act, 1844, 7 & 8 Vict. c. 85, s. 11.

(*k*) *Robinson* v. *Dunmore*, 2 Bos. & P. 416.

(*l*) *Garton* v. *Brist. & Ex. Ry.*, 1 B. & S. 162; 30 L.J. Q.B. 294; cp. *Stone* v. *Midland Ry.*, (1904) 1 K.B. 669; 73 L.J. K.B. 392.

(*m*) Keilwey, 50, pl. 4.

(*n*) Bac.Abr. Carriers, B.; *Pickford* v. *Grand Junction Ry.*, 8 M. & W. 372; 10 L.J. Ex. 342.

(*o*) *Crouch* v. *L. & N. W. Ry.*, 14 C.B. 290; 23 L.J. C.P. 73.

(*p*) *Per* Willes, J., *Myers* v. *L. & S. W. Ry.*, L.R. 5 C.P. 3; 39 L.J. C.P. 57.

(*q*) *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292; *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680.

carry such articles as a common carrier (*r*), but may, nevertheless, accept and carry them under a special contract throwing the risk of damage to them from ordinary accidents during the transit upon the owner or the consignor (*s*). Since his first duty is to carry safely, a common carrier is justified in incurring delay, if delay is necessary to secure the safe carriage, and is not responsible for the consequences of delay arising from causes beyond his control (*t*).

As regards dogs and live animals, if the carrier does not, by his public profession and practice undertake to carry them, he may insist upon carriage under special conditions, or under a special contract (*u*). But in the case of a railway or canal company such conditions or contract must be just and reasonable, must not exempt the company from liability for their own neglect or default, and must be in writing signed by the consignor or his agent (*x*). Where carriers by sea give public notice that they receive goods for shipment on the condition and agreement only of the ship sailing under a bill of lading in the form ordinarily adopted, they are not bound to receive and carry otherwise than in accordance with their published terms (*y*). The mere posting up at a particular railway station of a list of tolls for the carriage of coals, amongst other things, will not constitute the company common carriers of coals from that particular station, if in point of fact they have no accommodation there for receiving coals, and do not carry coals from that spot, although they carry them over other parts of their line (*z*). The Board of Agriculture and Fisheries make orders with respect to the transit or movement by land or by water of animals affected with pleuro-pneumonia or foot and mouth disease and also with respect to the movement of animals (*a*) and persons into, within, or out of infected places or areas and the cleansing and disinfection of vessels, vehicles, &c., used for the carrying

(*r*) *Johnson* v. *Mid. Ry.*, 4 Exch. 371; 18 L.J. Ex. 366; *McManus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353.

(*s*) *Peek* v. *North Staff. Ry.*, 10 H.L. Cas. 473; 32 L.J. Q.B. 241; *Phillips* v. *Edwards*, 28 L.J. Ex. 52; 3 H. & N. 813; *Austin* v. *Manchester Ry.*, 16 Q.B. 600; 20 L.J. Q.B. 440; 10 C.B. 454; 21 L.J. C.P. 179; *Carr* v. *Lanc. & York. Ry.*, 7 Exch. 707; 21 L.J. Ex. 261; *Martin* v. *Gt. India Pen. Ry.* L.R. 3 Ex. 9; 37 L.J. Ex. 27. As to the effect of omitting to have a special contract, see the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7, and *Wilkinson* v. *Lanc. & York. Ry.*, (1907) 2 K.B. 222; 76 L.J. K.B. 801.

(*t*) *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210.

(*u*) *Harrison* v. *L. B. & S. C. Ry.*, 2 B. & S. 122; 31 L.J. Q.B. 113. See *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111, *post*, p. 1047.

(*x*) 17 & 18 Vict. c. 31, s. 7; *post*, p. 1045.

(*y*) *Phillips* v. *Edwards*, 3 H. & N. 812; 28 L.J. Ex. 52; *Wilton* v. *Royal Atlantic Mail St. Packet Co.*, 10 C.B. N.S. 453; 30 L.J. C.P. 369.

(*z*) *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680; 33 L.J. C.P. 171; *Johnson* v. *Midland Ry.*, 4 Exch. 372; 18 L.J. Ex. 366.

(*a*) As to dogs, see 6 Edw. 7, c. 32, s. 2.

of animals for hire (*b*). Every railway company is also bound to make provision, to the satisfaction of the Board of Agriculture and Fisheries, of water and food at such stations as may be directed, and such water and food or either of them shall be supplied to animals carried on the request of the consignor or of any person in charge thereof. The company supplying water or food may take therefor such reasonable charges as the Board may by order approve, recoverable against either the consignor or the consignee and also secured by a lien on the animals carried. It is an offence to keep an animal without water for twenty-four consecutive hours (*c*).

By the Explosives Act, 1875 (*d*), the carriage of dangerous goods is regulated (*e*). If a carrier is employed to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, the fact must be communicated to him, or the consignor will be responsible for any injury that may result to the carrier or his servants from the want of such communication (*f*).

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, consisting of such things as a traveller, according to the wants of the class to which he belongs, usually carries with him for his own personal convenience, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, but he is not bound to carry merchandise, or articles wholly unconnected with luggage, unless he professes to carry merchandise, or knows the luggage to be merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise (*g*). To make a company liable for the loss of articles enumerated in sect. 1 of the Carriers Act, 1830, the provisions of that Act must be complied with (*h*).

Representations by railway companies' time-tables.—A railway company by the publication of a time-table, represents that a train will run at or about the time specified, and the company will be responsible in damages to all who tender themselves

(*b*) Diseases of Animals Act, 1894, 57 & 58 Vict. c. 57, ss. 21, 22; see *Cox* v. *G. E. Ry.*, L.R. 4 C.P. 181; 38 L.J. C.P. 151; *post*, p. 1057.

(*c*) 57 & 58 Vict. c. 57, s. 23.

(*d*) 38 & 39 Vict. c. 17.

(*e*) Harbour authorities and railway and canal companies may make by-laws as to carriage (ss. 34, 35), and the Secretary of State as to other carriers (s. 37); as to specially dangerous explosives, see s. 43; and as to exemption of carrier where consignor or consignee is in fault, s. 88.

(*f*) *Farrant* v. *Barnes*, 11 C.B. N.S. 553; 31 L.J. C.P. 137; *Bamfield* v. *Goole Transport Co.*, (1910) 2 K.B. 94; 79 L.J. K.B. 1070.

(*g*) *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 114; *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N. S. 818; 31 L.J. C.P. 271; as to passengers' luggage generally, see *post*, p. 1036.

(*h*) *Casswell* v. *Cheshire Lines Committee*, (1907) 2 K.B. 499; 76 L.J. K.B. 734.

for conveyance at the appointed time and find that no train at all has been provided (*i*); but railway companies do not by their time-tables guarantee the arrival of their trains at intermediate stations, or their departure from them, at the exact time fixed. All they undertake to do is to carry the passengers without any unreasonable delay (*k*). The fixing up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station (*l*). The mere taking of a ticket is not sufficient evidence of a contract to convey a passenger to a certain place within a given time; the time-bills must be produced to prove the contract (*m*).

Implied undertaking of railway companies to forward passengers or goods without unnecessary delay.—Every railway company, which has sold tickets to an intended passenger, impliedly undertakes to provide means of conveyance and forward him to his place of destination with reasonable speed (*n*), and is responsible in damages if the passenger suffers serious personal inconvenience from a breach of this undertaking (*o*). But pecuniary loss sustained by the passenger by reason of his not being able to get to a place, which he could otherwise have arrived at in time to meet persons with whom he had appointments, is too remote (*p*). If one party does not perform his contract, the other may do so for him as near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable is to consider whether, according to the ordinary habits of society, a person delayed on his journey would have incurred the expenditure in question on his own account (*q*).

If railways are blocked up and impeded by snow, the company is nevertheless bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred, which they have no means of recovering from their passengers; but as to cattle and goods, "if a snowstorm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense" (*r*). So if there be

(*i*) *Denton* v. *G. N. Ry.*, 5 E. & B. 868; 25 L.J. Q.B. 129; two of the judges thought there was a contract, and all three that there was a tort.

(*k*) *Hurst* v. *G. W. Ry.*, 19 C.B. N.S. 310; 34 L. J. C.P. 264.

(*l*) *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680; 33 L.J. C.P. 171; *Lockyer* v. *International Sleeping Car Co.*, 61 L.J. Q.B. 501.

(*m*) *Hurst* v. *G. W. Ry.*, *supra*; and see *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*n*) *G. N. Ry.* v. *Hawcroft*, 21 L.J. Q.B. 178.

(*o*) *Hobbs* v. *L. & S. W. Ry.*, L. R. 10 Q.B. 111; 44 L.J. Q.B. 49; *Burton* v. *Pinkerton*, L.R. 2 Ex. 340; 36 L.J. Ex. 137.

(*p*) *Hamlin* v. *G. N. Ry.*, 1 H. & N. 408; 26 L.J. Ex. 20.

(*q*) *Le Blanche* v. *L. & N. W. Ry.*, 1 C.P.D. 286; 45 L.J. C.P. 521.

(*r*) *Briddon* v. *G. N. Ry.*, 28 L.J. Ex. 51.

delay in delivering goods by reason of an accident occurring on the defendants' line, such accident being caused wholly by the negligence of another railway company, having running powers over the defendants' line, the defendants, in the absence of a special contract to deliver within a certain time, are not responsible (*s*).

Negligence of common carriers.—Common carriers are bound, independently of any contract, by the mere fact of their having received passengers, to take the utmost care for their safe conveyance (*t*); and, if an accident causing injury occurs, a common carrier can discharge himself only by proving that the accident was inevitable (*u*), that is, that it did not occur from the want of due care, either on the part of himself and his servants, or on the part of any independent contractor who may have been employed by him to construct the means of conveyance (*x*). As to defective means of conveyance, see *ante*, p. 1015. Where a passenger stood up and looked out of the window, and, by reason of the door being unfastened, fell out and was injured, it was held that there was evidence of negligence by the railway company for which they were liable (*y*). But a passenger may, by special agreement, contract to be carried at his own risk, so as to exempt the company from responsibility for even the gross and wilful negligence of their servants (*z*); and in such a case the company will be exempt from liability not only during the transit, but while the passenger is leaving the company's premises (*a*). Such a special agreement will protect not only the company with which it is made, but also any other company on whose line the passenger may be carried in the course of the journey (*b*).

An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence (*c*). The opening of the carriage door is an invitation to alight (*d*);

(*s*) *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210.

(*t*) *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201.

(*u*) *Burns* v. *Cork & Bandon Ry.*, 13 Ir. C.L.R. 543.

(*x*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 251; *Burns* v. *Cork & Bandon Ry.*, *supra*; *Francis* v. *Cockerell*, L.R. 5 Q.B. 184, 501; 39 L.J. Q.B. 291; *John* v. *Bacon*, L.R. 5 C.P. 437; 39 L.J. C.P. 365.

(*y*) *Gee* v. *Metropolitan Ry.*, L.R. 8 Q.B. 161; 42 L.J. Q.B. 105; commenting on *Adams* v. *L. & Y. Ry.*, L.R. 4 C.P. 739; 38 L.J. C.P. 277.

(*z*) *McCawley* v. *Furness Ry.*, L.R. 8 Q.B. 57; 42 L.J. Q.B. 4.

(*a*) *Gallin* v. *L. & N. W. Ry.*, L.R. 10 Q.B. 212; 44 L.J. Q.B. 89.

(*b*) *Hall* v. *N. E. Ry.*, L.R. 10 Q.B. 437; 44 L.J. Q.B. 164; as to how far this applies to carriage of goods, see *post*, pp. 1045, 1047.

(*c*) *Cockle* v. *S. E. Ry.*, L.R. 7 C.P. 321; 41 L.J. C.P. 140.

(*d*) *Praeger* v. *Bristol & Exeter Ry.*, 24 L.T. N.S. 105; *L. & N. W. Ry.* v.

and so is the bringing up of a train to a final standstill, for the purpose of passengers alighting (*e*). Calling out the name of the station before the train has come to a standstill is not an invitation to alight; nor is merely overshooting the platform negligence (*f*). But if the porter has called out the name of the station, and the engine-driver has overshot the platform, and the train has come to a standstill, and no warning is given not to alight, the jury may very properly say that a passenger is not guilty of negligence in getting out (*g*). If the plaintiff, exercising his own discretion, chooses to get out of a train which has overshot the platform, the company are not responsible (*h*), especially when the station is well known to the plaintiff (*i*). Similar considerations arise in cases where the door of a railway carriage is slammed by a porter upon the hand of the plaintiff, and where either the company or the plaintiff may have been negligent, according to circumstances (*k*). And so the company may be liable if it has knowingly permitted overcrowding of a platform and a passenger on the platform has thereby been injured (*l*); or if it has negligently permitted the door of a compartment of a train to be open and a passenger standing on the platform has been struck and injured thereby (*m*). It is no part of the duty of a railway company to detain a train in order to allow a passenger, who alleges that he has been robbed in one of their carriages, to give another passenger or any other person into custody (*n*).

Loss of goods by common carriers (*o*).—The law, observes Holt, C.J., charges every person exercising the public employment of a common carrier, common hoyman, or master of a ship "intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be

Hellawell, 26 L.T. N.S. 557; *Gill* v. *G. E. Ry.*, 26 L.T. N.S. 945.

(*e*) *Cockle* v. *S. E. Ry.*, *infra*; *Bridges* v. *L. & N. W. Ry.*, L.R. 7 H.L. 213; 43 L.J. Q.B. 151; *Rose* v. *N. E. Ry.*, 2 Ex.D. 248; 46 L.J. Ex. 374.

(*f*) *Lewis* v. *L. C. & D. Ry.*, *infra*; *Cockle* v. *S. E. Ry.*, L.R. 7 C.P. 321; 41 L.J. C.P. 140.

(*g*) *Weller* v. *L. B. & S. C. Ry.*, L.R. 9 C.P. 126; 43 L.J. C.P. 137.

(*h*) *Siner* v. *G. W. Ry.*, L.R. 4 Ex. 117; 38 L.J. Ex. 67; but see *per* Brett, L.J., *Robson* v. *N. E. Ry.*, 2 Q.B.D. 86; 46 L.J. Q.B. 50; and see *Weller* v. *L. B. & S. C. Ry.*, *supra*, and *Rose* v. *N. E. Ry.*, 2 Ex.D. 248; 46 L.J. Ex. 374.

(*i*) *Lewis* v. *L. C. & D. Ry.*, L.R. 9 Q.B. 66; 43 L.J. Q.B. 8.

(*k*) *Fordham* v. *L. B. & S. C. Ry.*, L.R. 4 C.P. 619; 38 L.J. C.P. 324; *Richardson* v. *Met. Ry.*, 37 L.J. C.P. 300; *Maddox* v. *L. C. & D. Ry.*, 38 L.T. N.S. 458; *Coleman* v. *S. E. Ry.*, 4 H. & C. 699; *Met. Ry.* v. *Jackson*, 3 App.Cas. 193; 47 L.J. C.P. 303.

(*l*) *Fraser* v. *Caledonian Ry.*, (1903) 5 F. 41. As to overcrowding of compartments, see *Pounder* v. *N. E. Ry.*, (1892) 1 Q.B. 385; 61 L.J. Q.B. 136; *Cobb* v. *G. W. Ry.*, (1894) A.C. 419; 63 L.J. Q.B. 629.

(*m*) *Toal* v. *North British Ry.*, (1908) A.C. 352; 77 L.J. P.C. 119.

(*n*) *Cobb* v. *G. W. Ry.*, (1894) A.C. 419; 63 L.J. Q.B. 629.

(*o*) See further, pp. 982—993, *ante*.

never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable" (*p*).

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods (*q*). Thus, where a fire broke out in an adjoining building, and extended to the carrier's premises, without any neglect on the part of the carrier himself, it was held that, inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster was no answer to an action (*r*). If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper covering for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible (*s*).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage (*t*). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence of the owner or the consignor, such as defective packing, nor for losses occasioned by an inherent defect in the article causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is bound to take all reasonable means to provide against the defect. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards slipped his head through the noose and escaped, it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck,

(*p*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909; 1 Smith's L.C. 173 (ed. 11).

(*q*) *Oakley* v. *Portsmouth Steam Packet Co.*, 11 Exch. 622; 25 L.J. Ex. 99.

(*r*) *Forward* v. *Pittard*, 1 T.R. 33; *Hyde* v. *Trent Nav. Co.*, 5 T.R. 399.

(*s*) *Nugent* v. *Smith*, 1 C.P.D. 423, 436; 45 L.J. C.P. 697; Doct. & Stud. Dial. 2, ch. 38; Noy, ch. 43.

(*t*) *Dale* v. *Hall*, 1 Wils. 281.

but it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken proper means to secure him, and that he was responsible for the loss (*u*). Where, however, a greyhound, secured in the way ordinarily adopted and obviously intended by the owner to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and during the journey slipped his head through the collar and was lost, it was held that the company was not responsible (*x*). So, where sheepskins were damaged by being carried in trucks containing woodchips, it was held that as the persons who actually loaded the skins were not shown to have had notice that the mode of packing employed was likely to be injurious, though some other official of the carrying company had such notice, there was no evidence of wilful misconduct on the part of the company's servants (*y*).

Common carriers are not responsible for the "inherent vice" of the goods which they carry, so that where animals are injured by their own acts and without any negligence on the part of the carrier, the carrier is not liable (*z*). Nor are they liable for an inherent tendency of goods to decay or ignite (*a*), although delay in forwarding perishable goods is evidence of misconduct on their part (*b*).

If a cargo or load of goods of a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *primâ facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control (*c*).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third person, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party (*d*). But where the misconduct of the third person is caused by the orders of the owner of the goods, the carrier will not be responsible (*e*).

(*u*) *Stuart* v. *Crawley*, 2 Stark. 324.

(*x*) *Richardson* v. *N. E. Ry.*, L.R. 7 C.P. 75; 41 L.J. C.P. 60.

(*y*) *Forder* v. *G. W. Ry.*, (1905) 2 K.B. 532; 74 L.J. K.B. 871.

(*z*) *Blower* v. *G. W. Ry.*, L.R. 7 C.P. 655; 41 L.J. C.P. 268; *Kendal* v. *L. & S. W. Ry.*, L.R. 7 Ex. 373; 41 L.J. Ex. 184; *Gill* v. *Manchester, Sheffield & Lincolnshire Ry.*, L.R. 8 Q.B. 186; 42 L.J. Q.B. 89.

(*a*) *Alston* v. *Herring*, 11 Exch. 822; 25 L.J. Ex. 177; *Rohl* v. *Parr*, 1 Esp. 444; *Boyd* v. *Dubois*, 3 Campb. 133; *Lister* v. *Lancs. & Yorks. Ry.*, (1903) 1 K.B. 878; 72 L.J. K.B. 385.

(*b*) *Graham* v. *Belfast & Northern Counties Ry.*, (1901) 2 Ir.R. 13.

(*c*) *Hawkes* v. *Smith*, Car. & M. 72.

(*d*) *Trent Nav. Co.* v. *Wood*, 3 Esp. 130.

(*e*) *Butterworth* v. *Brownlow*, 19 C.B. N.S. 409; 34 L.J. C.P. 266.

An omnibus proprietor or other common carrier of passengers only, who receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, cannot be charged for the loss of them as a common carrier of goods. He is, in such a case, merely a gratuitous bailee of the goods, chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. And if luggage is carried free, upon the express terms that the passenger shall himself take charge of it, and that it shall be taken at his risk, he cannot make the carrier responsible for the loss of it (*f*). If, however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire (*g*), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit (*h*).

Contributory negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has substantially conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier (*i*). So, where the consignor concealed a quantity of guineas in an ordinary brown paper parcel tied with a string (*k*), and a number of sovereigns in a packet of tea (*l*), and several hundred pounds' worth of bank-notes and gold in an ordinary schoolboy's box, and the money so sent was lost by the way, it was held that the common carrier was not responsible (*m*). And if glass, china, or fragile articles are delivered to a carrier to be carried, and no notice is given of the peculiar nature of the articles, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage, as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles, and the amount of care requisite for their safe conveyance. Contributory negligence, it must be borne in mind, is that sort of negligence which being a cause of the injury, is of such a character that its effect could not have been counter-

(*f*) *Stewart* v. *L. & N. W. Ry.*, 3 H. & C. 135 ; 33 L.J. Ex. 199 ; as to passengers' luggage generally, see *post*, p. 1036.

(*g*) *Brooke* v. *Pickwick*, 4 Bing. 218 ; 5 L.J. (O.S.) C.P. 158.

(*h*) *Marshall* v. *York and Newcastle Ry.*, 11 C.B. 655 ; 21 L.J. C.P. 24.

(*i*) *Butterworth* v. *Brownlow*, 19 C.B. N.S. 409 ; 34 L.J. C.P. 266.

(*k*) *Clay* v. *Willan*, 1 H.Bl. 298.

(*l*) *Bradley* v. *Waterhouse*, 3 C. & P. 318 ; cp. *Gibbon* v. *Paynton*, 4 Burr. 2298.

(*m*) *Batson* v. *Donovan*, 4 B. & Ald. 37 ; *Mayhew* v. *Eames*, 3 B. & C. 601 ; 3 L.J. (O.S.) K.B. 108.

acted or avoided by the ordinary care of the defendant (*n*). Contributory negligence is frequently set up where the plaintiff alleges that he has been injured in alighting from a train, or in getting his hand trapped upon entering the carriage, or while travelling from the flying open of the carriage door (*o*).

Limitation of liability by public notice—Carriage of valuables, &c.—The Carriers Act, 1830 (*p*), by sect. 1, exempts common carriers by land from liability for the loss of (*q*), or injury to, gold or silver, precious stones, jewellery, watches, clocks, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings (*r*), title-deeds, paintings (*s*), engravings, pictures (*t*), plated articles, glass (*u*), china, silks (*x*), in a manufactured or unmanufactured state, furs (*y*), lace (*z*), wrought up or not wrought up with other materials (*a*), contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS (*b*), unless, at the time of the delivery thereof for the purpose of being carried or of accompanying any passenger (*c*), the value and nature of such articles or property shall have been DECLARED by the person sending or delivering the same, and the increased charge thereinafter mentioned (sect. 2), or an engagement to pay the same, accepted by the person receiving such parcel or package. Pictures placed in a waggon with wooden sides, but without a top, so that they could be seen to be pictures, were held to be contained in a parcel or package (*d*). Mere mention of the value to a station-master

(*n*) *Radley* v *L. & N. W. Ry.*, 1 App. Cas. 754; 46 L.J. Ex. 573; as to the negligence of a third party, see *Ayles* v. *S. E. Ry.*, L.R. 3 Ex. 146; 37 L.J. Ex. 104; *Daniel* v. *Met. Ry.*, L.R. 5 H.L. 45; 40 L.J. C.P. 121.

(*o*) *Adams* v. *L. & Y. Ry.*, L.R. 4 C.P. 739; 38 L.J. C.P. 277; *Gee* v. *Met. Ry.*, L.R. 8 Q.B. 161; 42 L.J. Q.B. 105; and see the cases, *ante*, pp. 1025, 1026.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*q*) *Hearn* v. *L. & S. W. Ry.*, 10 Exch. 801; 24 L.J. Ex. 180; *Millen* v. *Brasch*, 10 Q.B.D. 142; 51 L.J. Q.B. 127.

(*r*) *I.e.*, if of value at the time of carriage: *Stoessigger* v. *S. E. Ry.*, 3 E. & B. 549; 23 L.J. Q.B. 293.

(*s*) *I.e.*, if works of art: see *Woodward* v. *L. & N. W. Ry.*, 3 Ex.D. 121; 47 L.J. Ex. 263.

(*t*) The frames of framed pictures as well as the pictures are within the Act: *Henderson* v. *L. & N. W. Ry.*, L.R. 5 Ex. 90; 39 L.J. Ex. 55.

(*u*) As to a glass frame, see *Treadwin* v. *G. E. Ry.*, L.R. 3 C.P. 308; 37 L.J. C.P. 83.

(*x*) Silk guards and silk dresses are included: *Bernstein* v. *Baxendale*, 6 C.B. N.S. 259; 28 L.J. C.P. 265; overruling *Davey* v. *Mason*, Car. & M. 50; so, also, is elastic silk webbing, made as in *Brunt* v. *Midland Ry.*, 2 H. & C. 889; 33 L.J. Ex. 187.

(*y*) Felt hats are not furs: *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*z*) By 28 & 29 Vict. c. 94, s. 1, the term "lace" is not to include machine-made lace.

(*a*) See *Brunt* v. *Midland Ry.*, *supra*.

(*b*) See further on this section, p. 1040.

(*c*) As to the applicability of this section to passengers' luggage, see *Casswell* v. *Cheshire Lines Committee*, (1907) 2 K.B. 499; 76 L.J. K.B. 734.

(*d*) *Whaite* v. *L. & Y. Ry.*, L.R. 9 Ex. 67; 43 L.J. Ex. 47.

is no declaration of value within the meaning of the Act, unless intended to operate as a declaration of value (*e*). When the declaration is formally made, the carrier is entitled, if the value exceeds 10*l.*, and he has a notice of the increased rate of charge for parcels exceeding the value of 10*l.* put up in his office, to demand the increased rate of charge; but, if he does not think fit to notify the increased rate of charge, he cannot demand it; and, if he has notified it, but fails to demand it, he must be taken to have received the goods subject to his common law liability as an insurer of their safe conveyance, and will not be entitled to the protection of the statute (*f*). The consignor is bound by his declaration, and cannot afterwards show that the value of the goods exceeded that declared (*g*). If the journey is to be performed partly by land and partly by sea, the contract is divisible, and the carrier is entitled to the protection of the Merchant Shipping Act, as far as the journey is to be performed by sea (*h*), and to the protection of the Carriers Act so far as it is to be performed by land (*i*); and he will not lose such protection by having received the goods under a special contract, unless its terms are inconsistent with the goods having been received by him in his capacity of a common carrier (*k*).

Statutory notice of increased rate of charge.—By sect. 2, when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed ten pounds, it shall be lawful for the common carrier to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are received for the purpose of conveyance, and all persons sending or delivering parcels containing such articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. By sect. 3, in the last-mentioned case, the person receiving such increased rate of charge, or accepting an engagement to pay the same, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any

(*e*) *Robinson* v. *S. W. Ry.*, 19 C.B. N.S. 51; 34 L.J. C.P. 234.
(*f*) *Behrens* v. *G. N. Ry.*, 31 L.J. Ex. 299; 7 H. & N. 950.
(*g*) *M'Cance* v. *L. & N. W. Ry.*, 3 H. & C. 343; 34 L.J. Ex. 39.
(*h*) *L. & S. W. Ry.* v. *James*, L.R. 8 Ch. 241; 42 L.J. Ch. 337.
(*i*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.
(*k*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244; 38 L.J. Q.B. 137.

benefit or advantage under the Act, but shall be responsible as at common law, and be liable to refund the increased rate of charge.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier for the receiving of parcels to be conveyed, is (sect. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (sect. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the Act is (sect. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandise;—that is to say, special contract, the provisions of which are inconsistent with the exemption claimed by the carrier under the first section (*l*); nor (sect. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

By sect. 4, no public notice or declaration shall be deemed or construed to limit, or in anywise affect, the common law liability of any common carriers in respect of any articles or goods to be carried or conveyed by them, but they shall be liable for the loss of, or injury to, any articles and goods in respect whereof they may not be entitled to the benefit of that Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. This statute is confined to public notices, such as were very common before the Act —notices addressed to the public at large,—and is not applicable to a notice specifically delivered to form the basis of a special contract (*m*). Where the common carrier is not a common carrier of the particular description of goods tendered him for conveyance, and has the option of receiving them or rejecting them at his own good will and pleasure, he may prescribe his own terms of conveyance; and, if the party delivering

(*l*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244; 38 L.J. Q.B. 137.

(*m*) *Walker* v. *York & North Mid. Ry.*, 2 E. & B. 750; 23 L.J. Q.B. 73; *Van Toll* v. *S. E. Ry.*, 12 C.B. N.S. 75; 31 L.J. C.P. 241.

goods to be carried is personally served with a notice of the terms on which the common carrier carries goods, and after seeing the notice sends the goods, he must be taken to agree that they shall be carried on those terms, and there is then a special contract between him and the common carrier for their conveyance (*n*), unless the carriage is by railway or canal so as to necessitate a signed special contract under the Railway and Canal Traffic Act (*post*, p. 1045). But with regard to such articles as the common carrier is bound by his public profession and employment to carry, the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment (*o*). If the delivery of goods under such circumstances authorises an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier (*p*). A remover of furniture for hire is not generally a common carrier, and, where a special contract is entered into between the owner of the furniture and the carrier, it will exclude any question of liability as a common carrier (*q*).

Common carriers may protect themselves by special contract against fire and sea risks, and may carry goods on the terms that they are not to be held responsible for such losses (*r*).

Special contracts exempting from responsibility for damage to certain classes and descriptions of goods.—Whenever a man enters into a contract for the carriage of goods, he impliedly grants some labour and care in return for the hire. It is impossible so to construe a special contract for the carriage of goods, as to make the carrier say, "We will receive your goods; but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious" (*s*). In the case of articles of a perishable nature, such as fish, or of a very delicate and fragile nature, such as statuary, sculptured alabaster, or marble, which the common carrier does not commonly profess to carry, and which may be readily injured, a common carrier may refuse to receive and carry, except under a special contract exonerating

(*n*) Wightman, J., *Walker* v. *York & North Mid. Ry.*, 2 E. & B. 750, 760; 23 L.J. Q.B. 73.

(*o*) Ld. Kenyon, *Kirkman* v. *Shawcross*, 6 T.R. 14, 17; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 162; 30 L.J. Q.B. 276.

(*p*) *Crouch* v. *L. & N. West. Ry.*, 9 Exch. 556; 23 L.J. C.P. 148.

(*q*) *Scaife* v. *Farrant*, L.R. 10 Ex. 358; 44 L.J. Ex. 234.

(*r*) *Maving* v. *Todd*, 1 Stark. 74; *Collins* v. *Bristol & Exeter Ry.*, 11 Exch. 790; 7 H.L.Cas. 205. But see *Price* v. *Union Lighterage Co.*, (1904) 1 K.B. 412; 73 L.J. K.B. 222.

(*s*) *Lyon* v. *Mells*, 5 East, 438; Doct. & Stud. Dial. 2, ch. 39; Noy's Maxims, ch. 43, 92.

from all responsibility for damage done *in transitu* not occasioned by the neglect or default of himself or his servants (*t*). So, with regard to horses, it is said to be very reasonable that common carriers by railway should be allowed to make agreements protecting them against the peculiar risks attending the carriage of horses, and it was, therefore, held, before the passing of the Railway and Canal Traffic Act (*post*, p. 1043), that railway companies might, by special contract, throw the risk of the conveyance of a horse by railway upon the owner, so that, if the horse was injured in the transit from any ordinary railway casualty, the owner would have no remedy against the company for the loss (*u*). Again, if goods are offered for carriage by passenger train which the company is only bound to carry by goods train, the company may impose upon the public such terms as they think fit (*x*). Where a steamship company issued passengers' tickets on which was printed a notice or condition "that the ship will not be accountable for luggage, goods, or other descriptions of property, unless bills of lading have been signed therefor, each passenger allowed twenty cubic feet of luggage free," it was held that the company had a right to impose this condition on their passengers, provided it was imposed upon all alike; that the passenger, therefore, was bound to get a bill of lading for all the luggage for which he intended to make the ship accountable, but that he had the option of taking luggage under his own personal control without any bill of lading, carrying it, in that case, at his own risk (*y*). If the company does not impose the same terms upon all passengers alike, or the passenger offers to sign a bill of lading and is unable to obtain it, the company cannot avail themselves of the condition as protecting them from liability (*z*).

The notices commonly given by common carriers before the passing of the Carriers Act, that they would not be responsible for the loss of or damage to parcels above a certain value, unless the value was declared and a premium of insurance paid, were held to apply only to the responsibilities and liabilities of the carrier as an INSURER of the safety of the goods, and not to

(*t*) *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441; *Peek* v. *N. Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241; *Leeson* v. *Holt*, 1 Stark. 186; but see *Sutton* v. *Ciceri*, 15 App.Cas. 145.

(*u*) *Carr* v. *Lanc. & York. Ry.*, 7 Exch. 707; 21 L.J. Ex. 261; *Harrison* v. *L. B. & S. C. Ry.*, 2 B. & S. 122; 31 L.J. Q.B. 113; overruled by *Peek* v. *North Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241.

(*x*) *Stone* v. *Midland Ry. Co.*, (1904) 1 K.B. 669; 73 L.J. K.B. 392. As to the applicability of s. 7 of the Railway and Canal Traffic Act, 1854, where no special contract of carriage is signed, see *Wilkinson* v. *Lanc. & York. Ry.*, (1907) 2 K.B. 222; 76 L.J. K.B. 801.

(*y*) *Wilton* v. *Royal Atl. Mail St. Packet Co.*, 10 C.B. N.S. 453; 30 L.J. C.P. 369.

(*z*) *G. W. Ry.* v. *Goodman*, 12 C.B. 313; 21 L.J. C.P. 197.

exempt him, in the absence of fraudulent concealment of value or risk on the part of the consignor, from the consequences of misconduct or negligence of himself or persons in his employ (*a*).

Void limitations of liability.—A person who undertakes the public employment of a common carrier of merchandise or of passengers and luggage has no more right, it is apprehended, to engraft upon his contract or employment the terms that "all merchandise received by him to be carried is carried at the risk of the owners," or that "all luggage delivered to him by his passengers is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," that a common innkeeper has to refuse to receive guests, except on the terms that he shall not be responsible for the safe keeping of their goods and luggage deposited in his inn. The consignor of merchandise or the passenger has a right to reject these terms, and to insist that merchandise, such as is ordinarily carried by the common carrier, or the customary allowance of luggage for a passenger, shall be taken at the common carrier's risk, provided the consignor makes the declaration of value, and is ready to pay the premium of insurance, in those cases where the declaration and payment are required by law. Where the carriage of particular articles is attended with any peculiar or extraordinary risk, the common carrier is entitled, as we have seen, to refuse to receive and carry such articles, unless the nature and value of the articles are declared, and an increased charge paid for insurance; but he may, at the same time, receive and carry them under a special contract, providing that they shall be carried at the risk of the owner at a lower rate of charge (*ante*, p. 1032). And, a common carrier of passengers merely, who does not receive for carriage luggage with his passengers, but allows his passengers to carry with them, under their own care, a small quantity of personal luggage, is not responsible for the loss of such luggage (*b*). Where the carrier seeks to set up a special contract limiting his liability, he must show that the terms of it have been brought to the consignor's notice. The most frequent illustrations are to be found in the conditions printed upon luggage tickets, where the luggage is left in the cloak-room, the railway company being no longer carriers but warehousemen. Where a passenger with a ticket in the form of a book of coupons, inside of which was a condition limiting the

(*a*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L.J. Ex. 382. See *per* Ld. Blackburn, *M. S. & L. Ry.* v. *Brown*, 8 App.Cas. 703, 709; 53 L.J. Q.B. 124; *Peek* v. *N. Staff. Ry.*, *supra*, p. 1022.

(*b*) See *infra*.

responsibility of the company to their own trains, was injured in France, and the jury found that the condition was not brought to his notice, it was held that the whole book was the contract, and that the passenger was bound by the condition (*c*).

Loss of passengers' luggage by railway companies.—The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller, has led from the earliest times to the practice, on the part of the carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as covered by the fare paid for the conveyance of the passenger.

Under the older system of travelling by stage-coaches, canal-boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. By these Acts the right of the passenger is expressly limited to ordinary luggage, which must be taken to mean the personal luggage of the traveller; and the amount which he is entitled to take free of charge is ascertained. Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage; this would include not only all articles of apparel whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying (*d*); but not, it would seem, a bicycle (*e*). On the other hand, what is carried for the purposes of business, such as merchandise or the like (*f*), or for larger or ulterior purposes than those of the journey, such as articles of furniture or household goods (*g*), will not come within the description of

(*c*) *Burke* v. *S. E. Ry.*, 5 C.P.D. 1; 19 L.J. C.P. 107. Some doubt seems thrown on this decision by the House of Lords in *Richardson, Spence & Co.* v. *Rowntree*, (1894) A.C. 217; 63 L.J. Q.B. 283.

(*d*) *Macrow* v. *G. W. Ry.*, L.R. 6 Q.B. 612; 40 L.J. Q.B. 300.

(*e*) *Britten* v. *G. N. Ry.*, (1899) 1 Q.B. 243; 68 L.J. Q.B. 75.

(*f*) *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N.S. 818; 31 L.J. C.P. 271; *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 286; *Belfast & Ballymena Ry.* v. *Keys*, 9 H.L.Cas. 556.

(*g*) *Hudston* v. *Midland Ry.*, L.R. 4 Q.B. 366; 38 L.J. Q.B. 213.

ordinary luggage. So deeds and money carried by an attorney among his luggage for use in the causes in which he may be engaged are not ordinary luggage (*h*), nor is a child's rocking-horse (*i*), nor sheets and blankets for the use of the passenger's household (*k*), though a chronometer may be ordinary luggage for a master mariner (*l*). But the company (with knowledge) may choose to take without extra payment that which is not ordinary luggage, in which case they will be responsible for the loss (*m*); so also upon any limit in point of weight, if the company choose to allow a passenger to carry more, they will be liable (*n*). As to articles enumerated in sect. 1 of the Carriers Act, 1830, the company will be protected unless the provisions of that Act have been complied with (*o*). The liability of common carriers, in respect of articles carried as passengers' luggage, is that of carriers of goods as distinguished from that of carriers of passengers. Most of the Railway Acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him ordinary luggage or articles of clothing of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. But these enactments do not prevent railway companies from running excursion trains for passengers only, without luggage (*p*), and if, in such a case a passenger is allowed to carry with him a small quantity of luggage free at his own risk, and avails himself of the privilege, and the luggage is lost, the company is not responsible for the loss of it (*q*). Where a passenger by an excursion train, knowing that the railway company did not allow passengers to carry luggage by such trains, nevertheless secretly put luggage into the train, it was held that the law would imply a promise from the wrongdoer to pay the company for the carriage of it (*r*). Railway companies are responsible for the acts and omissions of their porters in the management and

(*h*) *Phelps* v. *L. & N. W. Ry.*, 19 C.B. N.S. 321; 34 L.J. C.P. 259.

(*i*) *Hudston* v. *Midland Ry.*, L.R. 4 Q.B. 366; 38 L.J. Q.B. 213.

(*k*) *Macrow* v. *G. W. Ry.*, L.R. 6 Q.B. 612; 40 L.J. Q.B. 300.

(*l*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.

(*m*) *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 271.

(*n*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 461; 32 L.J. C.P. 244.

(*o*) *Casswell* v. *Cheshire Lines Committee*, (1907) 2 K.B. 499; 76 L.J. K.B. 734.

(*p*) *Stewart* v. *L. & N. W. Ry.*, 3 H. & C. 135; 33 L.J. Ex. 199.

(*q*) *Williams* v. *G. W. Ry.*, 10 Exch. 15; *Munster* v. *S. E. Ry.*, 4 C.B. N.S. 698; 27 L.J. C.P. 308.

(*r*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 641; 32 L.J. C.P. 245.

delivery of passengers' luggage (*s*). But if a passenger packs merchandise in carpet-bags and portmanteaux, and passes it off as luggage, he cannot recover for the loss of it, as he is guilty of an unfair concealment towards the company, in preventing them from making the charge they would be entitled to make for the carriage of merchandise (*s*). A railway company is, in general, liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling (*t*). But the passenger must take ordinary care of it; and therefore, where the passenger left the carriage in which his luggage was for another in the course of the journey, and his portmanteau was stolen, it was held that the company was not responsible (*u*). Where the passenger retains his own personal control over the luggage, the company are no longer insurers of its safety, but are liable for negligence only (*x*). But where a passenger on arriving at a station gave a bag to a porter, who agreed to take care of it, and to put it into the carriage with the passenger, and while the passenger was taking a ticket the bag was lost, it was held that the company were responsible (*y*). Where luggage is received as luggage of a servant, but it turns out to be the master's, who is following by another train, the company are not liable for the loss (*z*). Where a railway company made a bye-law to the effect that they "would not be responsible for the care of luggage, unless booked and paid for," it was held that the bye-law was null and void (*a*).

Application of Carriers Act.—The Carriers Act, it will be observed, applies solely to common carriers *by land*. Where, however, the contract for carriage is divisible, and applies to carriage partly by water and partly by land, and the loss occurs during the carriage by land, the carrier is entitled to the benefit of the statute (*b*); and where the contract is to carry by land and sea also, it is divisible, so as to afford a defence to the carrier if the loss in fact occurs during the carriage by land (*c*). The

(*s*) *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N.S. 818; 31 L.J. C.P. 271; *Belfast & Ballymena Ry.* v. *Keys*, 9 H.L. Cas. 556; *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 286.

(*t*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.

(*u*) *Talley* v. *G. W. Ry.*, L.R. 6 C.P. 44; 40 L.J. C.P. 9. With respect to luggage deposited in a cloak-room, see *ante*, p. 865.

(*x*) *Talley* v. *G. W. Ry.*, *supra*; *Bergheim* v. *G. E. Ry.*, 3 C.P.D. 221; 47 L.J. C.P. 318. See, however, *G. W. Ry.* v. *Bunch*, 13 App.Cas. 31; 57 L.J. Q.B. 361; as to where luggage is in his control, see *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 839; 18 L.J. C.P. 251; *Kent* v. *Mid. Ry.*, L.R. 10 Q.B. 1; 44 L.J. Q.B. 18; *Mid. Ry.* v. *Bromley*, 17 C.B. 372; 25 L.J. C.P. 24.

(*y*) *G. W. Ry.* v. *Bunch*, 13 App.Cas. 31; 57 L.J. Q.B. 361.

(*z*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122.

(*a*) *Midland Ry.* v. *Bromley*, 17 C.B. 375; 25 L.J. C.P. 94.

(*b*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244; 38 L.J. Q.B. 137.

(*c*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40; *ante*, p. 1031.

effect of the Act is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10*l.*, and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not put up in his office a notice or tariff of charges for the increased risk of conveyance of such articles, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The person who sends the goods must take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the first section of the statute (*d*). As soon, however, as the declaration has been made, the common carrier is entitled to demand an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice affixed in his office of the sums he charges above the usual rate of charge. If there is no tariff, he has no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the Act (*e*). Apart from the declaration of value, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character (*f*). And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute (*g*). Mere mention of the value incidentally is no declaration of value within the statute (*h*).

Person to make declaration of value and pay increased rate of carriage.—In a case before the passing of the Carriers Act, it was held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an implied authority to do all that was necessary to be done to insure them a safe conveyance; and, therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier (*i*); but the limitation

(*d*) *Pianciani* v. *L. & S. W. Ry.*, 18 C.B. 226.

(*e*) *Baxendale* v. *Hart*, 6 Exch. 789; 21 L.J. Ex. 123.

(*f*) *Crouch* v. *L. & N. W. Ry.*, 14 C.B. 295; 23 L.J. C.P. 73.

(*g*) *Behrens* v. *G. N. Ry.*, 7 H. & N. 950; 31 L.J. Ex. 299; see *ante*, pp. 1021, 1030.

(*h*) *Robinson* v. *S. W. Ry.*, 19 C.B. N.S. 51; 34 L.J. C.P. 234.

(*i*) *Clarke* v. *Hutchins*, 14 East, 476.

of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carriers Act, being now established by Act of Parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor, to pay the carriage and insure articles directed to be forwarded by his customers, unless he receives express directions so to do (*k*). If, indeed, the articles are of an extremely fragile character, or if they are of unusual value, it would be the duty of the consignor to declare their nature and value to the common carrier, that proper care might be taken of them (*ante*, p. 1029); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them.

Articles to which Act extends.—The statute extends to any of the articles enumerated in the first section (*l*), although not within the words of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage (*m*). If the contents of a parcel or package exceeding 10*l.* in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the Act, the common carrier is released from all liability in respect of the former, but, as regards the latter, his common law liability remains the same as before the passing of the statute (*n*). If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the terms of the Act freed from all responsibility and liability in respect of the loss thereof, if the consignee has not declared the nature and value of the article, and paid, or agreed to pay, the increased charge specified in the notice, although the loss may have been occasioned by gross negligence (*o*). If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff will not be entitled to recover even the value of the box or case in which they are contained (*p*),

(*k*) *Cothay* v. *Tute*, 3 Campb. 129; *Bailey* v. *Sweeting*, 30 L.J. C.P. 150; 9 C.B. N.S. 843.

(*l*) See *ante*, p. 1030.

(*m*) *Owen* v. *Burnett*, 2 Cr. & M. 353; 3 L.J. Ex. 76; *Boys* v. *Pink*, 8 C. & P. 361.

(*n*) *Bernstein* v. *Baxendale*, 6 C.B. N.S. 251; 28 L.J. C.P. 265.

(*o*) *Hinton* v. *Dibbin*, 2 Q.B. 646; 11 L.J. Q.B. 113.

(*p*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L.J. Ex. 382.

but he will, if there are articles in it to which the statute does not apply (*q*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. This "limitation," observed Parke, B., "it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own" (*r*). And if, after the declaration has been made, the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute (*s*).

Losses covered by the statute.—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery (*t*).

Losses through theft by common carrier's servants.—Nothing contained in the Carriers Act is (see sect. 8) to protect any common carrier for hire from liability to answer for loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's employ. Although, therefore, the common carrier relies upon the statute as a defence, contending that there was no declaration of value of the article alleged to

(*q*) *Treadwin* v. *G. E. Ry.*, L.R. 3 C.P. 308; 37 L.J. C.P. 83. A framed picture is one entire thing, and cannot be divided so as to charge the carrier for the loss of the frame: *Henderson* v. *L. & N. W. Ry.*, L.R. 5 Ex. 90; 39 L.J. Ex. 55.

(*r*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L.J. Ex. 382.

(*s*) *Behrens* v. *G. N. Ry.*, 7 H. & N. 950; 31 L.J. Ex. 299.

(*t*) *Hearn* v. *L. & S. W. Ry.*, 10 Exch. 801; 24 L.J. Ex. 180; *Millen* v. *Brasch*, 10 Q.B.D. 142; 51 L.J. Q.B. 127.

have been lost, the defence may be rebutted by showing that the loss arose from the felonious act of the carrier's servant (*u*).

When, however, the goods have been accepted by a carrier under a special contract of carriage, the statute does not apply; and, in such a case, where express notice has been given to a consignor by a common carrier that he will not be responsible for parcels or packages above the value of 10*l*., unless the value is declared, and an increased remuneration paid the carrier is not necessarily responsible for a purloining by his servant (*x*). Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft although *primâ facie* proof of negligent keeping, is not absolutely conclusive, and the carrier may exonerate himself from liability by showing that there was no want of any proper precaution on his part to guard against theft by his servants. If the consignor, observes Lord Tenterden, has concealed the value of the parcel from the carrier, and has adopted a disguise for it "likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being likely to be selected for depredation by a dishonest servant," and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss (*y*).

In order to establish the fact of theft by the common carrier's servants, it is not necessary to show that some particular servant has committed a felony; it is sufficient if there is evidence raising a *primâ facie* case that the goods were stolen by the carrier's servants (*z*); it is not enough, however, that there is a greater degree of probability that the carrier's servants took the goods than that a stranger took them by reason of their greater facility of access and opportunities of stealing them (*a*). All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other persons, receiving wages from them and not from the carrier (*b*).

Liabilities of common carrier's servants.—The Carriers Act

(*u*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 307; 27 L.J. C.P. 205.

(*x*) *Butt* v. *G. W. Ry.*, 11 C.B. 140; 20 L.J. C.P. 241; *G. W. Ry.* v. *Rimell*, 27 L.J. C.P. 201.

(*y*) *Bradley* v. *Waterhouse*, M. & M. 154.

(*z*) *Vaughton* v. *L. & N. W. Ry.*, L.R. 9 Ex. 93; 43 L.J. Ex. 75.

(*a*) *McQueen* v. *G. W. Ry.*, L.R. 10 Q.B. 569; 44 L.J. Q.B. 130.

(*b*) *Machu* v. *L. & S. W. Ry.*, 2 Exch. 415; 17 L.J. Ex. 271; *Stephens* v. *L. & S. W. Ry.*, 18 Q.B.D. 121; 56 L.J. Q.B. 171.

(see sect. 8) does not protect the coachman, guard, bookkeeper, or other servant of the common carrier, from liability for losses or injuries occasioned by their own personal neglect and misconduct. This applies to liabilities *ex delicto;* for the coachman, guard, or other servant is not, by the common law, liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. The contract for the carriage of the goods is made with the common carrier or coach-proprietor who carries on the business, and not with his servant or agent who has no interest in the concern, and does not share in the profits of the trade (*c*).

Losses occasioned by consignor's defective packing.—If the loss has been occasioned by the negligence of the consignor or his servants, in not properly packing or securing the goods, the carrier is not responsible for the loss. Thus, the carrier will not be answerable if wine or spirits escape by reason of a defective bung in a cask (*d*), unless he had notice of the leakage, and had the means of stopping it and neglected to do so (*e*). If the defective packing of goods is patent and visible, and easily remedied, and the common carrier accepts the goods for conveyance, he is bound to take all reasonable means to provide for their safety (*f*). But if the mode of packing is that in ordinary use, and the carrier is led by the sender's conduct to conclude that it is safe, the carrier, at any rate if he is not a common carrier, will not be responsible for injury to the goods arising from such packing (*g*).

Railway and Canal Traffic Act—Liability of railway, canal, and steamboat companies for neglect, default, and breach of duty.—By sect. 7 (*h*) of the Railway and Canal Traffic Act, 1854 (*i*),—which by 26 & 27 Vict. c. 92, s. 31, extends, so far as its provisions are applicable, "to steam vessels and to the traffic carried on thereby,"—every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving (*k*), forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any-

(*c*) *Cavenagh* v. *Such*, 1 Pr. 331; *Williams* v. *Cranston*, 2 Stark. 82.

(*d*) *Hudson* v. *Baxendale*, 2 H. & N. 575; 27 L.J. Ex. 93.

(*e*) *Beck* v. *Evans*, 16 East, 244.

(*f*) *Stuart* v. *Crawley*, 2 Stark. 32.

(*g*) *Richardson* v. *N. E. Ry.*, L.R. 7 C.P. 75; 41 L.J. C.P. 60.

(*h*) See *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 254; 38 L.J. Q.B. 137; 51 & 52 Vict. c. 25.

(*i*) 17 & 18 Vict. c. 31.

(*k*) As to when a horse is "received," see *Hodgman* v. *West Mid. Ry.*, 6 B. & S. 560; 35 L.J. Q.B. 85.

wise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But nothing therein contained is to be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable (*l*), and no greater liability will be incurred than certain sums named in the section for injuries to horses, cattle, &c., unless the sender has declared them to be of greater value at the time of delivery, and paid an increased charge accordingly (*m*). The neglect or default of a railway company or its servants does not extend to acts of a servant beyond the scope of his employment, *e.g.*, felonious acts. A railway company carrying goods can therefore, like other carriers, protect itself by special contract against theft of the goods even by its own servants, and the statutory requirement that the contract shall be reasonable does not apply (*n*).

Where an Act of Parliament authorized a railway company to make regulations respecting passengers' luggage, and the company's regulations required passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage van some wearing apparel wrapped in a shawl and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common law liability to receive and carry the article as personal luggage (*o*).

In cases where railway companies under the Carriers Act, or the Railway Traffic Act, are entitled to receive an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their

(*l*) As to the construction of this section, see *Peek* v. *North Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241, *post*, p. 1045.

(*m*) The section does not apply to a railway company whose special Acts were passed before 26 & 27 Vict. c. 92: *The Stella*, (1900) P. 162; 69 L.J. P. 70.

(*n*) *Shaw* v. *G. W. Ry.*, (1894) 1 Q.B. 373.

(*o*) *Munster* v. *S. E. Ry.*, 4 C.B. N.S. 676; 27 L.J. C.P. 312.

common law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default (*p*), *e.g.*, for delay in forwarding the articles (*q*).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability for loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods (*r*). And the rule is the same, where the suit is brought in the Admiralty Division against the vessel (*s*). It makes no difference that a contract of carriage was made with another person, if the plaintiff alleges that his goods were lawfully in the possession of the defendants, and were lost or injured through their negligence (*t*).

Special contracts with railway and canal companies for carriage of goods and chattels.—By the Railway and Canal Traffic Act, 1854 (*u*), it is further enacted that no special contract between any railway or canal company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively, for carriage; but nothing therein contained is to alter or affect the rights, privileges, or liabilities of any such company, under the Carriers Act, with respect to articles of the description mentioned in that Act. Special contracts with railway and canal companies, therefore, for the carriage of merchandise and chattels, are placed under the control of the court, so that the conditions imposed by the contract must be just and reasonable; and no condition can protect the company, unless it be contained in a contract signed in accordance with the statute (*x*). But no special contract signed according to the statute is necessary to define the nature and extent of the public profession of the common carrier and of the duties he under-

(*p*) *Peek* v. *North Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241.

(*q*) *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*r*) *Phillips* v. *Clark*, 2 C.B. N.S. 163; 26 L.J. C.P. 168; *M'Manus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353.

(*s*) *Ohrloff* v. *Briscall*, 35 L.J. P.C. 63; *sub nom. The Helène*, L.R. 1 P.C. 231.

(*t*) *Martin* v. *Great Indian Peninsular Ry.*, L.R. 3 Ex. 9; 37 L.J. Ex. 27; *Czech* v. *Gen. Steam Nav. Co.*, L.R. 3 C.P. 14; 37 L.J. C.P. 3.

(*u*) 17 & 18 Vict. c. 31, s. 7.

(*x*) *Peek* v. *North Staff. Ry.*, 10 H.L. Cas. 473; 32 L.J. Q.B. 241; *Aldridge* v. *G. W. Ry.*, 15 C.B. N.S. 582; 33 L.J. C.P. 161; *Allday* v. *G. W. Ry.*, 5 B. & S. 903; 34 L.J. Q.B. 5; *L. & N. W. Ry.* v. *Dunham*, 18 C.B. 826; 26 L.J. C.P. 25; *M'Manus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353.

takes in favour of the public at large (*y*); and a contract not signed is valid as against the company (*z*).

Before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; wherefore, every notice, condition, and declaration, under the statute, however reasonable, must, in order to be binding upon the person sought to be affected by it, be in writing and signed in the mode provided by the statute (*a*). If a man has an opportunity of reading the conditions, and chooses to sign them without reading them, he is nevertheless bound by them, if they are reasonable (*b*). But the Act does not apply to traffic beyond the company's own lines or canals, so that a condition printed on a passenger's through ticket from London to Paris, that the company would not be responsible for loss, &c., except on the company's own lines, is valid, although not signed by the passenger (*c*).

Unjust and unreasonable conditions in special contracts.— The reasonableness of the condition will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being paid the customary hire, or whether it was in their power to refuse to carry them upon any terms (*d*). Whenever, in order to bring a railway or canal company within the protection of a condition or special contract, it is necessary to construe it as excluding responsibility for losses occasioned by the company's negligence and misconduct, the condition or special contract is unreasonable and unjust, and therefore void, unless an option is given to the customer to have the goods carried on the ordinary terms, at the ordinary rate (*e*). A condition, therefore, will be void which

(*y*) *Ante*, p. 1019.

(*z*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244, 251; 38 L.J. Q.B. 137.

(*a*) *M'Manus* v. *Lanc. & York. Ry.*, *ante*, p. 1045; *Peek* v. *North Staff. Ry.*, *ante*, p. 1045; *Simons* v. *G. W. Ry.*, 18 C. B. 805; 26 L.J. C.P. 25; *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441.

(*b*) *Lewis* v. *G. W. Ry.*, 5 H. & N. 867; 29 L.J. Ex. 425.

(*c*) *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209.

(*d*) *Pardington* v. *South Wales Ry.*, 1 H. & N. 392; 26 L.J. Ex. 105; *Simons* v. *G. W. Ry.*, 18 C.B. 805; 26 L.J. C.P. 25; *Garton* v. *Bristol & Exeter Ry.*, E. B. & E. 112; 30 L.J. Q.B. 273. As to what is a reasonable percentage charged on declared value, see *Harrison* v. *L. B. & S. C. Ry.*, 2 B. & S. 122; 31 L.J. Q.B. 113.

(*e*) *Peek* v. *North Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241; *Lloyd* v. *Waterford & Lim. Ry.*, 15 Ir. C.L.R. 37; *Allday* v. *G. W. Ry.*, 5 B. & S. 903; 34 L.J. Q.B. 5; *Rooth* v. *N. E. Ry.*, L.R. 2 Ex. 173; 36 L.J. Ex. 83.

would have the effect of protecting the company even in the case of the wilful misconduct of their own servants (*f*), and for the same reason will a regulation be unreasonable and void which would exempt a company from responsibility for any passenger's luggage not fully and properly addressed with the name and destination of the owner without excepting even the misconduct or felony of the company's own servants (*g*). But conditions may be in part reasonable and in part not; and the plaintiff will be bound by those which are reasonable (*h*). Where the plaintiff sent a dog by the defendants' line, and signed a ticket, which stated that the company would not be common carriers of dogs, and would not receive dogs for conveyance except on special terms, it was held that although the company were not bound to be common carriers of dogs, yet they were bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for their carriage, and that the charges made must not be unreasonable (*i*); and, where a railway company received goods to be carried under a condition absolving them from all liability for the loss of, or damage to, goods insufficiently or improperly packed, marked, directed, or described, the condition was held to be unreasonable and unjust, as insufficient packing, marking, or directing, &c., of goods constituted no sufficient ground for relieving the company from liability respecting the performance of their duty (*k*). Where horses were to be forwarded by a cattle-truck, and the owner signed a ticket undertaking all risk of conveyance, loading and unloading, but the truck provided, though, in external appearance, and, so far as the defendants' servants knew, sound and sufficient, was, in fact, unsound, and one of the horses was injured in consequence, it was held that the railway company was responsible for the damage done, notwithstanding the terms of the special contract (*l*).

It is the duty of every railway or canal company setting up a condition in qualification and restriction of their common law

(*f*) *Ashendon* v. *L. B. & S. C. Ry.*, 5 Ex.D. 190, where *Harrison* v. *L. B. & S. C. Ry.*, 2 B. & S. 122; 31 L.J. Q.B. 113, is said to be overruled by *Peek* v. *N. S. Ry.*, *ante*, p. 1046. See *Brown* v. *M. S. & L. Ry.*, 8 App.Cas. 703; 53 L.J. Q.B. 124.

(*g*) *Cutler* v. *N. L. Ry.*, 19 Q.B.D. 64; 56 L.J. Q.B. 648.

(*h*) *Gregory* v. *West Mid. Ry.*, 2 H. & C. 944; 33 L.J. Ex. 155; *M'Cance* v. *L. & N. W. Ry.*, 3 H. & C. 343; 34 L.J. Ex. 39; *Simons* v. *G. W. Ry.*, 18 C.B. 805; 26 L.J. C.P. 25.

(*i*) *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111; cp. *Williams* v. *Midland Ry.*, (1908) 1 K.B. 252; 77 L.J. K.B. 157.

(*k*) *Simons* v. *G. W. Ry.*, 18 C.B. 805; 26 L.J. C.P. 25; *L. & N. W. Ry.* v. *Dunham*, 18 C.B. 826; 26 L.J. C.P. 25; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 112; 30 L.J. Q.B. 273; cp. *Sutcliffe* v. *G. W. Ry.*, (1910) 1 K.B. 478; 79 L.J. K.B. 437.

(*l*) *M'Manus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353; *M'Cance* v. *L. & N. W. Ry.*, 34 L.J. Ex. 39; 3 H. & C. 343.

liability to show that the condition is just and reasonable; and, if they make an extra charge for insuring the safe conveyance of live animals, the extra charge must be reasonable and just (*m*). A stipulation that goods shall be carried "at owner's risk" only exempts the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence (*n*), even though a lower charge than usual was made (*o*). Where the company were not to be liable in respect of any loss or "detention," except by wilful misconduct, it was held that a purposed detention through a negligent mistake in supposing the carriage had not been paid, although not amounting to wilful misconduct, was a "detention" for which the company was liable (*p*).

Just and reasonable conditions.—The following conditions have been held just and reasonable:—that all claims for loss or damage should be made within seven days after the time when the goods have been delivered (*q*), that a railway company will not undertake to forward goods by any particular train, or be answerable for their non-arrival in time for any particular market (*r*), that they will not be responsible, under any circumstances, for loss of market or other loss or injury arising from detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud (*s*), that they will not be responsible for the risks attendant upon the carriage by railway of perishable articles, live animals and chattels, such as accidents occasioned by the fright or restiveness of horses, or from the wheel of a carriage taking fire (*t*), or for loss arising from delay in forwarding fish, where it is impossible to know the exact condition of the fish at the time of its delivery to be carried, and where the slightest delay in its transmission may occasion a vast loss (*u*), or for loss or damage to fragile materials, such as statuary or sculptured marbles, not occasioned by the negligence of the company or its servants (*x*).

(*m*) *Harrison* v. *L. B. & S. C. Ry.*, 2 B. & S. 122; 31 L.J. Q.B. 113; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 162; 30 L.J. Q.B. 294; *Peek* v. *North Staff. Ry.*, 10 H.L.Cas. 473; 32 L.J. Q.B. 241; *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111.

(*n*) *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123; *D'Arc* v. *L. & N. W. Ry.*, L.R. 9 C.P. 325.

(*o*) *D'Arc* v. *L. & N. W. Ry.*, L.R. 9 C.P. 325.

(*p*) *Gordon* v. *G. W. Ry.*, 8 Q.B.D. 44; 51 L.J. Q.B. 58. If the defendants intended that they were not to be liable for such "detention" the condition was unreasonable.

(*q*) *Lewis* v. *G. W. Ry.*, 5 H. & N. 867; 29 L.J. Ex. 425.

(*r*) *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441; *White* v. *G. W. Ry.*, 2 C.B. N.S. 7; 26 L.J. C.P. 158; *Lord* v. *Midland Ry.*, L.R. 2 C.P. 339; 36 L.J. C.P. 170.

(*s*) *Beal* v. *South Devon Ry.*, 3 H. & C. 337; *Lord* v. *Midland Ry.*, L.R. 2 C.P. 339; 36 L.J. C.P. 170.

(*t*) *Austin* v. *Manchester Ry.*, 10 C.B. 454; 21 L.J. C.P. 179.

(*u*) *Beal* v. *South Devon Ry.*, *supra*; *Wren* v. *Eastern Counties Ry.*, 35 L.T. 5.

(*x*) *Peek* v. *North Staff. Ry.*, 10 H.L. Cas. 473; 32 L.J. Q.B. 241.

If the company offer the consignor a *bonâ fide* practical choice, either to have his goods carried in the usual way, at a reasonable rate, or at his own risk at a lower rate, and he elects the latter, the condition is not unreasonable (*y*). Where there was a contract to carry at owner's risk, but the company were to be liable for the wilful misconduct of their servants, it was held that in the absence of such misconduct the company were not responsible, and that the contract was reasonable (*z*). The question as to what is reasonable is a question for the judge(*a*).

Sect. 7 of 17 & 18 Vict. c. 31, is extended by sect. 31 of 26 & 27 Vict. c. 92, to steam-vessels employed by railway companies, as auxiliary to their line of railway, and to the traffic carried on by means of such steam-vessels, but it does not apply to a railway company whose special Acts were passed before the extending Act (*b*). It applies to passengers' luggage (*c*), and to goods received without special contract for carriage in a way in which the railway company were under no obligation to carry them, *e.g.*, travellers' samples carried by passenger train (*d*), but not to goods received by the company for safe custody, and not for carriage (*e*). Nor does it apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company (*f*). Sect. 12 of 34 & 35 Vict. c. 78, applies where a carriage is by a vessel not belonging to nor worked by the company (*g*).

Liability of railway company during sea transit.—When a railway or canal company contracts by through-booking to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, they may by their contract assume the risk even beyond their own premises (*h*). But, in such a case, a condition exempting the company from liability for any loss or damage which may arise during the carriage by sea of such animals, &c., from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents

(*y*) Blackburn, J., *ib.*; *Lewis* v. *G. W. Ry.*, 3 Q.B.D. 195; 47 L.J. Q.B. 131; *Brown* v. *M. S. & L. Ry.*, 8 App. Cas. 703; 53 L.J. Q.B. 124; *G. W. Ry.* v. *M'Carthy*, 12 App.Cas. 218; 56 L.J. Ch. 3.

(*z*) *Lewis* v. *G. W. Ry.*, 3 Q.B.D. 195; 47 L.J. Q.B. 131; see *Gordon* v. *G. W. Ry.*, 8 Q.B.D. 44; 51 L.J. Q.B. 58.

(*a*) *Per* Ld. Herschell in *G. W. Ry.* v. *M'Carthy*, 12 App.Cas, 218; 56 L.J. Ch. 3.

(*b*) *The Stella*, (1900) P. 162; 69 L.J. P. 70.

(*c*) *Cohen* v. *S. E. Ry.*, 2 Ex.D. 253; 46 L.J. Ex. 417.

(*d*) *Wilkinson* v. *Lanc. & York. Ry.* (1907) 2 K.B. 222; 76 L.J. K.B. 801.

(*e*) *Van Toll* v. *S. E. Ry.*, 12 C.B. N.S. 75; 31 L.J. C.P. 241.

(*f*) *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209.

(*g*) *Doolan* v. *Midland Ry.*, 2 App. Cas. 792.

(*h*) *Logan* v. *Highland Ry.*, (1900) 2 F. 292.

of the seas, rivers, and navigation, of whatever kind soever, will, if published in a conspicuous manner in the office when such through-booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, &c., be valid as part of the contract between the consignor of such animals, &c., and the company, just as if the company had signed and delivered to the consignor a bill of lading containing such condition (*i*).

Where a railway company, under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the company, they will be answerable in damages in respect of loss of life or personal injury, or in respect of loss or damage to such animals or goods during the carriage in such vessel, in like manner, and to the same amount, as they would be answerable if the vessel had belonged to them (*k*).

Implied authority of railway servants to bind company by special contract.—"It is the duty of railway companies to have some person capable of giving directions and of dealing with everything that the exigency of the traffic may require, and of granting any reasonable demand. The persons who are said to be general superintendent and managing director have power to bind the company as to all things within the scope of the business of the company by any contract within the limits of their employment" (*l*). If they act beyond the scope of their ordinary business, it must be shown, in order to bind the company, that they are acting under a special authority from the board of directors (*m*). But, if there is a particular course of dealing with which the consignor is acquainted, he must be taken to know that the servants have no power to bind the company on any but the usual terms (*n*).

Commencement and duration of liability—Loss or damage in warehouses.—When a common carrier carries on the business both of a warehouseman and a common carrier, the extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for

(*i*) 31 & 32 Vict. c. 119, s. 14, *post*, p. 1055.

(*k*) 34 & 35 Vict. c. 78, s. 12, *post*, p. 1055.

(*l*) *Brown* v. *Bristol and Exeter Ry.*, 4 L.T. 830; *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*m*) *Taff Vale Ry.* v. *Giles*, 2 E. & B. 822; 23 L.J. Q.B. 43.

(*n*) *Slim* v. *G. N. Ry.*, 14 C.B. 647; 23 L.J. C.P. 166.

hire (*o*). Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire (*p*). But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law (*q*). Whenever the common carrier receives goods to be kept until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire, and not as a gratuitous bailee, although he does not charge warehouse rent (*r*).

Delivery of goods at place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition (*s*), and deliver them into the hands of the consignee, or of some person expressly or impliedly authorized by him to receive them, taking especial care that they are delivered into the hands of the right person (*t*). If imposed upon by a fictitious order, carriers will not be responsible, if they act according to the usual custom of business, and in accordance with their instructions (*u*). When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the roadside at which the coach usually stops, unless he has received directions from the consignee so to do (*x*). If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound to part with the possession of the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee (*y*), and will only be

(*o*) *Cairns* v. *Robins*, 8 M. & W. 258; 10 L.J. Ex. 452; *Garside* v. *Trent Navigation Co.*, 4 T.R. 582.

(*p*) *Van Toll* v. *S. E. Ry.*, 16 C.B. N.S. 75; 31 L.J. C.P. 241.

(*q*) *Forward* v. *Pittard*, 1 T.R. 27; Buller, J., in *Hyde* v. *Trent and Mersey Nav. Co.*, 5 T.R. 398. See *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71. As to accidental fires in warehouses, see *Addison on Torts*, p. 706 (ed. 8).

(*r*) *White* v. *Humphery*, 11 Q.B. 43.

(*s*) *Raphael* v. *Pickford*, 6 Sc. N.R. 478; 12 L.J. C.P. 176; *Black* v. *Baxendale*, 1 Exch. 410; 17 L.J. Ex. 50.

(*t*) *Golden* v. *Manning*, 3 Wils. 433; 2 W.Bl. 916; *Birkett* v. *Willan*, 2 B. & Ald. 356; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 4 Bing. 476; 6 L.J. (O.S.) C.P. 97.

(*u*) *McKean* v. *McIvor*, L.R. 6 Ex. 36; 40 L.J. Ex. 30.

(*x*) *L. & N. W. Ry.* v. *Bartlett*, 7 H. & N. 400; 31 L.J. Ex. 92.

(*y*) *Storr* v. *Crowley*, M'Clel. & Y. 136.

bound to exercise reasonable care with respect to the goods (*z*). And if the consignee, having no warehouse of his own, asks him to keep the goods till he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his custody of them (*a*). Upon the arrival of the goods at their destination, and tender of them to the consignee, the carrier is no longer a common carrier in the sense of being an insurer, but is bound nevertheless to take care of the goods (*b*); and if he is put to expense in so doing by reason of the default of the consignee in not receiving the goods, the carrier may recover such expenses (*c*). Where goods are delivered to be carried to a certain place for a named consignee, such consignee is entitled to delivery at any other place, and the carrier is not responsible for loss after such delivery (*d*). The carrier is protected by the Carriers Act after the goods have been negligently carried beyond the destination (*e*). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss (*f*).

Delivery of luggage at railway stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage

(*z*) *Heugh* v. *L. & N. W. Ry.*, L.R. 5 Ex. 51; 39 L.J. Ex. 48.

(*a*) *Webb, In re*, 8 Taunt. 449. See *Shepherd* v. *Bristol & Exeter Ry.*, L.R. 3 Ex. 189; 37 L.J. Ex. 113.

(*b*) *G. N. Ry.* v. *Swaffield*, L. R. 9 Ex. 132; 43 L.J. Ex. 89; *Chapman* v. *G. W. Ry.*, 5 Q.B.D. 278; 49 L.J. Q.B. 420; *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*c*) *G. N. Ry.* v. *Swaffield*, *supra*.

(*d*) *Cork Distillers' Co.* v. *Great Southern Ry., Ireland*, L.R. 7 H.L. 269.

(*e*) *Morritt* v. *N. E. Ry.*, 1 Q.B.D. 302; 45 L.J. Q.B. 289.

(*f*) *Bourne* v. *Gatliffe*, 3 Sc. N.R. 1; 8 *ib.* 604; 7 M. & Gr. 850; *Syeds* v. *Hay*, 4 T.R. 260; *Wardell* v. *Mourillyan*, 2 Esp. 693.

to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (*g*). The passenger must be allowed a reasonable time to claim his luggage at the destination (*h*); but if after claiming it he leaves it with a porter for a time the company will not be responsible if it be lost (*i*). Passengers' luggage is within sect. 7 of the Railway and Canal Traffic Act, 1854 (*j*), and a notice or condition that the company will not be responsible is void (*k*).

Acceptance of goods and passengers to be carried beyond limits of ordinary destination.—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance (*l*), there is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another conveyance (*m*). If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them (*n*), but the company may by express contract limit its liability to loss and damage occurring on its own line of railway (*o*). A railway company which accepts goods for carriage by a named route is liable to the consignor in damages for loss occasioned to him owing to the goods being

(*g*) *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 839; 18 L.J. P.C. 251; *Butcher* v. *L. & S. W. Ry.*, 16 C.B. 13. See *ante*, p. 1038.

(*h*) *Patscheider* v. *G. W. Ry.*, 3 Ex.D. 153.

(*i*) *Hodkinson* v. *L. & N. W. Ry.*, 14 Q.B.D. 228.

(*j*) 17 & 18 Vict. c. 31.

(*k*) *Cohen* v. *S. E. Ry.*, 2 Ex.D. 253; 46 L.J. Ex. 417.

(*l*) Such a limitation is a reasonable one: see *Aldridge* v. *G. W. Ry.*, 15 C.B. N.S. 582; 33 L.J. C.P. 161.

(*m*) *Garnett* v. *Willan*, 5 B. & Ald. 53; *Logan* v. *Highland Ry.*, (1900) 2 F. 292.

(*n*) *Muschamp* v. *Lanc. & Preston Ry.*, 8 M. & W. 421; 10 L.J. Ex. 460; *Watson* v. *Ambergate Ry.*, 15 Jur. 448; *Collins* v. *Bristol & Exeter Ry.*, 11 Exch. 790; 25 L.J. Ex. 185; *Bristol & Exeter Ry.* v. *Collins*, 7 H.L.Cas. 234; 29 L.J. Ex. 41; *Wilby* v. *West Corn. Ry.*, 2 H. & N. 703; 27 L.J. Ex. 181; *Mytton* v. *Midland Ry.*, 4 H. & N. 615; 28 L.J. Ex. 385; *Coxon* v. *G. W. Ry.*, 5 H. & N. 274; 29 L.J. Ex. 165; *Hayes* v. *S. W. Ry.*, 9 Ir. C.L.R. 474; *Webber* v. *G. W. Ry.*, 3 H. & C. 771; 34 L.J. Ex. 170.

(*o*) *Fowles* v. *G. W. Ry.*, 7 Exch. 699; 22 L.J. Ex. 76; *Aldridge* v. *G. W. Ry.*, 15 C.B. N.S. 582; 33 L.J. C.P. 161. See *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209; and *Caledonian Ry.* v. *Mulholland*, (1898) A.C. 216; 67 L.J. P.C. 1.

wilfully carried (as distinguished from carriage by mistake) by a different route; and a clause in the consignment note exempting the company from liability for delay, &c., except upon proof that it arose from wilful misconduct on the part of its servants, has no application to such a case (*p*).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods (*q*). The same principle applies to the conveyance of passengers (*r*), who are injured during the journey, although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants themselves (*s*). And it applies to the entire journey from commencement to termination. Where, therefore, the contract was to carry the plaintiff from the shore to a hulk, and there wait till a vessel came to carry him to his destination, and he was injured while on board the hulk, it was held that the defendants were responsible, though the hulk did not belong to them, and was merely used by agreement for the purpose of embarking passengers on board their vessels (*t*).

Railway companies may also enter into arrangements whereby they become agents for one another, and responsible for each other's acts, so that a contract to carry and deliver made with one company may render the other liable for a breach occurring on the line of the latter (*u*). If one railway company receives goods to carry part of the way, and then transfers them to another company to carry them to the place of destination, the agents of the latter company are agents of the first company for receiving notice of countermand; and, if they receive such notice and pay no attention to it, the first company is responsible for the neglect (*x*). The consignee may receive the goods

(*p*) *Mallet* v. *G. E. Ry.*, (1899) 1 Q.B. 309; 68 L.J. Q.B. 256. But see remarks on this case in *Foster* v. *G. W. Ry.*, (1904) 2 K.B. 306; 73 L.J. K.B. 811.

(*q*) *Crouch* v. *G. W. Ry.*, 3 H. & N. 183; 27 L.J. Ex. 345; *Scothorn* v. *South Staff. Ry.*, 8 Ex. 345; 22 L.J. Ex. 121.

(*r*) *Blake* v. *G. W. Ry.*, 7 H. & N. 987; 31 L.J. Ex. 346; *Buxton* v. *N. E. Ry.*, L.R. 3 Q.B. 549; 37 L.J. Q.B. 258.

(*s*) *Thomas* v. *Rhymney Ry.*, L.R. 6 Q.B. 266; 40 L.J. Q.B. 89. See *Foulkes* v. *Met. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361.

(*t*) *John* v. *Bacon*, L.R. 5 C.P. 437; 39 L.J. C.P. 365.

(*u*) *Gill* v. *Manchester, &c. Ry.*, L.R. 8 Q.B. 186; 42 L.J. Q.B. 89.

(*x*) *Scothorn* v. *South Staff. Ry.*, 8 Exch. 345; 22 L.J. Ex. 121; *Crouch* v. *G. W. Ry.*, 3 H. & N. 183; 27 L.J. Ex. 345.

at any stage of the journey, and may alter their destination at his pleasure (*y*).

By sect. 14 of 31 & 32 Vict. c. 119, where a railway or canal company, or the lessees, owners, or managers of such company, by through-booking, contract to carry any animals, luggage, or goods partly by railway and partly by sea or canal, a condition exempting the company from liability for any loss or damage arising during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, or steam, and all other accidents of seas, rivers, and navigation of whatever kind, shall, if published in a conspicuous manner in the office where the through-booking is effected, and legibly printed on the receipt or freight note, be valid as part of the contract between the consignor and the company (*z*). The section does not operate to prevent a railway company from making with a passenger travelling with a free pass conditions exempting the company from liability for the loss of his luggage, although no notice has been posted in the company's office (*a*).

By sect. 12 of 34 & 35 Vict. c. 78, where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages, in respect of loss of life, or personal injury, or loss of or damage to animals or goods during carriage in such vessel.

Refusal of consignee to receive goods—Carrier as bailee.—If the consignee refuses to receive the goods, or cannot be found, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. An entirely new contract arises by implication of law between the carrier and the consignor—the carrier holds the goods as the bailee of the consignor, and is bound to take due and ordinary care of the goods and to deliver them to the consignor, on being paid his fair and reasonable charges (*b*), but he is not liable for a subsequent mis-delivery of them if he acts with reasonable care (*c*). If the person to whom the goods are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place

(*y*) *L. & N. W. Ry.* v. *Bartlett*, 7 H. & N. 400; 31 L.J. Ex. 92; *Butterworth* v. *Brownlow*, 19 C.B. N.S. 409; 34 L.J. C.P. 266.

(*z*) See 51 & 52 Vict. c. 25, s. 28.

(*a*) *The Stella*, (1900) P. 16; 69 L.J. P. 70.

(*b*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 318; 38 L.J. C.P. 335; *Heugh* v. *L. & N. W. Ry.*, L.R. 5 Ex. 51; 39 L.J. Ex. 48; *McKean* v. *M'Ivor*, L.R. 6 Ex. 36; 40 L.J. Ex. 30.

(*c*) *Heugh* v. *L. & N. W. Ry.*, *supra*.

of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property. If the consignor or owner of the goods is known to him, it would be reasonable for him to give notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected (*d*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came (*e*). A consignee's right to reject goods on account of damage sustained by them in course of carriage depends in each case upon the extent of the damage sustained (*f*).

Payment of fare or hire—Carrier's lien.—When credit has not, by express contract of the parties, been given for the payment of the price of the carriage of goods, the delivery of the goods to the consignee and the payment of the price of the carriage are concurrent acts to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried until he is tendered his hire for their conveyance. If the consignee refuses to pay the sum demanded for their carriage, the carrier is not justified in at once sending the goods back to the place whence they came, but must hold them a reasonable time, to see if the consignee will accept and pay for them (*g*). If the consignee still refuses, the carrier will hold at the disposal of the consignor, and is entitled to look to the latter for the payment of his hire. The carrier holds the goods first that he may get payment of the freight, and then to deal with them as the consignee may direct (*h*). The transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him and the purchaser he holds them not as carrier, but as the purchaser's agent (*i*). Where a carrier delivers part of the goods, he may be assumed not to have abandoned his lien upon the rest for his unpaid freight. He is bound to deliver up to the extent of the freight which has been paid; but the moment he has delivered enough to satisfy that, he has a lien upon the whole of the remainder of the cargo for the unpaid freight (*k*). If a railway company posts at the

(*d*) *Hudson* v. *Baxendale*, 2 H. & N. 575; 27 L.J. Ex. 93.

(*e*) *G. W. Ry.* v. *Crouch*, 3 H. & N. 183; 27 L.J. Ex. 345; *Heugh* v. *L. & N. W. Ry.*, L.R. 5 Ex. 51; 39 L.J. Ex. 48.

(*f*) *Dick* v. *East Coast Ry.*, (1902) 4 F. 178.

(*g*) *G. W. Ry.* v. *Crouch*, 3 H. & N. 201; 27 L.J. Ex. 345.

(*h*) *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71.

(*i*) *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*k*) *Cooper, Ex parte, supra.*

offices and stations a bye-law to the effect that every passenger losing his ticket shall be liable to pay the full fare from the most distant station on the line, the company has no power to enforce it by detaining the person of a passenger who refuses to pay the specified amount (*l*), or by forcibly removing him from the carriage in which he is travelling (*m*).

The common law accords to common carriers a right to retain goods and chattels carried until they have received the customary remuneration for the services they have been compelled to render, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods have been stolen and delivered to a carrier to be carried the carrier may refuse to deliver them to the owner without being paid the price of their carriage, "for when the robber brought them to him he was obliged to receive them and carry them, and therefore since the law compelled him to carry them it will give him remedy by retainer for the price of the carriage" (*n*).

But the carrier has no lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by notice or agreement that all goods delivered for conveyance will be held as a security for the payment of such debts, as well as for the payment of the price of their own carriage (*o*). But a common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his vehicle, to convey the goods of all persons tendering his hire for the carriage; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, without legal effect (*p*). Where an Order in Council directed that every cattle-truck should be disinfected once in every twenty-four

(*l*) *Chilton* v. *London & Croydon Ry.*, 16 M. & W. 212; 16 L.J. Ex. 89; *Poulton* v. *L. & S. W. Ry.*, L.R. 2 Q.B. 534; 36 L.J. C.P. 294. See Addison on Torts, p. 180 (ed. 8).

(*m*) *Butler* v. *M. S. & L. Ry.*, 21 Q.B.D. 207; 57 L.J. Q.B. 564.

(*n*) *Exeter Carriers' case*, cited 2 Ld. Raym. 867.

(*o*) *Wright* v. *Snell*, 5 B. & Ald. 353; *G. E. Ry.* v. *Lord's Trustee*, (1909) A.C. 109; 78 L.J. K.B. 160.

(*p*) *Butler* v. *Woolcott*, 2 Bos. & P. N.R. 64; *Oppenheim* v. *Russell*, 3 Bos. & P. 47; *Rushforth* v. *Hadfield*, 6 East. 527; 7 *ib.* 227.

hours during its use, it was held that the railway company had no lien for the expense of such cleansing upon the person sending cattle by the truck, as it was not a service done for such person individually as distinguished from the rest of the public (*q*).

Section 97 of 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to a railway company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages (*r*).

If a person goes to a coach-office and has a place booked for him by a particular coach, and he then leaves his portmanteau at the coach-office, the coach-proprietor will, it seems, have a lien upon the portmanteau for his reasonable and customary remuneration and charge for booking; but if the person merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all (*s*). When goods delivered to be carried are received from the waggon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse-room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof (*t*). A common carrier of passengers and luggage has a lien upon the luggage for the fare of the passenger as well as for the carriage of his effects, but he has no right to detain the person of the passenger or the clothes he is actually wearing (*u*). If the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered (*x*).

Common carrier's charges—Railway charges.—The statutes requiring justices of the peace to assess and fix the charges for land carriage of goods have long since been repealed (*y*); but the hire or charge for carriage must be fair and reasonable,

(*q*) *Cox* v. *G. E. Ry.*, L.R. 4 C.P. 181; 38 L.J. C.P. 151.

(*r*) *Wallis* v. *L. & S. W. Ry.*, L.R. 5 Ex. 62; 39 L.J. Ex. 57. See *Brown* v. *G. W. Ry.*, 9 Q.B.D. 744; 51 L.J. Q.B. 529; but see *M. S. & L. Ry.* v. *North Central Wagon Co.*, 13 App.Cas. 554; 58 L.J. Ch. 219.

(*s*) *Higgins* v. *Bretherton*, 5 C. & P. 2. Whether, if the place be booked, the coach proprietor would have a lien for the full fare, *quære*, S. C.

(*t*) *Lambert* v. *Robinson*, 1 Esp. 119.

(*u*) *Wolf* v. *Summers*, 2 Campb. 631.

(*x*) *Wallace* v. *Woodgate*, Ry. & M. 194.

(*y*) 7 & 8 Geo. 4, c. 39 (repealed, S. L. R. 1873).

and must not exceed the ordinary and customary rate of remuneration. By sect. 1, sub-sect. 2 of the Railway and Canal Traffic Act, 1894 (*z*), under regulations of the Board of Trade, every railway company shall keep the books, schedules, or other papers, specifying all the rates, charges and conditions of transport in use upon their railway on 31st December, 1892, open for inspection at their head office, and shall upon demand supply copies or extracts thereof (*a*). If a person sends to a carrier's office to know his rate of charge, the carrier is bound by the representation there made by his clerks; and, for goods sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake (*b*). When, by a railway Act, the word "toll" is to include the charge for goods conveyed by the railway, whether for the use of the railway or for the moving power, or for the use of the carriage, *primâ facie* it includes everything that a carrier does, and for which he is entitled to charge (*c*). By the Acts of Parliament under which railway companies are incorporated, it is generally provided that the charges for the carriage of goods shall be reasonable and equal to all persons. This will not, however, prevent the company from charging special rates for carriage in a special manner, *e.g.*, for carriage in passenger trains of goods which they are only bound to carry by goods train (*d*).

Duty of railway and canal companies to afford reasonable facilities for carriage of passengers, merchandise, and chattels. —By sect. 2 of the Railway and Canal Traffic Act, 1854 (*e*), every railway company and canal company shall afford all reasonable facilities (*ee*) for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any

(*z*) 57 & 58 Vict. c. 54.

(*a*) As to the hearing and determination by the Railway and Canal Commissioners of complaints with respect to increase of rates and charges since December 31, 1892, see 57 & 58 Vict. c. 54, ss. 1, 2; and *North Staff. Coll. Owners' Assoc.* v. *North Staff. Ry. and Others*, (1908) 2 K.B. 765; 77 L.J. K.B. 1021; and as to the meaning of "rate authorised," see *Spillers & Bakers, Ltd.* v. *G. W. Ry.*, (1909) 1 K.B. 604; 78 L.J. K.B. 444.

(*b*) *Winkfield* v. *Packington*, 2 C. & P. 600.

(*c*) *Pegler* v. *Monmouth Ry. & Canal Co.*, 6 H. & N. 644; 30 L.J. Ex. 249.

(*d*) *Stone* v. *Midland Ry.*, (1904) 1 K.B. 669; 73 L.J. K.B. 392.

(*e*) 17 & 18 Vict. c. 31.

(*ee*) *Spillers & Bakers, Ltd.* v. *G. W. Ry.*, (1911) 1 K.B. 386.

particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (*f*); and where the railways or canals form part of a continuous line of railway and canal communication, all due and reasonable facilities shall similarly be afforded for receiving and forwarding traffic without preference or advantage, or prejudice, or disadvantage, as aforesaid. By the Railway and Canal Traffic Act, 1888 (*g*), s. 25, the said facilities include the due and reasonable receiving, forwarding, and delivering of through traffic at through rates, tolls, or fares under conditions set out in the section (*h*). It has been held, however, that the above provisions apply only to the "receiving," "forwarding," and "delivering," of traffic, and not to facilities for storing goods after they have been delivered to the consignees. Where, therefore, a railway company let the surplus land adjoining their station to one coal merchant to the exclusion of others, it was held that another coal merchant had no ground of complaint, although the first-named merchant did not require or use the whole of the surplus land for the purpose of storing his coals (*i*). A cloakroom has been held to be a reasonable facility (*k*).

No distinction must be made by the company between one class of persons and another (*l*). The company cannot, therefore, charge a person, who is himself a common carrier, for a parcel or package, whatever may be its contents, more than it would charge one of the public. Where a railway company acted as a common carrier of goods, and issued certain scales of charge for the carriage, including the collection, loading, unloading, and delivery, and also carried goods for other carriers, to whom they made certain allowances for collection, &c., but in their dealings with a particular carrier they refused to make these allowances, it was held that the charges to the latter were

(*f*) *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177; *Midland Ry.* v. *Myers*, *Rose & Co.*, (1908) 2 K.B. 356; 77 L.J. K.B. 554.

(*g*) 51 & 52 Vict. c. 25.

(*h*) The Railways (Private Sidings) Act, 1904, 4 Edw. 7, c. 19, further extends the said facilities to traffic upon private sidings and private branch railways. Sect. 28 of 51 & 52 Vict. c. 25, makes the provisions applicable to sea traffic.

(*i*) *West* v. *L. & N. W. Ry.*, L.R. 5 C.P. 622; 39 L.J. C.P. 282, *per* Montague Smith and Brett, JJ., diss. Bovill, C.J., and Keating, J. See *E. & W. India Dock Co.* v. *Shaw*, *Savill & Albion Co.*, 39 Ch.D. 524; 57 L.J. Ch. 1038.

(*k*) *Singer Manufacturing Co.* v. *L. & S. W. Ry.*, (1894) 1 Q.B. 83; 64 L.J. Q.B. 411; as to providing waterclosets, see *West Ham Corporation* v. *G. E. Ry.*, 64 L.J. Q.B. 340; as to through booking, see *Didcot*, *Newbury*, *&c. Ry.* v. *G. W. Ry.*, (1897) 1 Q.B. 33; 66 L.J. Q.B. 33.

(*l*) See *Ransome* v. *East. Co. Ry.*, 1 C.B. N.S. 437; 26 L.J. C.P. 91; see *post*, p. 1063 *et seq.*; the convenience of the public is an element in the consideration of what may constitute an "undue" preference: *Palmer* v. *L. B. & S. C. Ry.*, L.R. 6 C.P. 194; 40 L.J. C.P. 133.

not equal or reasonable, and that he might recover from the company divers extra charges paid by him over and above what had been charged to other carriers and to the public (*m*). Charges for collection and delivery of parcels cannot be included in the general charge for the carriage, so as to impose upon parties who do not require these services and do not avail themselves of them the burden of paying for them (*n*). No unreasonable preference or advantage can lawfully be given to any particular person or company, or to any particular description of traffic (*o*). But the fair interests of the railway company must be taken into consideration; and they are entitled to make a difference in their charges, where it is shown that there is a difference in the cost of carriage to the company, and in the labour and expense incurred by them in the delivery of the goods (*p*).

If overcharges are made they may be recovered back (*q*). Therefore, where a railway company charged a certain rate upon the *aggregate* weight of several packages, if addressed to the same consignee at the same place, it was held that they could not charge a common carrier *separately* upon the weight of the packages consigned to him, although, in addition to the carrier's address on the packages, there was also labelled the address of the person to whom the carrier (through his agent) intended to deliver them (*r*). However, this will not prevent a railway company from charging through-rates to places beyond their termini, at a rate lower in proportion than that charged for part of the distance, although such part is the whole of their line, and a common carrier is not, therefore, entitled to have his packages carried over the line for such lower rate (*s*).

Section 16 of 31 & 32 Vict. c. 119, provides for equal charges to passengers, where a railway company is authorized

(*m*) *Parker* v. *G. W. Ry.*, 7 M. & Gr. 253; 13 L.J. C.P. 105; 11 C.B. 545; 21 L.J. C.P. 57; *Parker* v. *Bristol & Exeter Ry.*, 6 Exch. 702; *L. & N. W. Ry.* v. *Evershed*, 3 App.Cas. 1029; 48 L.J. Q.B. 22; *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, 11 App.Cas. 97; 55 L.J. Q.B. 181.

(*n*) *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S. 137; 33 L.J. C.P. 197; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 112; 30 L.J. Q.B. 273.

(*o*) 17 & 18 Vict. c. 31, s. 2; 51 & 52 Vict. c. 25, s. 27; see *L. & N. W. Ry.* v. *Evershed*, *supra*.

(*p*) *Ransome* v. *East. Co. Ry.*, *supra*; *Oxlade* v. *N. E. Ry.*, 1 C.B. N.S. 454; 26 L.J. C.P. 129; *Baxendale* v. *East. Co. Ry.*, 4 C.B. N.S. 81; 27 L.J. C.P. 137; *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, *supra*; *Midland Ry.* v. *Myers*, *Rose & Co.*, (1908) 2 K.B. 356; 77 L.J. K.B. 554; 51 & 52 Vict. c. 25, s. 27 (2). As to tonnage rates and parcel rates, see *Parker* v. *G. W. Ry.*, 6 E. & B. 77; 25 L.J. Q.B. 209; as to foreign goods, see *Mansion House Assoc.* v. *L. & S. W. Ry.*, (1895) 1 Q.B. 927; 64 L.J. Q.B. 529. As to increase of rates, see *North Staff. Coll. Owners' Assoc.* v. *North Staff. Ry. and Others*, (1908) 2 K.B. 765; 77 L.J. K.B. 1021.

(*q*) *Pegler* v. *Monmouth, Ry. &c.*, 6 H. & N. 644; 30 L.J. Ex. 249; *Garton* v. *Bristol & Exeter Ry.*, *supra*; *L. & N. W. Ry.* v. *Evershed*, *supra*.

(*r*) *Baxendale* v. *L. & S. W. Ry.*, L.R. 1 Ex. 137; 35 L.J. Ex. 108.

(*s*) *Baxendale* v. *L. & S. W. Ry.*, *supra*.

to maintain and work steam vessels, and prohibits any reduction or advance in the fare in consequence of the persons using the steamboat having travelled, or being about to travel, by the railway or not (*t*). Where an aggregate sum for the fare by boat and rail is charged, the ticket must distinguish the amount charged for each (*Ib.*). Where two railways are worked by one company the calculation of charges by distance must be reckoned as if it was one railway (sect. 18). As to agreements between railway and canal companies, see 36 & 37 Vict. c. 48, s. 16; 51 & 52 Vict. c. 25, s. 36.

Carriage of packed parcels.—A railway company has no right to make an increased charge for packed parcels, in order to prevent carriers from entering into competition with them in the conveyance of goods; and there is no difference between a packed parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual all the contents being his own (*u*). But in certain cases an extra charge may be made for increased risk (*x*); and, if the company has to make separate deliveries to several persons, they are entitled to make an additional charge in respect of the increased trouble (*y*). When the duty of making equal charges to all persons is not imposed upon the company, they may impose a different rate of carriage for packed parcels from what they charge for ordinary packages (*z*).

In some cases which decided that an extra charge might be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not carriers, for what they called inclosures, which were in reality packed parcels, and the courts held that an extra charge for a packed parcel to a carrier was against the statutes, imposing upon railway companies the duty of charging equally to all persons in respect of goods of a like description (*a*). The company may, however, divide goods into classes by descriptions appropriate to the different classes it chooses to make, and make different charges for the different classes (*b*). By 31 & 32 Vict. c. 119, s. 17, it is provided

(*t*) See 51 & 52 Vict. c. 25, s. 28.

(*u*) *Pickford* v. *Grand Junc. Ry.*, 10 M. & W. 399; *Crouch* v. *G. N. Ry.*, 11 Exch. 742; 25 L.J. Ex. 137; *Piddington* v. *S. E. Ry.*, 5 C.B. N.S. 111; 27 L.J. C.P. 295; *Baxendale* v. *L. & S. W. Ry.*, *supra*; *Garton* v. *Bristol & Exeter Ry.*, 4 H. & N. 49; 28 L.J. Ex. 169; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*x*) *Garton* v. *Bristol & Exeter Ry.*, *supra*.

(*y*) *Baxendale* v. *East. Co. Ry.*, 4 C.B. N.S. 81; 27 L.J. C.P. 137.

(*z*) *Branley* v. *S. E. Ry.*, 12 C.B. N.S. 63; 30 L.J. C.P. 286.

(*a*) *Parker* v. *G. W. Ry.*, 11 C.B. 545; 21 L.J. C.P. 57; *Crouch* v. *G. N. Ry.*, 11 Exch. 742; 25 L.J. Exch. 137; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*b*) Erle, J., *Branley* v. *S. E. Ry.*, 12 C.B. N.S. 63; 31 L.J. C.P. 290.

that, on application in writing to the secretary of the company, by any person who has paid for the conveyance of goods, the company shall render an account to the applicant distinguishing how much of the charge is for conveyance—including tolls for the use of the railway, the use of carriages, and for locomotive power—and how much for loading and unloading, covering collection, delivery, and other expenses, but without particularising the items of such last-mentioned charge.

Injunction to enforce compliance with Railway and Canal Traffic Act.—By 17 & 18 Vict. c. 31, s. 3, it is enacted that it shall be lawful for any company, or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act, to apply in a summary way to the Court (see note (*d*), *infra*) for a writ of injunction or interdict, restraining such company from continuing such contravention and enjoining obedience to the Act(*c*); and in case of disobedience of any such writ of injunction or interdict, the Court may order that a writ of attachment or other process applicable shall issue against any one or more of the directors, or against any owner, lessee, contractor, or other person failing to obey the writ of injunction or interdict, and may make an order directing the payment of a sum of money not exceeding for any one company the sum of 200*l.* per day, during such company's failure to obey the injunction or interdict, such money to be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the Court, or to his Majesty, and to be recoverable by attachment or writ of execution; and, in any such proceeding, the Court may order and determine that all or any costs thereof shall be paid by or to the one party or the other, as the Court shall think fit (*d*).

It is then clear that railway companies cannot promote their own interests as carriers at the expense of the right of the public to equality of treatment (*e*), or give to one individual greater advantages at their stations (*f*), or upon their line, than they allow to another (*g*). Where a railway company, in order

(*c*) See *Ransome* v. *East. Co. Ry.*, 26 L.J. C.P. 91; 1 C.B. N.S. 437. As to whether a cause of action can arise from a breach of sect. 2 of the Act, see *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, 11 App.Cas. 97; 55 L.J. Q.B. 181. As to defence and counter-claim, see *Lanc. & Yorkshire Ry.* v. *Greenwood*, 21 Q.B.D. 215; 58 L.J. Q.B. 16; *Rhymney Ry.* v. *Rhymney Iron Co.*, 25 Q.B.D. 146; 59 L.J. Q.B. 414.

(*d*) These powers are now exercised by the Railway and Canal Commission established by 51 & 52 Vict. c. 25.

(*e*) *Baxendale* v. *G. W. Ry.*, 5 C.B. N.S. 350; 28 L.J. C.P. 69.

(*f*) *Marriott* v. *L. & S. W. Ry.*, 1 C.B. N.S. 499; 26 L.J. C.P. 154; *Beadell* v. *East. Co. Ry.*, 2 C.B. N.S. 509; 26 L.J. C.P. 250; *Baxendale* v. *Bristol & Exeter Ry.*, 11 C.B. N.S. 787.

(*g*) *Baxendale* v. *North Devon Ry.*, 3 C.B. N.S. 324; see 31 & 32 Vict. c. 119, s. 16, *ante*, p. 1061.

to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own waggons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation; the company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services of which they do not desire to avail themselves (*h*). So if a number of tradesmen in a country town request a railway company to deliver all goods addressed to them to a local carrier for distribution by him, the company cannot, in order to compete with that carrier, under the pretence of requiring a special order as to each packet, in effect cause the delivery by such carrier to be so delayed as to become impracticable (*i*). Nor can a railway company exclude carriers' vans from the delivery of goods at a station after a certain hour, if they admit vans, with goods collected from their own receiving houses, after that hour (*k*).

Where a railway company is proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, the Court will issue a writ of injunction ordering to desist from giving such undue preference (*l*). But the operation of the statute is confined to undue preferences given to one person or class of persons over another in the traffic along the same railway or canal (*m*), and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway (*n*). And it has been held that the statute is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities, and full train-loads at regular periods, provided the real object of the company is to obtain thereby a greater remunerative profit, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee (*o*).

(*h*) Cockburn, C.J., *Garton* v. *G. W. Ry.*, 5 C.B. N.S. 678; 28 L.J. C.P. 303; *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S. 137; 33 L.J. C.P. 197; see 31 & 32 Vict. c. 119, s. 17, *ante*, p. 1062.

(*i*) *Parkinson* v. *G. W. Ry.*, L.R. 6 C.P. 554.

(*k*) *Palmer* v. *L. B. & S. C. Ry.*, L.R. 6 C.P. 195.

(*l*) *Harris* v. *Cockermouth Ry.*, 3 C.B. N.S. 693; 27 L.J. C.P. 162; *Ransome* v. *East. Co. Ry.*, 8 C.B. N.S. 709; 27 L.J. C.P. 166; *Cooper* v. *L. & S. W. Ry.*, 4 C.B. N.S. 738; 27 L.J. C.P. 324.

(*m*) *Bennett* v. *Manch., Sheff. & Linc. Ry.*, 6 C.B. N.S. 707.

(*n*) *Jones* v. *East. Co. Ry.*, 3 C.B. N.S. 718.

(*o*) *Nicholson* v. *G. W. Ry.*, 5 C.B. N.S. 366; 28 L.J. C.P. 89; *Strick* v. *Swansea Canal Co.*, 16 C.B. N.S. 245; 31 L.J. C.P. 240.

Before the Court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, it must in general be satisfied that some substantial injury or inconvenience is sustained by the public, and that the complaint is *bonâ fide* made on behalf of the public (*p*). It was formerly held that, the exercise of this special jurisdiction being subject to no review (*q*), and depending in each case upon the special facts, decisions under it were not binding on the Court in the same way that precedents in law are binding (*r*).

Passenger fares—Right of passenger to alight at intermediate station.—There is, apart from special contract, no right in a passenger to break a journey contracted for at any intermediate station (*s*). Where a railway company, under the influence of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a bye-law, subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the bye-law was wholly inapplicable; the passenger having paid his fare the company had no right to prevent him from getting down at any intermediate station (*t*). Where, on the other hand, a railway company had issued a ticket on which a notice was printed that it was only to be used to the station named thereon, it was held that the passenger holding such ticket, provided the notice was brought home to him, was not entitled to travel beyond such station and merely pay the ordinary single fare for the extra journey travelled; such a ticket constituted a special contract between the railway company and the passenger (*u*). Where a passenger lost his ticket, and on being required to pay the fare from the station whence the train started, declined to do so, it was held that the company were not justified in removing him from the carriage in which he was travelling (*x*).

Season ticket—Conditions—Forfeiture of deposit.—The plaintiff purchased a season ticket, and agreed to be bound by

(*p*) *Painter, Ex parte*, 2 C.B. N.S. 702; *Caterham Ry., In re*, 1 C.B. N.S. 410; 26 L.J. C.P. 161.

(*q*) But see now 51 & 52 Vict. c. 25, s. 17.

(*r*) *Palmer* v *L. & S. W. Ry.*, L.R. 1 C.P. 588; 35 L.J. C.P. 289; diss. Willes and Keating, JJ.

(*s*) *Ashton* v. *Lancs. & Yorks. Ry.*, (1904) 2 K.B. 313; 73 L.J. K.B. 701.

(*t*) *Reg.* v. *Frere*, 4 E. & B. 598; 24 L.J. M.C. 68. As to the construction of this bye-law, see *Jennings* v. *G. N. Ry.*, L.R. 1 Q.B. 7; 35 L.J. Q.B. 15; *Dearden* v. *Townsend*, L.R. 1 Q.B. 10; 35 L.J. M.C. 50.

(*u*) *G. N. Ry.* v. *Palmer*, (1895) 1 Q.B. 862; 64 L.J. Q.B. 316; *L. & N. W. Ry.* v. *Hinchcliffe*, (1903) 2 K.B. 32; 72 L.J. K.B. 530.

(*x*) *Butler* v. *Manchester, Sheffield & Lincolnshire Ry.*, 21 Q.B.D. 207; 57 L.J. Q.B. 564. See Addison on Torts, p. 180 (ed. 8).

certain conditions, one of which was that the ticket was to be considered the property of the company, to be delivered to them on the day after expiry; another was that the ticket and the deposit should be forfeited on breach of any of the conditions; a few days after expiry of the ticket the plaintiff delivered it to the company and claimed a return of the deposit; and it was held that he could not recover the deposit (*y*).

Dangerous railway bridges, viaducts, and embankments.—Every railway company in actual occupation of its line is responsible for the preservation of all bridges, viaducts, and embankments, and if injuries are sustained by persons travelling along a highway under a bridge or viaduct (*z*), or by passengers travelling along the line, from the insecure state of a bridge or viaduct, the railway company will be responsible, whether the injury arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric (*a*). If a railway embankment has been injured by some extraordinary flood, and the rails give way, and passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries sustained (*b*); but it would seem that every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all violence of the weather that may be expected at some time or another, though rarely, to occur, and if it fails in this duty it will be responsible in damages for negligence (*c*).

Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe ferry-boats and landing-stages, and all proper means for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage, and merchandise (*d*). Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, or inevitable accident (*e*).

(*y*) *Cooper* v. *L. B. & S. C. Ry.*, 4 Ex.D. 88; 48 L.J. Ex. 434.

(*z*) *Kearney* v. *L. B. & S. C. Ry.*, L.R. 6 Q.B. 759; 40 L.J. Q.B. 285.

(*a*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 251; as to bridges for passengers at stations, see *Longmore* v. *G. W. Ry.*, 35 L.J. C.P. 135.

(*b*) *Withers* v. *North Kent Ry.*, 27 L.J. Ex. 417.

(*c*) *Great West. Ry. Co. of Canada* v. *Fawcett*, 1 Moore's P.C.C. N.S. 120. See also 8 & 9 Vict. c. 20, s. 46.

(*d*) *Willoughby* v. *Horridge*, 12 C.B. 751; 22 L.J. C.P. 90.

(*e*) *Amies* v. *Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B.; *Oakley* v. *Portsmouth, &c. Steam Packet Co.*, 11 Exch. 622; 25 L.J. Ex. 22, *ante*, p. 1027. As to loss of goods by overloading ferry boat, see *Mouse's case*, 12 Co. 63.

Notice of action to railway companies.—When an Act of Parliament incorporating a railway company provides that no action shall be brought against the company for anything done or omitted to be done pursuant to the Act, or in execution of the powers and authorities given by the Act, unless previous notice in writing shall have been given by the party intending to prosecute such action, or unless such action shall have been brought within a limited period, the enactment does not in general extend to actions *ex contractu*, and does not affect the liability of the company upon contracts entered into by it in its character of a common carrier. The omission by a plaintiff, consequently, to give such notice does not preclude him from recovering damages against the company for negligence or misconduct, or for a breach of those duties and obligations which result from the employment as a common carrier (*f*). But, where the parties were trying, in an action *ex contractu*, the right of the company to make certain charges under the particular provisions of their Act of Parliament, the action was considered to be brought for something done under the Act, and notice of action was held to be necessary (*g*).

Parties to be made plaintiffs in actions against carriers.—The action against a carrier for the loss of goods entrusted to him for conveyance should, in the absence of an express contract of carriage, be brought by the owner of the goods; for with him, as the party damnified, is the implied contract for safe conveyance deemed to be made (*h*). When, in execution of a contract of sale, goods are delivered to a carrier for transmission to the purchaser, and no express contract for a pecuniary consideration has been entered into between the carrier and the consignor for their carriage, the delivery to the carrier is delivery to the purchaser and there is implied in law a promise for safe conveyance in favour of the party in whom the right of property in the goods is at the time vested. Where, therefore, the right of property and the risk of loss have passed to the consignee, the latter is the only party entitled to sue the carrier for an injury to the goods, whether such carrier be chosen by the purchaser or by the vendor (*i*). A consignor, acting merely

(*f*) *Palmer* v. *Grand Junc. Ry.*, 4 M. & W. 749; 8 L.J. Ex. 129; *Carpue* v. *L. & B. Ry.*, 5 Q.B. 747; 13 L.J. Q.B. 133. See, however, the cases, *ante*, p. 1015.

(*g*) *Kent* v. *G. W. Ry.*, 3 C.B. 714; 16 L.J. C.P. 72.

(*h*) *Dawes* v. *Peck*, 8 T.R. 330; *Fragano* v. *Long*, 4 B. & C. 219; 3 L.J. (O.S.) K.B. 177. As to a single individual suing under a firm name in an Admiralty action *in rem*, see *The Assunta*, (1902) P. 150; 71 L.J. P. 75.

(*i*) *Dutton* v. *Solomonson*, 3 Bos. & P. 584; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Brown* v. *Hodgson*, 2 Campb. 36; *King* v. *Meredith*, *ib.* 639; *Coxe* v. *Harden*, 4 East, 217; *Evans* v. *Nichol*, 4 Sc. N.R. 43; 11 L.J. C.P. 6.

as agent, has no right of action even though he may have paid the price of the carriage (*k*). If, however, from fraud or non-compliance with the requisites of the Statute of Frauds, no actual transfer of the right of property and the risk of loss from the consignor to the consignee has taken place, the consignor is the proper party to maintain the action (*l*). So, if a tradesman merely sends goods for approval to a particular customer, or on terms of "sale or return," or sends goods of the value of 10*l*. and upwards pursuant to an oral order or an oral contract of sale, to a person who has not given "earnest" or made a part payment, or accepted any part of the goods, and the contract is void by reason of the provisions of the Statute of Frauds, then, as there has been no actual transfer of the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier (*m*). And, when a special contract has been entered into between the carrier and the consignor, whereby the carrier, in consideration of a sum of money paid or agreed to be paid by the consignor for the carriage of the goods, agrees to convey them to the consignee, it is no answer to an action by the consignor against the carrier to say that he is not the owner of the goods, and the action may be brought either by the consignor with whom the special contract was made, or by the consignee as the owner of the goods in whose behalf it was made (*n*).

So also, the bailee of goods, who has a special property in them, may enforce an express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue; and whichever first obtains damages, it is a full satisfaction" (*o*). But a settlement for loss or damage, made with one who brings goods to a carrier, but who has no property or interest in them, will not be an answer to an action by the owner (*p*).

Every person who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the carriage was under a special contract to which he is no party (see *ante*, p. 1015).

(*k*) *Dawes* v. *Peck*, 8 T.R. 330; *Brown* v. *Hodgson*, 2 Campb. 36; *King* v. *Meredith*, *ib.*, 639; *Murphy* v. *Midland Gt. Western* (*Ireland*) *Ry.*, (1903) 2 I.R. 5.

(*l*) *Coombs* v. *Brist. & Ex. Ry.*, 3 H. & N. 510; 27 L.J. Ex. 401; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 4 Bing. 476; 6 L.J. (O.S.) C.P. 97.

(*m*) *Coats* v. *Chaplin*, 3 Q.B. 489; 11 L.J. Q.B. 315.

(*n*) *Davis* v. *James*, 5 Burr. 2680; *Bell* v. *Chaplain*, Hard. 321; *Moore* v. *Wilson*, 1 T.R. 659; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600. See also *G. W. Ry.* v. *Bagge*, 15 Q.B.D. 625; 54 L.J. Q.B. 599.

(*o*) *Nicolls* v. *Bastard*, 2 Cr. M. & R. 660; 5 L.J. Ex. 7; *Joseph* v. *Knox*, 3 Campb. 320; *Sargent* v. *Morris*, 3 B. & Ald. 277; *Freeman* v. *Birch*, 1 N. & M. 420.

(*p*) *Coombs* v. *Brist. & Ex. Ry.*, 3 H. & N. 1; 27 L.J. Ex. 269.

A servant, for example, may maintain an action against a railway company, or other carrier, for injuries caused by negligent management of a train by which he was a passenger, or by negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being one independent of the contract (*q*). So, where a railway company were bound by statute to carry the mails and the officers of the post-office accompanying them, it was held that the company must exercise a reasonable care in performing the duty to carry safely cast upon them by the statute; so that if any officer of the post-office was injured by the negligent management of their trains, he was entitled to maintain an action for damages, although the contract for his conveyance was between the company and the Postmaster-General (*r*).

Joint bailment to common carrier.—Where a box delivered to a carrier to be carried contained things belonging to the plaintiffs separately, and none in which they had a joint ownership, it was held that there was a joint bailment in respect of which they might sue jointly (*s*).

Parties to be made defendants.—When goods have been delivered to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the carrier, and not his mere servant or agent (*t*). But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. Section 8 of the Carriers Act (*ante*, p. 1041) provides that the Act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion by its servants of the property which has come into the hands of such servants in the course of their employment. There must be some one authorized on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their

(*q*) *Marshall* v. *York, Newcastle & Berwick Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; and see the cases, *ante*, p. 1018.

(*r*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 989; 20 L.J. Q.B. 411. Explained in *East India Ry.* v. *Kalidas Mukerjee*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*s*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 318; 27 L.J. C.P. 335.

(*t*) *Williams* v. *Cranston*, 2 Stark. 82.

porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company. Thus, where the general superintendent of a railway company refused to deliver up to the plaintiff goods forwarded to him, it was held that the company was responsible for the unlawful detention by their servant (*u*).

The common carrier cannot limit his liability in respect of the negligence of his servants by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages" (*x*).

Carriage of goods and passengers over distinct lines of railway.—We have already seen (*ante*, p. 1053), that, where goods are received by a railway company to be carried to a particular destination, the company receiving the goods and to whom the hire is paid is the party to be sued for loss or damage, although such loss or damage has been sustained on the line of a second or third railway company, to whom they have been delivered by the first railway company to be carried to their place of destination (*y*). But, under circumstances, both companies may become joint contractors for the conveyance of the goods (*z*). So with regard to a passenger and his luggage, if one fare is paid and one ticket given for the entire journey, the contract is with the company issuing the ticket and receiving the money, and not with a second or third railway company over whose line the passenger is travelling in order to reach his destination (*a*); and the company with which the contract is made will be liable for the negligence of such other railway company, the contract being that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management (*b*).

(*u*) *Taff Vale Ry.* v. *Giles*, 2 E. & B. 822; 23 L.J. Q.B. 43.

(*x*) Page, J., Cas. temp. Hard. 90; and see *Hyde* v. *Trent & Mersey Nav. Co.*, 5 T.R. 397.

(*y*) *Brist. & Exeter Ry.* v. *Collins*, 7 H.L.C. 231; 29 L.J. Ex. 41; *Coxon* v. *G. W. Ry.*, 5 H. & N. 274; 29 L.J. Ex. 165; *Logan* v. *Highland Ry.*, (1900) 2 F. 292.

(*z*) *Hayes* v. *South Wales Ry.*, 9 Ir. C.L.R. 474.

(*a*) *Mytton* v. *Mid. Ry.*, 4 H. & N. 621; 28 L.J. Ex. 385; *G. W. Ry.* v. *Blake*, 7 H. & N. 687; 31 L.J. Ex. 346; *Buxton* v. *N. E. Ry.*, L.R. 3 Q.B. 549; 37 L.J. Q.B. 258.

(*b*) *Thomas* v. *Rhymney Ry.*, L.R. 6 Q.B. 266; 40 L.J. Q.B. 89. See, however, *Taylor* v. *G. N. Ry.*, L.R. 1 C.P.

But, in the case of a through booking, the contracting company may limit its liability for misconduct of servants to its own line (*c*). Every railway company which allows its line to remain open for public traffic is responsible to passengers who sustain injury from the line being unsafe, although such persons are conveyed along it in the carriages of some other company (*d*).

Measure of damages.—In all actions against common carriers for unlawfully refusing to carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff, in consequence of the wrongful refusal (*e*) of such carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses (if reasonable) are recoverable, if claimed by the plaintiff, and specified in his claim as part of the damage he has sustained. In the same way, if an innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller to have shelter and accommodation; and if the traveller has been put to expense in seeking accommodation elsewhere, he is entitled to recover as special damage the expenses incurred if such as he would probably have incurred on his own account (*f*). So, also, if a shipowner fails to fulfil his contract to carry goods, he will be liable in damages for the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods at the place of dispatch and the amount of the freight and insurance (*g*).

All persons are responsible for the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and to assess the damages according to the way in which the parties have conducted themselves (*h*).

The amount of damages recoverable from common carriers for loss of, or injury to, goods, is regulated by the several Acts of Parliament, requiring consignors in certain cases to declare

385; 35 L.J. C.P. 210; *ante*, p. 1025; *Wright* v. *Midland Ry.*, L.R. 8 Ex. 137; 41 L.J. Ex. 89, *ante*, p. 1016.

(*c*) *Mahony* v. *Waterford, Limerick and Western Ry.*, (1900) 2 Ir.R. 273.

(*d*) *Birkett* v. *Whitehaven, &c. Ry.*, 4 H. & N. 738; 28 L.J. Ex. 348.

(*e*) *Le Blanche* v. *L. & N. W. Ry.*, 1 C.P.D. 286; 45 L.J. C.P. 521.

(*f*) *Le Blanche* v. *L. & N. W. Ry.*, *supra*.

(*g*) *Ströms Bruks Aktie Bolag* v. *J. & P. Hutchison*, (1905) A.C. 515; 74 L.J. P.C. 130.

(*h*) *Davis* v. *N. W. Ry.*, 4 Jur. N.S. 1305.

the value of the article at the time it is delivered to be carried (*ante*, p. 1043). No greater damages than 50*l*. are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its officers; 15*l*. per head for neat cattle: and 2*l*. per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value (*i*). Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a railway company to be carried, and the contract between the parties has been made upon that basis, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value (*k*).

Generally speaking, when a carrier fails to deliver articles of merchandise in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried according to contract, and their marketable value at the earliest period at which they could have been brought to market after their delivery to the consignee, will be the measure of damages recoverable (*l*). If the goods have been lost altogether, the consignee is not restricted to the value of the goods at the place where they were delivered to the carrier to be carried; but, if their marketable value was greater at the place of destination than at the place of consignment, the consignee is entitled to recover that difference, as being a loss likely to arise in the ordinary course of trade (*m*). If there is no market at the place of delivery, the damages must be ascertained by taking into consideration, in addition to the cost price and expense of transit, the reasonable profit of the importer. Where goods were delivered to a carrier by sea to be carried from Glasgow to Vancouver's Island, and on the arrival of the ship at the latter place they could not be found, it was held that the true measure of damages was the cost of re-placing the lost articles in Vancouver's Island, with interest at 5 per cent. on the amount until judgment by way of compensation for the delay (*n*).

In assessing the damages the accruing freight must be

(*i*) 17 & 18 Vict. c. 31, s. 7.

(*k*) *M'Cance* v. *L. & N. W. Ry.*, 7 H. & N. 477; 34 L.J. Ex. 39; 3 H. & C. 343.

(*l*) *Rice* v. *Baxendale*, 7 H. & N. 96; 30 L.J. Ex. 371; *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154.

(*m*) *O'Hanlan* v. *G. W. Ry.*, *supra*, *Ströms Bruks Aktie Bolag* v. *J. & P. Hutchison*, (1905) A.C. 515; 74 L.J. P.C. 130.

(*n*) *Collard* v. *S. E. Ry.*, 7 H. & N. 79; 30 L.J. Ex. 393; *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 235.

deducted (*o*). Where the charter-party provides for advanced freight, in estimating the damages for non-delivery only, the unpaid freight must be deducted from the value of the goods, not the advanced freight as well (*o*). And where goods were shipped under a charter-party which provided that the whole freight should be advanced, and it was advanced, and the amount thereof insured, and the plaintiff bought the goods at a price covering the freight and insurance, it was held that they were entitled to recover the advanced freight and the insurance for the benefit of the underwriters and insurers (*p*).

In an action against a common carrier for loss sustained by long delay in the delivery of articles of merchandise intrusted to him to be carried, whereby the consignee had lost the season for selling them to advantage, and the marketable value of the articles was seriously diminished, it was held that the carrier was answerable for this loss, it being such as might naturally be expected to result from great delay in delivering articles of merchandise (*q*). So, where a railway company contracted with the plaintiff, who showed goods at agricultural shows, to carry the goods to another show-ground on a particular day, although nothing was said by the parties as to the purpose for which the goods were to be carried, the Court inferred that the defendants must have known it, and that the plaintiff was entitled to damages for loss of profit which was a natural result, and that no evidence was necessary to show that he had a prospect of making profit at the particular show (*r*). But where shoe manufacturers agreed to supply a London firm with shoes for the French army, to be delivered on the 3rd of February, and gave notice that they were under contract to deliver on the 3rd, and that, if not, the shoes would be thrown on their hands, but not that there was anything exceptional otherwise in the contract, it was held that the carriers were not liable for the difference between the price the consignors had to sell the shoes at, and the agreed price, as the difference was extraordinary, and it was not such a loss as naturally arose or could be reasonably contemplated (*s*).

When the consignor has been guilty of no intentional deception as to the risk, and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, which has been caused solely by the negligence of the

(*o*) *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67 ; 56 L.J. Q.B. 202.

(*p*) *Dufourcet* v. *Bishop*, 18 Q.B.D. 373 ; 56 L.J. Q.B. 497.

(*q*) *Wilson* v. *Lanc. & York. Ry.*, 9 C.B. N.S. 632 ; 30 L.J. C.P. 232 ; *Schulze* v. *G. E. Ry.*, 19 Q.B.D. 30 ; 56 L.J. Q.B. 442 ; *Dunn* v. *Bucknall Bros.*, (1902) 2 K.B. 614 ; 71 L.J. K.B. 963.

(*r*) *Simpson* v. *L. & N. W. Ry.*, 1 Q.B.D. 274 ; 45 L.J. Q.B. 182.

(*s*) *Horne* v. *Midland Ry.*, L.R. 8 C.P. 131 ; 42 L.J. C.P. 59 ; *The Parana*, L.R. 2 P.D. 118 ; 45 L.J. P. 108.

common carrier, the latter is bound by the common law to make compensation for the loss occasioned, to the extent, at all events, of the apparent or presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary value which may have been accidentally imparted to it, and which could not, from the nature and appearance of the thing, be fairly presumed to exist. Thus, where the plaintiff had put a 50*l.* bank-note into his carpet-bag amongst his wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on arrival of the coach at its place of destination the bag was lost, the jury gave a verdict for the value of the wearing apparel, but not for the value of the note, and the Court afterwards refused to increase the verdict by the amount of the note (*t*). In other cases, however, the plaintiff has recovered the full value of the article lost (*u*).

But the plaintiff is not entitled to recover damages for loss of wages of workmen kept unemployed by reason of the non-arrival of the goods, or for loss of profit which might have been made if the goods had been delivered in due course, if the carrier had no notice of the purpose for which the goods were wanted (*x*); and, if the carrier held the goods at the time of the loss in the character of a warehouseman, he cannot, in general, be made responsible for more than the actual value of the goods (*y*).

Where a warehouseman warehoused part of the goods at a place other than that agreed upon, and they were destroyed without negligence, it was held that the damages were not too remote (*z*). And so where an innkeeper contracted to stable horses, and then let the stables to another who turned out the plaintiff's horses which caught cold and were damaged, such damage was held not too remote (*a*). But where the proximate cause of injury was the plaintiff's own neglect, even though the defendant had also done a wrongful act, the defendant was relieved from responsibility for the loss (*b*).

Damages in respect of delay in delivery.—If by reason of goods not having been delivered in due time, the season for

(*t*) *Miles* v. *Cattle*, 6 Bing. 743; 8 L.J. (O.S.) C.P. 271.

(*u*) *Sleat* v. *Fagg*, 5 B. & Ald. 342; *Walker* v. *Jackson*, 10 M. & W. 161; 12 L.J. Ex. 165; see Angell on Carriers, s. 262.

(*x*) *Le Peintur* v. *S. E. Ry.*, 2 L.T. 170; *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L.J. Ex. 179; *Watson* v. *Ambergate, &c. Ry.*, 15 Jur. 448; and see *Horne* v. *Midland Ry.*, L.R. 8 C.P. 131; 42 L.J. C.P. 59.

(*y*) *Henderson* v. *N. E. Ry.*, 9 W. R. 519.

(*z*) *Lilley* v. *Doubleday*, 7 Q.B.D. 510; 51 L.J. Q.B. 310.

(*a*) *McMahon* v. *Field*, 7 Q.B.D. 591; 50 L.J. Q.B. 552; disapproving *Hobbs* v. *L. & S. W. Ry.*, L.R. 10 Q.B. 111; 44 L.J. Q.B. 49; where plaintiff's wife catching cold was held too remote.

(*b*) *Virtue* v. *Bird*, 2 Lev. 196.

finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit which would have been made upon the sale of them if they had been delivered at the proper time (*c*); or, where the goods consist of machinery, the presumed profit which would have been made by the use of them, during the time it took to replace them (*d*). The right measure is the market value of the goods at the place and time at which they ought to have been delivered, or, if there is no market, then the price at the place of manufacture, with the cost of carriage, and a reasonable sum for importer's profit (*e*). Hotel expenses incurred by the consignee while waiting for the delivery of the goods by the carrier are not recoverable (*f*).

Damages in case of personal injuries.—The measure of damages is the loss of time, expense incurred, pain and suffering, and permanent injury causing pecuniary loss (*g*). A new trial will be granted in an action for personal injuries arising from a railway accident, where the damages found by the jury are so small as to show that they omitted to take into consideration some of the elements of damage (*h*), as well as where they are unreasonably large. The jury are to consider "what the plaintiff's income would probably have been, how long that income would probably have lasted, and all other contingencies to which a practice is liable" (*i*).

Claims against a common carrier for refusing to carry should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiffs tendered to the defendant certain goods to be carried from one place to the other; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, yet the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience,

(*c*) *Wilson* v. *Lanc. & York. Ry.*, 9 C.B. N.S. 632; 30 L.J. C.P. 232; *Simmons* v. *S. E. Ry.*, 7 Jur. N.S. 849; *G. W. Ry.* v. *Redmayne*, L.R. 1 C.P. 329; *Schulze* v. *G. E. Ry.*, 19 Q.B.D. 30; 56 L.J. Q.B. 442.

(*d*) *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 235.

(*e*) *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154.

(*f*) *Woodger* v. *G. W. Ry.*, L.R. 2 C.P. 318; 36 L.J. C.P. 177.

(*g*) *Blake* v. *Mid. Ry.*, 18 Q.B. 93; 21 L.J. Q.B. 233; *Armsworth* v. *S. E. Ry.*, 11 Jur. 758. As to damages under the Fatal Accidents Act, 9 & 10 Vict. c. 93, see Addison on Torts, p. 879 *et seq.* (ed. 8).

(*h*) *Phillips* v. *L. & S. W. Ry.*, 5 Q.B.D. 78, 280; 49 L.J. Q.B. 233.

(*i*) *Per* Jessel, M.R., *ib.*

setting forth any special damage that may have been sustained, and concluding with a claim for damages (*k*).

Defences to actions.—Where the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special defence, state that he did not receive the goods to be carried as alleged in the claim; if the plaintiff has claimed against him upon his liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this defence (*l*). If he denies the plaintiff's title or right to the possession of the property, he must allege that the property was not, at the time he received it to be carried, the property of the plaintiff (*m*); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since the bailment, become entitled to the property, and had demanded it of the defendant (*n*).

If the defendant relies upon the Carriers Act, he must by his defence show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to him to be carried, the value and nature of the goods were not declared by the plaintiff (*o*).

Evidence at trial—Proof of bailment.—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorized by him to receive them. If they were merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has of course been no bailment of the goods to him (*p*), and he cannot consequently be made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which

(*k*) *Pickford* v. *Grand Junction Ry.*, 8 M. & W. 372; 10 L.J. Ex. 382.

(*l*) *White* v. *G. W. Ry.*, 2 C.B. N.S. 7; 26 L.J. C.P. 158.

(*m*) *Cheesman* v. *Exall*, 6 Exch. 341; 20 L.J. Ex. 209.

(*n*) *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618; 28 L.J. C.P. 58; *Europ. & Austral. R. M. Co.* v. *R. M. St. P. Co.* 30 L.J. C.P. 246.

(*o*) *Pianciani* v. *L. & S. W. Ry.*, 18 C.B. 226; *Hart* v. *Baxendale*, 6 Exch. 789; 21 L.J. Ex. 123.

(*p*) *Selway* v. *Holloway*, 1 Ld. Raym. 46; *Buckman* v. *Levi*, 3 Campb. 414; *Lovett* v. *Hobbs*, 2 Show. 128.

he was not bound to receive and carry, under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, or on terms different from those on which alone he was authorized to receive them, the carrier will either not be responsible for the loss of the goods, as never having been delivered to him, or, at all events, not on his common-law liability of an insurer (*q*). If the consignor has made a private bargain with the driver of the cart of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost; the bailment in such a case is a bailment to the driver alone, who alone is responsible for the loss (*r*). If the plaintiff has merely hired the cart of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual bailment of the goods to the carrier, the latter is not responsible for their safety (*s*). If a passenger travelling on the outside of a stage-coach has kept a parcel under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never in any way intrusted to his keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in any portion of the vehicle, *e.g.*, if luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, there has been a constructive bailment of the goods, so as to charge the carrier for the loss of them (*t*). A delivery of goods to a person sent or appointed by the carrier to receive them is, of course, a delivery to the carrier himself (*u*).

Proof of special contract.—We have seen that every special contract, notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, p. 1045); and the signature must be fairly obtained, for where a person who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence,

(*q*) *Edwards* v. *Sherratt*, 1 East, 604; *Slim* v. *G. N. Ry.*, 14 C.B. 647; 23 L.J. C.P. 166.

(*r*) *Butler* v. *Basing*, 2 C. & P. 613; *Bignold* v. *Waterhouse*, 1 M. & S. 259; *Middleton* v. *Fowler*, 1 Salk. 282.

(*s*) *East India Co.* v. *Pullen*, 2 Str. 690.

(*t*) *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 848; 18 L.J. C.P. 251; and other cases, *ante*, pp. 1036 *et seq.*

(*u*) *Syms* v. *Chaplin*, 5 Ad. & E. 634; 6 L.J. K.B. 25.

and he signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding (*x*).

Proof of jus tertii *by common carrier.*—A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. A common carrier is bound to receive goods properly tendered to him, and can make no inquiries into their ownership. The law protects him against the real owner if he has delivered the goods in pursuance of his employment without notice of any claim. The compulsory character of his employment ought equally to protect him against the pseudo-owner, from whom he could not refuse to receive goods in the event of the real owner claiming the goods, and their being given up to him (*y*).

(*x*) *Simons* v. *G. W. Ry.*, 2 C.B. N.S. 620.

(*y*) *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618, 630; 28 L.J. C.P. 58; *Cheesman* v. *Exall*, 6 Exch. 341; 20 L.J. Ex. 209, overruling *Laclouch* v. *Towle*, 3 Esp. 114.

CHAPTER V.

OF CONTRACTS OF INDEMNITY.

SECTION I.

PRINCIPAL AND SURETY.

Contract of suretyship.—A surety undertakes or contracts to be answerable for the payment of a debt, or the performance of an act, in the event of the failure of some other person, who is primarily responsible for the payment of such debt, or the performance of the act. It is essential to the contract of suretyship that there be a principal or third party primarily liable. If, therefore, no contract has been entered into with the third party on whose account the covenantor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. By the terms of some contracts, it is frequently left in doubt whether the contract is the contract of a surety coming in aid only of a principal debtor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal contracting party stipulating for some benefit for a third party, who is not bound by the contract, and to whom no liability whatever attaches (*a*). When a man wishing to procure credit for a friend writes a letter to a shopkeeper, requesting him to supply his friend with goods, saying, "If *he* does not pay you, I will," the undertaking is the undertaking of a surety. If he says, "I will be answerable," or, "I will see you paid," the expressions are equivocal; and then we ought to look at the surrounding circumstances to see what the contract really is (*b*). If, upon examination of those circumstances, it appears that the party to whom the goods have been furnished has been treated as the principal contracting party: as, for example, if the credit has been given to him in the tradesman's books, and he has been applied to for payment: then the promisor can only be

(*a*) *Ante*, p. 29; *Spark* v. *Heslop*, 28 L.J. Q.B. 197; 1 E. & E. 563; *Nicholas* v. *Ridley*, (1904) 1 Ch. 192; 73 L.J. Ch. 145.

(*b*) Bayley, B., *Simpson* v. *Penton*, 2 Cr. & M. 433; 3 L.J. Ex. 126.

liable as a surety after default on the part of such principal contracting party. If the promisor is himself interested in the subject-matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party (*c*). But, where B. verbally promised that, if M. would supply C. with iron, and take C.'s acceptances, he would discount such acceptances, this was held to be a promise to answer for the default of another, and M. was not allowed to recover against B. on B.'s refusal to discount the acceptances (*d*). So, whether a contract is one of suretyship or some other form of contract, as, *e.g.*, a contract of insurance, will similarly be a question of fact to be settled by a consideration of all the circumstances, and for this purpose not only the words of the contract will be considered but also extrinsic evidence (*e*). A contract of suretyship by one of two joint tortfeasors in favour of the other will not support an action (*f*).

Authentication of guarantees.—The guarantee or undertaking of a surety must be authenticated by writing; for, by sect. 4 of the Statute of Frauds, no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the AGREEMENT upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised (*g*). The statute, however, applies only to promises made to the person to whom another is already or is to become answerable, and not to an original contract to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not (*h*). Where only three have signed what was intended to be a joint and several guarantee by four and the fourth has, though willing to sign, died without signing, then the three who have signed will not be liable (*i*). At one time, if the guarantee or undertaking was made by simple contract or by writing not under seal, the consideration for the promise, as well as the promise

(*c*) *Fitzgerald* v. *Dressler*, 7 C.B. N.S. 374; 29 L.J. C.P. 113.

(*d*) *Mallet* v. *Bateman*, L.R. 1 C.P. 163; 35 L.J. C.P. 40.

(*e*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 166; *Dane* v. *Mortgage Insurance Corporation*, (1894) 1 Q.B. 54; 63 L.J. Q.B. 144; *Denton's Estate, In re*, (1904) 2 Ch. 178; 73 L.J. Ch. 465.

(*f*) *Smith* (W. H.) & *Son* v. *Clinton*, 25 T.L.R. 34.

(*g*) See *ante*, pp. 28—33.

(*h*) *Forth* v. *Stanton*, 1 Saund. 211, 234; *Thomas* v. *Cook*, 8 B. & C. 728; *Guild & Co.* v. *Conrad*, (1894) 2 Q.B. 885; 63 L.J. Q.B. 721; *Harburg India Rubber Comb Co.* v. *Martin*, (1902) 1 K.B. 778; 71 L.J. K.B. 529.

(*i*) *National Provincial Bank of England* v. *Brackenbury*, 22 T.L.R. 797. And see p. 1091, *post*.

itself, had to be disclosed upon the face of the writing; but, by 19 & 20 Vict. c. 97, s. 3, no special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. But parol evidence is not admissible to explain the promise; wherefore, the whole promise must be in writing, or the memorandum will be insufficient(*k*). So if the writing is so vague that the nature of the undertaking cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise (*l*). And if the name of the principal intended to be guaranteed is omitted or left in blank, there is no sufficient memorandum of the contract (*m*). Parol evidence is, however, admissible to show whether the surety signed the guarantee, and in what capacity he signed it, if such evidence does not contradict the document itself (*n*). A statement in a will that the testator had guaranteed and confirmed the guarantee was held to be a sufficient memorandum to satisfy the statute (*o*). The Statute of Frauds does not apply where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee; to bring it within the statute the debt must be exclusively the debt, default, or miscarriage of another (*p*).

Primary and secondary liabilities.—When money is advanced, or goods are supplied, to a principal debtor, on the security of a joint and several covenant, or a joint and several promissory note, executed by the principal debtor and his sureties for the repayment of the money or of the price, all the co-covenantors are primarily liable on the instrument, and are bound to see that the money is paid on the day appointed for payment, and therefore, if default is made, they may be at once sued upon the instrument. Formerly, when two or more persons signed a joint and several promissory note as principals, it was not allowed, at common law, to modify the effect of the contract by showing that one of them signed only as surety for the other; but now that fact may be pleaded and given in evidence for the

(*k*) *Holmes* v. *Mitchell*, 7 C.B. N.S. 361; 28 L.J. C.P. 301.
(*l*) *Ib.*
(*m*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.
(*n*) *Young* v. *Schuler*, 11 Q.B.D. 651.
(*o*) *Hoyle, In re*, (1893) 1 Ch. 85; 62 L.J. Ch. 182.
(*p*) *Orrell* v. *Coppock*, 26 L.J. Ch. 269, *ante*, pp. 29—33.

purpose of giving the party so signing the equitable rights of a surety, though not for the purpose of establishing a different contract from that evidenced by the writing, for example, that a party who has on the face of the contract entered into a primary obligation was not intended to be primarily liable, but had agreed only to be secondarily liable on the default of a joint contractor (*q*). Two persons may nevertheless appear to the creditor, at the time a contract is entered into, to be both principal debtors, yet if the creditor is afterwards notified that as between such persons one has become surety for the other, then the consequences usually incident to a contract of suretyship will attach (*r*).

Consideration stated on the face of a guarantee.—It has been already seen that a bygone transaction cannot be a good consideration for a promise (*ante*, p. 7); but, when there is a valid consideration in point of fact, the mere statement of it in the past tense on the face of a guarantee will not invalidate the contract. The contract must be interpreted with reference to the circumstances, to ascertain whether it was intended to apply to past or to future transactions; and, in case of doubt and ambiguity, it would seem that parol evidence is admissible for that purpose (*s*). The Courts will lean in favour of such a construction as will uphold the contract (*t*). If the consideration was a future valid consideration, and not a past transaction, the guarantee will be upheld as valid (*u*). But, if there are no future advances, and the instrument, construed with reference to the circumstances, does not show a future consideration, but refers altogether to a past transaction, it is invalid (*x*). The consideration disclosed need not be expressed in words of form, or with technical accuracy (*y*). Where the defendant, for the purpose of inducing the plaintiff to give his father time for the payment of a debt, signed a promissory note making himself

(*q*) *Pooley* v. *Harradine*, 7 E. & B. 431; 26 L.J. Q.B. 156; *Greenough* v. *McClelland*, 2 E. & E. 424; 30 L.J. Q.B. 15; *Manley* v. *Boycot*, 2 E. & B. 46; 22 L.J. Q.B. 265; *Mut. Loan Fund, &c.* v. *Sudlow*, 5 C.B. N.S. 453; 28 L.J. C.P. 108; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 809; 31 L.J. C.P. 143.

(*r*) *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L.R. 7 Ch. 142; 41 L.J. Ch. 332, 336; *Rouse* v. *Bradford Bank. Co.*, (1894) A.C. 586; 63 L.J. Ch. 890.

(*s*) *Hoad* v. *Grace*, 7 H. & N. 494; 31 L.J. Ex. 98.

(*t*) *Broom* v. *Batchelor*, 1 H. & N. 255, 263; 25 L.J. Ex. 299.

(*u*) *Hoad* v. *Grace*, *supra*; *Bainbridge* v. *Wade*, 16 Q.B. 89; 20 L.J. Q.B. 7; *Steele* v. *Hoe*, 19 L.J. Q.B. 89; *Edwards* v. *Jevons*, 19 L.J. C.P. 50; 8 C.B. 436; *Colbourn* v. *Dawson*, 20 L.J. C.P. 154; 10 C.B. 773; *Brooks* v. *Haigh*, 10 Ad. & E. 309, 334.

(*x*) *Bell* v. *Welch*, 9 C.B. 154, 168; 19 L.J. C.P. 184; *Allnutt* v. *Ashenden*, 5 M. & Gr. 392; 12 L.J. C.P. 124; *Westhead* v. *Sproson*, 30 L.J. Ex. 265; 6 H. & N. 728.

(*y*) *Pace* v. *Marsh*, 8 Moore, 59; 1 L.J. (O.S.) C.P. 69; *Boehm* v. *Campbell*, 3 Moore, 15; *Oldershaw* v. *King*, 2 H. & N. 399, 519; 27 L.J. Ex. 120.

and his father jointly liable to the plaintiff for the amount, and the plaintiff forbore to sue the father for several years, it was held that there was good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing (*z*). So long as there is consideration for a guarantee, the Court will not take notice of its inadequacy (*a*). An indorsement on a contract of a guarantee for the faithful performance of the contract by one of the contracting parties may be read in connection with the contract, in order to establish the consideration (*b*).

Incomplete contract of guarantee.—Care must be taken in all cases to mark the distinction between a concluded contract of guarantee, and a mere proposal, or offer, or tender of a guarantee, it being necessary ere the latter can become a perfect contract that it be accepted and that the acceptance be notified to the maker, and that the maker's final assent to the engagement be obtained. Where the defendant wrote a letter to the plaintiffs to the following effect:—"Gentlemen,—As I understand Messrs. Anderson and Co. have given you an order for rigging, &c., which will amount to about 4,000*l.*, I can assure you, that from what I know of their honour and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit;" which letter was given by the defendant to Anderson and Co., and by them handed to the plaintiffs, who thereupon furnished the articles, and, being unable to procure payment from Anderson and Co., brought an action against the defendant, it was held that the letter was a mere overture or offer, and did not import a perfect guarantee, and that, if the plaintiffs had intended to treat it as a guarantee, they ought to have given notice to the defendant (*c*).

If references are required from, and given by, an intended surety, and the creditor means to dispense with the references, and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation before he acts upon the guarantee (*d*).

Conditions precedent.—When the liability of the surety is to attach only on the happening of some precedent act or event, it must be fully established that the event has happened (*e*).

(*z*) *Crears* v. *Hunter*, 19 Q.B.D. 341; 56 L.J. Q.B. 518.

(*a*) *Dutchman* v. *Tooth*, 7 Sc. 710.

(*b*) *Coldham* v. *Showler*, 3 C.B. 312; 15 L.J. C.P. 261.

(*c*) *M'Iver* v. *Richardson*, 1 M. & S. 557; *Mozley* v. *Tinkler*, 1 Cr. M. & R. 692; 4 L.J. Ex. 84.

(*d*) *Morten* v. *Marshall*, 2 H. & C. 305; 33 L.J. Ex. 54.

(*e*) *Moor* v. *Roberts*, 3 C.B. N.S. 830; 27 L.J. C.P. 161.

Fidelity bonds.—If a surety has by a penal obligation under seal guaranteed the performance of some contract or duty by his principal, and the period for which he is to be bound is defined in the recitals or condition, it cannot afterwards be extended by any general words. If the recital sets forth the appointment of the principal to some office or employment, and the condition of the bond is for the good conduct and faithful service of such principal, the liability of the surety will be co-extensive with the duration of the office; if the office is an annual office, the liability will not extend beyond the current year of office (*f*); if it is a fixed and permanent employment for the life of the party, the liability of the surety will continue during the whole of the latter's life; if the duration is uncertain, as, for instance, where it is dependent on the will of the employer, the liability will be as uncertain as the time of the employment (*g*). So, if a bond is given to secure the faithful services of the principal in one office at a specified salary, it will not extend to a different office at the same salary, or to the same office at a different and reduced salary (*h*); and a surety who becomes responsible for the good conduct of his principal as a storekeeper, will not be bound for him if he is afterwards employed as a clerk (*i*). But there must be a substantial change in the appointed duties, or the surety will not get rid of his liability (*k*). The surety should, on an important change in the employment being made, be given the opportunity of considering whether he will adhere to his guarantee in its altered form (*l*). Where by the recitals of a bond to secure the faithful service of a deputy-postmaster it appeared that the Postmaster-General had deputed J. "for the term of six months following," and the condition was, that J. should, during all the time he continued deputy-postmaster, faithfully and diligently perform and execute the duties of the office, it was held that the liability of the surety was restricted to the six months specified in the recitals (*m*). And, although the recital of the bond does

(*f*) *Cambridge* (*Mayor*) v. *Dennis*, 27 L.J. Q.B. 474; E. B. & E. 660.

(*g*) *Dartmouth* (*Mayor*) v. *Silly*, 7 E. & B. 97; 26 L.J. Q.B. 90.

(*h*) *N. W. Ry.* v. *Whinray*, 10 Exch. 77; 23 L.J. Ex. 261; *Holland* v. *Lea*, 9 Exch. 430; 23 L.J. Ex. 122. But payments made in excess of the salary agreed upon have been held to be recoverable: *Bramley Union* v. *The Guarantee Society*, 64 J.P. 308; 16 T.L.R. 263.

(*i*) *R.* v. *Herron & Montgomery*, (1903) 2 Ir.R. 474. Cp. *Anderson* v. *Thornton*, 3 Q.B. 271; 11 L.J. Q.B. 265; *Whitcher* v. *Hall*, 5 B. & C. 269; 4 L.J. (O.S.) K.B. 167.

(*k*) *Portsea Island Union* v. *Whillier*, 29 L.J. Q.B. 150; 2 E. & E. 755. See further, *post*, p. 1086.

(*l*) *R.* v. *Herron & Montgomery*, *supra*; applying *Holme* v. *Brunskill*, 3 Q.B.D. 495; 47 L.J. Q.B. 610.

(*m*) *Arlington* (*Lord*) v. *Merricke*, 2 Wms. Saund. 411, a; *Stoughton* v. *Day*, Al. 10; Sty. 18; *Bamford* v. *Iles*, 3 Exch. 380; 18 L.J. M.C. 49; *Liverpool Water Co.* v. *Atkinson*, 6 East, 507.

not state the nature or duration of the office, or limit the period of service for the performance of which the surety binds himself, yet, if the office is in point of fact an annual office, and there is a fresh appointment each year, the surety is only answerable for the execution of the duty for the current year (*n*).

Duration and extent of surety's liability.—If the surety by express words manifests an intention to be bound for the faithful service of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will continue in force as long as the obligee may think fit to continue the employment (*o*). Thus, where the bond was conditioned for the due fulfilment of the duties of an office "during such time as" the principal "shall continue in the said office, whether by virtue of his said appointment, or of any re-appointment thereto," it was held that the obligation was not confined to the current year of office, but extended to all subsequent years during which the party was continually re-appointed (*p*). Where A. guaranteed B. the regular payment of interest payable under the debenture of a limited company until the principal sum secured by the debenture was repaid, and the principal sum was gone by operation of law upon the winding up of the company, yet the obligation of the surety was held to remain in respect of the interest and B. was allowed to prove in A.'s bankruptcy for the estimated value of future interest payable under the guarantee (*q*). And, if the duration of the employment is uncertain—if, for example, it is held or continues *durante bene placito*—and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the duration of the obligation of the surety is then as uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal or party employed (*r*). The death of the surety will not, therefore, in such circumstances put an end to his liability (*s*).

Release of surety.—The surety cannot, when no time is marked out by the contract for the termination of his liability, discharge himself from the liability he has voluntarily under-

(*n*) *Hassell* v. *Long*, 2 M. & S. 363; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Wardens of St. Saviour's* v. *Bostock*, 2 Bos. & P. N.R. 175; *Leadley* v. *Evans*, 9 Moore, 102; 2 L.J. (O.S.) C.P. 108; *Lond. Assur. Co.* v. *Bold*, 6 Q.B. 514; 14 L.J. Q.B. 50; *Cambridge* (*Mayor*) v. *Dennis*, 27 L.J. Q.B. 474; E. B. & E. 660.

(*o*) *Oswald* v. *Berwick* (*Mayor*), 5 H.L.C. 856; 25 L.J. Q.B. 383.

(*p*) *Augero* v. *Keen*, 1 M. & W. 390; 5 L.J. Ex. 233.

(*q*) *Fitzgeorge*, *In re*, *Robson*, *Ex parte*, (1905) 1 K.B. 462; 74 L.J. K.B. 322.

(*r*) *Curling* v. *Chalklen*, 3 M. & S. 502; *M'Gahey* v. *Alston*, 1 M. & W. 386.

(*s*) *Crace*, *In re*, *Balfour* v. *Crace*, (1902) 1 Ch. 733; 71 L.J. Ch. 358.

taken (*t*); and the Courts, therefore, construe doubtful contracts of suretyship (when they are under seal and the surety has no power of revoking them) in favour of the surety, so as to narrow rather than enlarge his liability.

Discharge of surety by change in employment of principal.—In the case of a guarantee of the good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that, if it be altered, the surety is discharged (*u*); but, if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety cannot then complain of a variation to which he has agreed (*x*). Where there is a bond of suretyship for the faithful execution of the duties of a public office, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided (*y*). So where the principal's contract is one entire contract for the performance by him of two or more things at different times, circumstances discharging the surety as to one of them will also release him from liability as to the other (*z*). But, where sureties guarantee by one bond the principal's good conduct in two distinct contracts of employment, the bond may be divisible so that the sureties are not discharged from liability as to one of the employments by the fact of the duties being altered and enlarged in the other (*a*). Where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all moneys, bills, &c., which he should receive in the course of his employment as clerk to the obligee, it was held that the liability of the surety ceased with the death of the obligee, and could not be extended to a new employment by the executors (*b*). And, where the condition of the bond was that a clerk should, during the time he continued in the service of the plaintiff, faithfully pay over all moneys which he should receive on the plaintiff's account, and the breach assigned was the non-payment by the clerk of money which he had received on account of the plaintiff and his

(*t*) But see as to this, *Burgess* v. *Eve*, L.R. 13 Eq. 450; 41 L.J. Ch. 515; *Phillips* v. *Foxhall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293.

(*u*) *Arlington* (*Lord*) v. *Merricke*, 2 Wms. Saund. 403. See also, *ante*, p. 1084.

(*x*) *Stewart* v. *M'Kean*, 10 Exch. 689; 24 L.J. Ex. 145.

(*y*) *Pybus* v. *Gibb*, 6 E. & B. 902; 26 L.J. Q.B. 41; *R.* v. *Herron & Montgomery*, (1903) 2 Ir. R. 474.

(*z*) *Croydon Commercial Gas Co.* v. *Dickinson*, L.R. 1 C.P.D. 707; 45 L.J. Q.B. 869.

(*a*) *Skillett* v. *Fletcher*, L.R. 2 C.P. 469; 36 L.J. C.P. 206; *Harrison* v. *Seymour*, L.R. 1 C.P. 518; 35 L.J. C.P. 264.

(*b*) *Barker* v. *Parker*, 1 T.R. 287, 295.

partner, this was held to be beyond the scope of the defendant's engagement (*c*). Again, if the surety is deprived of his remedy against the principal through not being informed within a reasonable time of his principal's default, as, for example, where the principal has been allowed to abscond through notice of his default not having been duly given, the surety will be discharged (*d*); but this result will not follow where, from the relationship and transactions between the principal and the surety it cannot be supposed that the latter was ignorant of what was taking place (*e*).

Bonds and guarantees under seal to partnerships and associations.—If a bond be given to secure the faithful services of a clerk to a firm of partners, or the repayment of advances made by such firm, and any change takes place in the constitution of the firm by the death or retirement of existing partners, or the accession of new partners, the contract of suretyship is at an end, unless it appears that the intention of the contracting parties was that the security should be a continuing one, and should remain in force notwithstanding changes in the co-partnership (*f*). So it will be even where the bond is to several partners *nominatim* to secure the repayment to them, "or either of them," of advances to be made "by them" (*g*). This principle of construction, narrowing the surety's liability, applies with still greater force in the case of bonds conditioned for the repayment of advances to be made *to* a firm, or to either of the partners; in such a case, if one partner dies, the liability of the surety will not extend to advances made to the survivor (*h*). If, therefore, the surety's liability is to continue after the retirement as well as after the death of one of several co-partners, such intention must be manifested with a precision not to be mistaken (*i*). By sect. 18 of the Partnership Act, 1890 (*k*), "a continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary,

(*c*) *Wright* v. *Russel*, 3 Wils. 530; 2 W.Bl. 934; *Napier* v. *Bruce*, 8 Cl. & Fin. 470; *Montefiore* v. *Lloyd*, 15 C.B. N.S. 203; 33 L.J. C.P. 49.

(*d*) *Snaddon* v. *London, Edinburgh & Glasgow Assur. Co.*, (1903) 5 F. 182 (Ct. of Sess.).

(*e*) *Caxton and Arrington Union* v. *Dew*, (1899) 68 L.J. Q.B. 380; following *Durham Corporation* v. *Fowler*, 22 Q.B.D. 394; 58 L.J. Q.B. 246.

(*f*) *Bellairs* v. *Ebsworth*, 3 Campb. 53; *Barclay* v. *Lucas*, 3 Doug. 321; *Myers* v. *Edge*, 7 T.R. 254; *Chapman* v. *Beckington*, 3 Q.B. 703; 12 L.J. Q.B. 61; *Lond. Assur. Co.* v. *Bold*, 6 Q.B. 524; 14 L.J. Q.B. 50; *Mills* v. *Alderbury Guardians*, 18 L.J. Ex. 252; 3 Exch. 590; *Montefiore* v. *Lloyd*, 15 C.B. N.S. 203; 33 L.J. C.P. 49.

(*g*) *Strange* v. *Lee*, 3 East, 484; *Weston* v. *Barton*, 4 Taunt. 673; *Dance* v. *Girdler*, 4 Bos. & P. 34.

(*h*) *Simson* v. *Cooke*, 8 Moore, 605; 2 L.J. (O.S.) C.P. 74.

(*i*) *Camb. University* v. *Baldwin*, 5 M. & W. 580; *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L.J. Q.B. 141; *Dry* v. *Davy*, 10 Ad. & E. 30; 8 L.J. Q.B. 209.

(*k*) 53 & 54 Vict. c. 39, s. 18.

revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given."

Limitation of surety's liability.—If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but will not avoid the obligation if the advances go beyond it (*l*), unless that result clearly appears to have been contemplated by the parties (*m*). A guarantee to secure moneys to be advanced to a third party on discount, "for the space of twelve calendar months," is countermandable within that time although some bills may have been discounted and repaid before notice (*n*). Where a surety gives a continuing guarantee limited in amount to secure the *floating balance* from time to time due from the principal to the creditor, and the floating balance exceeds the limited amount, the guarantee is, as between the surety and the creditor, to be construed as applicable to such part only of the debt as may be co-extensive with the amount of the guarantee; but a guarantee limited in amount for a debt already ascertained which exceeds the limit is not *primâ facie* to be construed as a security for a part of the debt only; it is a question of construction for the Court (*o*). Where the wife contracted as follows: "In consideration of your having at my request agreed to supply goods to my husband, I do hereby guarantee to you the sum of 500*l.*," it was held that the payment for goods supplied after the date of the guarantee only was secured (*p*).

Continuing liabilities.—Where a bond recited that the plaintiffs had agreed to advance to the principal "any sum of money not exceeding, at any one or more time or times, the sum of 200*l.* in the whole," and stipulated for the payment by the defendant, as surety, of "all and every such sum or sums of money, not exceeding the sum of 200*l.* as aforesaid," as the plaintiffs should advance, it was held to be a continuing security, not confined to the first 200*l.* advanced, but extending to all future advances and payments that might at any time be made (*q*). The Courts, however, in the case of con-

(*l*) *Seller* v. *Jones*, 16 M. & W. 112; 16 L.J. Ex. 20; *Gee* v. *Pack*, 33 L.J. Q.B. 49; *Backhouse* v. *Hall*, 6 B. & S. 507. 34 L.J. Q.B. 141.

(*m*) *Parker* v. *Wise*, 6 M. & S. 246; *Gordon* v. *Rae*, 8 E. & B. 1605; 27 L.J. Q.B. 185.

(*n*) *Offord* v. *Davies*, 12 C.B. N.S. 748; 31 L.J. C.P. 319.

(*o*) *Ellis* v *Emmanuel*, 1 Ex. D. 157; 46 L.J. Ex. 25.

(*p*) *Morrell* v. *Cowan*, 7 Ch. D. 151; 47 L.J. Ch. 73.

(*q*) *Batson* v. *Spearman*, 9 Ad. & E. 298.

tracts of suretyship under seal, favour a construction limiting the liability of the surety to some particular advance, so as to confine it within an ascertained definite limit, rather than one extending it to a continuous supply, creating an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal (*r*). In the case of simple contracts, on the other hand, no such favour is shown. Thus, where a guarantee was given for the payment of goods supplied to the amount of 100*l.*, it was held to be a continuing one, extending to supplies of goods at any time furnished, so long as the parties continued to deal together (*s*). From a continuing liability under seal the surety has no means of escape at common law; he cannot recall the bond, covenant, or obligation, that he has entered into, and say that he will be no longer responsible for advances to the principal, unless in the contract of suretyship he has expressly reserved to himself such a power (*t*); and his liability may be prolonged indefinitely, and for the whole life of the principal. But, in the case of simple contracts, the surety (though liable for all advances that have been made on the faith of his promise) may at any time revoke such promise, and discharge himself from the continuing liability, by giving notice to that effect (*u*). And a surety is not precluded by reason of his guarantee being a continuing one extending to sums advanced subsequently to the first sum advanced from obtaining the benefit of the Statute of Limitations (*x*).

The following guarantees have been held to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed 100*l.*" (*y*); "I undertake to be answerable to the extent of 100*l.* for any tallow supplied by you to A. B." (*z*); "I hereby agree to guaranty the payment of goods to be delivered . . . to S. & Co., according to the custom of their trading with you in the sum of 200*l.*" (*a*); "As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby undertake to guarantee you in a sum of 100*l.* payable to you in default on the

(*r*) *Kirby* v. *Marlborough* (*Duke*), 2 M. & S. 18.

(*s*) *Mason* v. *Pritchard*, 12 East, 227; *Mayer* v. *Isaac*, 6 M. & W. 605; 9 L.J. Ex. 225; *Hitchcock* v. *Humfrey*, 5 M. & Gr. 559; 12 L.J. C.P. 235; *Horlor* v. *Carpenter*, 27 L.J. C.P. 1; 3 C.B. N.S. 172.

(*t*) *Hassell* v. *Long*, 2 M. & S. 370; *Calvert* v. *Gordon*, 3 M. & R. 124; 7 L.J. (O.S.) K.B. 77.

(*u*) *Per* Erle, C.J., in *Offord* v. *Davies*, 12 C.B. N.S. 748; 31 L.J. C.P. 319; *Crace, In re, Balfour* v. *Crace*, (1902) 1 Ch. 733, 737; 71 L.J. Ch. 358.

(*x*) *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

(*y*) *Merle* v. *Wells*, 2 Campb. 413.

(*z*) *Bastow* v. *Bennett*, 3 Campb. 220.

(*a*) *Hargreave* v. *Smee*, 6 Bing. 244; 8 L.J. (O.S.) C.P. 46.

part of the said W. C. for two months" (*b*); "In consideration of your agreeing to supply goods to K., I agree to guarantee his present or any future debt with you to the amount of 60*l.*" (*c*); "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and, in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*" (*d*).

Guarantees not importing continuing liability.—The following guarantees have, on the other hand, been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as advances to the amount named have been made, and satisfied by the principal: "I engage to guarantee the payment of A. M. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of you" (*e*); "I agree to be answerable to K. for the amount of five sacks of flour, to be delivered to W. P., payable in one month" (*f*); "I agree to be answerable for the payment of 50*l.* for T. L., in case he does not pay for the gin he receives from you" (*g*). And where the guarantee was, "In consideration of your supplying Mr. S. with goods to the extent of 100*l.*, I undertake to pay you if he does not," it was held that the surety's liability was dependent upon credit to the amount of 100*l.* being given if required, but that, if the debtor did not demand 100*l.* worth of goods, the surety would be liable for whatever was supplied (*h*). But, where the surety guarantees only the payment of one sum *in solido* provided goods to the amount guaranteed are furnished, there is no cause of action against the surety until the full amount has been supplied (*i*).

Conditions precedent to surety's liability.—If the continued liability of the surety is made dependent upon certain conditions being observed by the creditor, the latter must strictly observe these conditions, or the surety will be discharged (*k*). Accord-

(*b*) *Allan* v. *Kenning*, 2 M. & Sc. 768.

(*c*) *Martin* v. *Wright*, 6 Q.B. 917; 14 L.J. Q.B. 142.

(*d*) *Wood* v. *Priestner*, L.R. 2 Ex. 66, 282; 36 L.J. Ex. 42, 127. See for other cases of continuing guarantees, *Heffield* v. *Meadows*, L.R. 4 C.P. 595; *Laurie* v. *Scholefield*, L.R. 4 C.P. 622; 38 L.J. C.P. 290; *Coles* v. *Pack*, L.R. 5 C.P. 65; 39 L.J. C.P. 63; *Nottingham Hide, Skin, & Fat Market Co.* v. *Bottrill*, L.R. 8 C.P. 694; 42 L.J. C.P. 256.

(*e*) *Melville* v. *Hayden*, 3 B. & Ald. 593.

(*f*) *Kay* v. *Groves*, 6 Bing. 276; 7 L.J. (O.S.) C.P. 9.

(*g*) *Nicholson* v. *Paget*, 1 Cr. & M. 48; 2 L.J. Ex. 18.

(*h*) *Dimmock* v. *Sturla*, 14 M. & W. 758; 15 L.J. Ex. 65.

(*i*) *Johnson* v. *Gandy*, 26 L.T. 72.

(*k*) *Watts* v. *Shuttleworth*, 5 H. & N.

ingly, where the creditor took a warrant of attorney from the principal debtor with a stipulation for the benefit of the surety that, on notice from the latter, the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction of the debt, and the creditor neglected to keep up the warrant of attorney as an efficient security, it was held that the surety was discharged (*l*). Again, where a party has consented to be co-surety with another, he cannot be made responsible if the other party refuses or neglects to be bound. Where, therefore, one of two intended co-sureties executes a deed of covenant for the repayment of advances to be made to the principal debtor, on the understanding that the money will not be advanced until the deed is executed by the other surety, and the deed never is executed by the other surety, the executing surety will be entitled to be discharged from every part of the debt (*m*). But a surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his (*n*).

Duty of person guaranteed.—Where the person guaranteed does an act injurious to the surety, or inconsistent with his rights, or omits to do an act which his duty requires him to do, and the omission proves injurious to the surety, the latter will be discharged (*o*). Thus, in the case of a guarantee given to an employer to secure the faithful services of a servant in his employment, the surety has a right to expect from the employer that he will call upon such servant to account in the ordinary course of business, and that he will not trust him beyond the bounds of ordinary prudence (*p*). But mere passive inactivity on the part of the principal, or his neglect to call the principal debtor to account, does not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to amount to fraud (*q*). The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer

235; 29 L.J. Ex. 229; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 808; 31 L.J. C.P. 143.

(*l*) *Watson* v. *Alcock*, 4 De G. M. & G. 242; 22 L.J. Ch. 858.

(*m*) *Evans* v. *Bremridge*, 8 De G. M. & G. 100; 25 L.J. Ch. 334; *Bonser* v. *Cox*, 4 Beav. 379; 10 L.J. Ch. 395; *National Provincial Bank of England* v. *Brackenbury*, 22 T.L.R. 797.

(*n*) *Cooper* v. *Evans*, L.R. 4 Eq. 45; 36 L.J. Ch. 431.

(*o*) *Watts* v. *Shuttleworth*, 29 L.J. Ex. 234; 5 H. & N. 235.

(*p*) *Smith* v. *Bank of Scotland*, 1 Dow, 292; *Railton* v. *Matthews*, 10 Cl. & F. 934.

(*q*) *Durham* (*Mayor*) v. *Fowler*, 22 Q.B.D. 394; 58 L.J. Q.B. 246.

fails to use all the means in his power to guard against the consequences of dishonesty (*r*). If, however, the master discovers that the person employed has been guilty of dishonesty, he must inform the surety, who has thereupon a right to withdraw from his guarantee (*s*); and, if the master omits so to inform the surety, the latter will be discharged so far as subsequent acts of dishonesty are concerned (*t*), unless the surety must in the circumstances have known of the dishonest acts (*u*).

Alteration of principal obligation discharging surety.—If a new contract is substituted for the original contract, or if the original contract is altered in any material point without the surety's consent, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound (*x*). Where the defendant had as surety signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it, and afterwards the payee, without the knowledge of the defendant, induced another person to sign it in order to strengthen the security, it was held that the defendant was discharged from liability (*y*). If the guarantee is of the honesty of the principal in any particular course of dealing with the plaintiff, that course of dealing is part of the agreement of the plaintiff with the surety, and the plaintiff cannot alter it and keep the surety liable. But a surety for a contractor was held not to be discharged from liability, although his position had been altered by the conduct of the employer, where that conduct was caused by a fraudulent act or omission of the contractor against which the surety had by the contract of suretyship guaranteed the employer (*z*). So, where the principal by deliberate suppression of part of a resolution of the Guardians obtained the consent of the Local Government Board to payments made to him in excess of salary there was held to be a cause of action under the guarantee (*a*). And, where the course of dealing is left to the option of the plaintiff altogether, or within certain limits, and is allowed by

(*r*) *Black* v. *Ottoman Bank*, 15 Moo. P.C. 472; *Mansfield Union* v. *Wright*, 9 Q.B.D. 683.

(*s*) *Burgess* v. *Eve*, L.R. 13 Eq. 450; 41 L.J. Ch. 515.

(*t*) *Phillips* v. *Foxall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293; *Sanderson* v. *Aston*, L.R. 8 Ex. 73; 42 L.J. Ex. 64.

(*u*) *Caxton Union* v. *Dew*, 68 L.J. Q.B. 380.

(*x*) *Whitcher* v. *Hall*, 5 B. & C. 276; 4 L.J. (O.S.) K.B. 167; *Bonar* v. *Macdonald*, 3 H.L.C. 239; *Gen. St. Nav. Co.* v. *Rolt*, 6 C.B. N.S. 550; *Polak* v. *Everett*, 1 Q.B.D. 669; 45 L.J. Q.B. 369; *Greenwood* v. *Francis*, (1899) 1 Q.B. 312; 68 L.J. Q.B. 228.

(*y*) *Gardner* v. *Walsh*, 5 E. & B. 83; 24 L.J. Q.B. 284, overruling *Catton* v. *Simpson*, 8 Ad. & E. 136. See also *Holme* v. *Brunskill*, 3 Q.B.D. 495; 47 L.J. Q.B. 610; *Bolton* v. *Salmon*, (1891) 2 Ch. 48; 60 L.J. Ch. 239.

(*z*) *Kingston-upon-Hull* (*Mayor*) v. *Harding*, (1892) 2 Q.B. 494; 62 L.J. Q.B. 55.

(*a*) *Bramley Union* v. *The Guarantee Society*, 64 J.P. 308; 16 T.L.R. 263.

the contract, the surety cannot complain of an alteration which he has himself permitted (*ante*, p. 1086). Where one enters into a bond as surety for the performance by another of two separate and distinct things, a subsequent alteration of the principal's contract as to one of these things without the surety's consent does not release the surety from his contract of suretyship as to the other (*b*).

Extension of time of payment.—Any enlargement of the time of payment by a binding contract with the principal debtor, made without the surety's authority, which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, amounts to substituting a new engagement in the place of the original contract and discharges the surety, inasmuch as the situation of the latter is varied and his liability prolonged beyond what was originally contemplated (*c*). As soon as the principal debtor has made default, the surety has a right to step in and pay the debt, and require the creditor to sue, or allow him to sue, the principal in his, the creditor's, name; and, if the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue the principal debtor, he thereby discharges the surety (*d*). But a contract with a stranger, or even with a co-surety (*e*), to give time to the principal debtor, which contract does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge such surety from liability (*f*); and there must have been either a new security given to extend the time of payment, or a binding agreement upon sufficient consideration to suspend the remedy (*g*). If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal without the consent or knowledge of the surety, the surety is discharged (*h*). The mere giving of additional security by the

(*b*) *Harrison* v. *Seymour*, L.R. 1 C.P. 518; 35 L.J. C.P. 264.

(*c*) *Rees* v. *Berrington*, 2 Ves. 542; *Combe* v. *Woolf*, 8 Bing. 162; 1 L.J. C.P. 51; *Eyre* v. *Bartrop*, 3 Mad. 221; *Nisbet* v. *Smith*, 2 Br. C.C. 578. See also *ante*, p. 1086. As to guarantees authorizing the giving time to the principal debtor, see *Cowper* v. *Smith*, 4 M. & W. 519; *Un. Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133; *Perry* v. *Prov. Bk. of England*, (1910) 1 Ch. 464; 79 L.J. Ch. 509.

(*d*) Williams, J., *Strong* v. *Foster*, 17 C.B. 219; 25 L.J. C.P. 106; *Bailey* v. *Edwards*, 34 L.J. Q.B. 45; 4 B. & S. 761; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L.R. 7 Ch. 142; 41 L.J. Ch. 332.

(*e*) *Clarke* v. *Birley*, 41 Ch.D. 422; 58 L.J. Ch. 616.

(*f*) *Frazer* v. *Jordan*, 8 E. & B. 303; 26 L.J. Q.B. 288.

(*g*) Parke, B., *Moss* v. *Hall*, 5 Exch. 50; 19 L.J. Ex. 205; *Bingham* v. *Corbitt*, 34 L.J. Q.B. 37.

(*h*) *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L.R. 7 H.L. 348; *Rouse* v. *Bradford Banking Co.*, (1894) A.C. 586; 63 L.J. Ch. 890.

principal to the creditor is not of itself a giving of time by the creditor to the principal (*i*).

There is no obligation on the part of the creditor to use active diligence against the principal debtor. It is the business of the surety and not that of the creditor to see that the principal pays (*k*). A mere promise, therefore, without consideration, not to sue the principal for a certain time will not discharge the surety (*l*), nor will mere laches, or forbearance, on the part of the creditor, to press the party liable, and sue for the money, unaccompanied by any suspension of the legal remedies (*m*). Nor will a parol agreement to extend the time of payment discharge the surety, when the principal obligation is under seal, inasmuch as such an agreement cannot affect the legal operation of the deed, or suspend the right of action thereon; though it will be otherwise where payment is extended by a binding contract (*n*). Nor will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety if the position of the latter has in nowise been varied thereby (*o*). Nor will the surety be discharged, if he has himself assented to the alteration of the principal obligation (*p*). In the case of an accommodation bill, known to all the parties to be such, the acceptor can only be considered a surety for the drawer, so that, if time be given to the drawer by a binding agreement, without the knowledge and concurrence of the acceptor, the acceptor is discharged (*q*). But, even in the case of a continuing guarantee, the Statute of Limitations may be successfully pleaded by way of defence where six years have elapsed since the right accrued under the guarantee, though, if the guarantee in terms included not only sums advanced but also interest and other incidental charges and such interest and charges had accrued against the guaranteed party within the period of six years before action being brought, the Statute of Limitations will not affect those items (*r*).

(*i*) *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, *ante*, p. 1093.

(*k*) *Wright* v. *Simpson*, 16 Ves. 734; Jervis, C.J., *Strong* v. *Foster*, 17 C.B. 216; 25 L.J. C.P. 106.

(*l*) *Tucker* v. *Laing*, 2 K. & J. 745, 749.

(*m*) *Orme* v. *Young*, Holt, N.P. 84; *Lond. Assur. Co.* v. *Buckle*, 4 Moore, 153; *Goring* v. *Edmonds*, 6 Bing. 91; 7 L.J. (O.S.) C.P. 235; *Dawson* v. *Lawes*, 23 L.J. Ch. 434; Kay, 280; *Durham* (*Mayor*) v. *Fowler*, 22 Q.B.D. 394; 58 L.J. Q.B. 246; *Kingston Corporation* v. *Harding*, (1892) 2 Q.B. 494; 62 L.J. Q.B. 55; *Rouse* v. *Bradford Banking Co.*, (1894) A.C. 586; 63 L.J. Ch. 890.

(*n*) *Bolton* v. *Buckenham*, (1891) 1 Q.B. 278; 60 L.J. Q.B. 261; *Bolton* v. *Salmon*, (1891) 2 Ch. 48; 60 L.J. Ch. 239.

(*o*) *Twopenny* v. *Young*, 3 B. & C. 208; *Bell* v. *Banks*, 3 Sc. N.R. 497.

(*p*) *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32; 63 L.J. Ch. 337.

(*q*) *Laxton* v. *Peat*, 2 Campb. 185; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L.J. Q.B. 41.

(*r*) *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

Suretyship where relation does not appear upon face of contract.—The doctrine of discharge by giving time is not confined to cases where the relation of suretyship appears on the face of the original contract between the creditor, the principal, and the alleged surety (*s*). The equity arises from the relation of the co-obligors, or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation (*t*). It is held to be inequitable in the creditor knowingly to prejudice the rights of the surety, although he may know of the existence of the relation of suretyship only at the time when he dealt with the principal debtor so as to prejudice such rights (*u*). But extraneous evidence is not admissible for the purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party (*x*).

Effect of giving time to principal debtor reserving remedies against surety.—If after the principal debtor has made default, and the surety has become liable to pay the debt, the creditor, by a binding contract, agrees to give the principal debtor time for payment, in the same contract expressly stipulating for the reservation of all his remedies against the surety, the latter will still remain liable, notwithstanding such agreement (*y*). "The reserve of remedies," observes Parke, B., "has that effect upon this principle; first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the principal debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him" (*z*). And, if a security is taken which by extending the time of payment would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the creditor and the principal debtor that

(*s*) *Rayner* v. *Fussey*, 28 L.J. Ex. 132.

(*t*) *Davies* v. *Stainbank*, 6 De G. M. & G. 679, 696; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L.R. 7 Ch. 142; 41 L.J. Ch. 332.

(*u*) *Pooley* v. *Harradine*, 7 E. & B. at p. 441; 26 L.J. Q.B. 156; *Greenhough* v. *McClelland*, 2 E. & E. 424; 30 L.J. Q.B. 15; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L.J. Q.B. 41.

(*x*) *Hollier* v. *Eyre*, 9 Cl. & Fin. 45.

(*y*) Ld. Eldon, *Glendenning, Ex parte*, Buck's B.C. 519.

(*z*) *Kearsley* v. *Cole*, 16 M. & W. 135; 16 L.J. Ex. 115; *Price* v. *Barker*, 4 E. & B. 779; 24 L.J. Q.B. 134.

the transaction should not have that effect, and may thus keep alive the liability of the surety (*a*).

Effect of release of principal debt.—If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving the discharge of the surety (*b*). If, therefore a creditor, by deed of composition, releases his debtor, and precludes himself from suing upon the obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed (*c*), or unless by the terms of the guarantee the surety is not discharged by the release of the principal debtor (*d*). So where a trustee in bankruptcy of a lessee for a term of years disclaims, a guarantor of the payment of such "rent as may be from time to time in arrear" under the lease is not liable for rent accruing due after the date of the disclaimer (*e*). On the other hand, extinguishment of the principal obligation by operation of law will not necessarily discharge the surety from his liability (*f*).

Release of principal obligation, reserving remedies against surety.—If the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor may compound with the principal debtor, receiving a portion only of the debt, and releasing from the payment of the residue, and at the same time reserve his rights and remedies against the surety. A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the parties, and the right of recourse against the surety be preserved (*g*). Where, therefore, upon the grant of an annuity, two co-sureties entered into a joint and several covenant for the payment by them of the annuity, in case of default by the grantor, and default was made by the grantor, whereupon a deed was executed between the grantor and grantee and one of the co-sureties, by which, in

(*a*) *Wyke* v. *Rogers*, 21 L.J. Ch. 613; 1 De G. M. & G. 408; *Boaler* v. *Mayor*, 19 C.B. N.S. 76; 34 L.J. C.P. 230.

(*b*) *Webb* v. *Hewitt*, 3 Kay & J. 438, 444; *Vorley* v. *Barrett*, 26 L.J. C.P. 1; 1 C.B. N.S. 225; *Commercial Bank of Tasmania* v. *Jones*, (1893) A.C. 313; 62 L.J. P.C. 104.

(*c*) *Lewis* v. *Jones*, 4 B. & C. 513, 515; 3 L.J. (O.S.) K.B. 270; *Green* v. *Wynn*, L.R. 4 Ch. 204; 38 L.J. Ch. 76, 220.

(*d*) *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133.

(*e*) *Stacey* v. *Hill*, (1901) 1 K.B. 660; 70 L.J. K.B. 435.

(*f*) *Jacobs, Ex parte*, L.R. 10 Ch. 211; 44 L.J. Bank. 34; *Ellis* v. *Wilmot*, L.R. 10 Ex. 10; 44 L.J. Ex. 10; *London Chartered Bank of Australia, In re*, (1893) 3 Ch. 540, 546; 62 L.J. Ch. 841; *Fitzgeorge, In re, Robson, Ex parte*, (1905) 1 K.B. 462; 74 L.J. K.B. 322.

(*g*) *Nevill's case*, L.R. 6 Ch. 43; 40 L.J. Ch. 1; *Bateson* v. *Gosling*, L.R. 7 C.P. 9; 41 L.J. C.P. 53; *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; 62 L.J. Q.B. 69.

consideration of all arrears being paid by such co-surety, the latter was released from the future payment of the annuity, and from all further liability upon his covenant, but it was provided that nothing therein contained should prejudice the rights of the grantee as against the grantor and the other co-surety, it was held that this proviso prevented the release from operating as a discharge of the co-surety, as it did not prejudice the latter or increase his liability (*h*). But a release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy" is an absolute release, and, if given without the surety's consent, discharges him (*i*). It seems to be the result of the authorities that a covenant not to sue qualified by a reserve of the remedies against sureties allows the surety to retain his remedies over against the principal debtor, and operates only so far as the rights of the surety may not be affected (*k*); but it remains to be considered in every case, whether the arrangement between the principal debtor and the creditor does prejudicially affect the rights or remedies of the surety (*l*); for, if it does, the surety is entitled to say that he is discharged (*m*).

Release of one of several co-sureties.—A release by the creditor of one of two or more co-sureties releases all (*n*). This is not so, however, where the sureties contract severally (*o*).

Payment by principal debtor.—If a party becomes surety for the due payment of all money that comes to the hand of the principal, the surety is discharged upon payment by the principal in such currency as the parties to whom the payment is made are willing to accept. If, therefore, these parties have the option of receiving cash, but choose to take bills or notes, which are ultimately dishonoured, the surety is none the less discharged (*p*). A payment accepted by the creditor in good faith and without notice, but afterwards avoided as a fraudulent preference, does not operate as a satisfaction of the debt or discharge the surety (*q*). If the primary security proves worth-

(*h*) *Thompson* v. *Lack*, 3 C.B. 552; 16 L.J. C.P. 75; *Kearsley* v. *Cole*, 16 M. & W. 135; 16 L.J. Ex. 115.

(*i*) *Cragoe* v. *Jones*, L.R. 8 Ex. 81; 42 L.J. Ex. 68.

(*k*) *Price* v. *Barker*, 4 E. & B. 760, 779; 24 L.J. Q.B. 134.

(*l*) *Owen* v. *Homan*, 20 L.J. Ch. 323; aff. 4 H.L.Cas. 1037.

(*m*) *Wright* v. *Sandars*, 3 Jur. N.S. 507.

(*n*) *Cheetham* v. *Ward*, 1 B. & P. 633; *E. W. A., In re*, (1901) 2 K.B. 642; 70 L.J. K.B. 810; *Nicholson* v. *Revill*, 4 Ad. & E. 683; 5 L.J. K.B. 129; *Evans* v. *Bremridge*, 25 L.J. Ch. 104; 2 K. & J. 174; *Mercantile Bank of Sydney* v. *Taylor*, (1893) A.C. 317; *E. W. A., In re*, (1901) 2 K.B. 642; 70 L.J. K.B. 810.

(*o*) *Ward* v. *National Bank of New Zealand*, 8 App.Cas. 755; 52 L.J. P.C. 65; *Good, Ex parte, Armitage, In re*, 5 Ch.D. 46; 46 L.J. Bank. 65.

(*p*) *Lichfield Union* v. *Greene*, 1 H. & N. 880; 26 L.J. Ex. 140.

(*q*) *Petty* v. *Cooke*, L.R. 6 Q.B. 790; 40 L.J. Q.B. 285.

less, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor (*r*). If the principal debtor has a set-off against the creditor arising out of the same transaction, the surety may take advantage of it in an action against him by the creditor for the amount guaranteed (*s*).

Fraud on sureties.—If, when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the surety with the knowledge of the creditor, the misrepresentation or concealment amounts to a fraud upon the surety, and discharges him from his engagement (*t*); though the principal is not bound to disclose to the surety every material circumstance known to him that may be calculated to affect or increase the responsibility of the surety (*u*). So a private agreement between the creditor and the principal debtor, which is a fraud upon the surety, will discharge him from liability upon his contract (*x*). And where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, it was held that he was entitled to have the bond cancelled (*y*). Where the plaintiffs were aware that the execution of the guarantee was to be procured through the guarantor's husband, who was living with his wife at the time and would presumably influence her, and the guarantor had no independent advice and did not understand the nature of the document, their action on the guarantee was held to be not maintainable (*z*). But the mere relation of husband and wife does not raise a presumption of undue influence nor is a contract of suretyship by a wife void merely because she has had no independent advice (*a*).

If a man finds that his agent has betrayed his trust, that he owes him a sum of money, or that it is likely he is in his debt, and, under such circumstances, requires sureties for his fidelity, holding him out as a trustworthy person, knowing, or having

(*r*) *Hardwick* v. *Wright*, 35 Beav. 133.

(*s*) *Becherraise* v. *Lewis*, L.R. 7 C.P. 372; 41 L.J. C.P. 161.

(*t*) *Stone* v. *Compton*, 6 Sc. 846; 5 Bing. N.C. 142; *Railton* v. *Mathews*, 10 Cl. & Fin. 942; *Spaight* v. *Cowne*, 1 H. & M. 359; *Lee* v. *Jones*, 17 C.B. N.S. 482; 34 L.J. C.P. 131; *Chaplin & Co.* v. *Brammall*, (1908) 1 K.B. 233; 77 L.J. K.B. 366.

(*u*) *North Brit. Assur. Co.* v. *Lloyd*, 10 Exch. 523; 24 L.J. Ex. 14; *Jackson* v. *Duchaire*, 3 T.R. 552; *Seaton* v. *Burnand*, (1900) A.C. 135; 69 L.J. Q.B. 409.

(*x*) *Pidcock* v. *Bishop*, 3 B. & C. 605; 3 L.J. (O.S.) K.B. 109.

(*y*) *Blest* v. *Brown*, 3 Giff. 450; *Cooper* v. *Joel*, 1 De G. F. & J. 240.

(*z*) *Chaplin & Co.* v. *Brammall*, (1908) 1 K.B. 233; 77 L.J. K.B. 366.

(*a*) *Bank of Africa* v. *Cohen*, (1909) W.N. 50; 25 T.L.R. 285.

ground to believe, that he is not so, he cannot afterwards avail himself of a guarantee obtained from a party who was ignorant of what was known to, and ought to have been disclosed by, the employer (*b*). So, if a person whose honesty is guaranteed makes defalcations, which the employer condones without notice to the guarantor, the latter is not liable for subsequent defalcations (*c*). But, if a person having doubts as to the circumstances of his agent, and therefore requiring fresh sureties, states his doubts at the time to these sureties, they have no right to complain (*c*).

A creditor is not bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, unless the dealings are such as to lead a reasonable man to believe that fraud must have been used (*d*). If a person abstains from inquiry because he sees that the result of inquiry will disclose fraud, his want of knowledge of the fraud affords no excuse, and in some cases wilful ignorance is not to be distinguished in its consequences from knowledge (*e*).

Discharge of surety by death of principal.—Where the liability of the surety does not arise until after default has been made by the principal, and the latter dies before making default, the surety is discharged (*f*). Upon the like principle, where a company was dissolved during the term of a lease, the rent of which was secured, it was held that the term came to an end on the dissolution and that therefore the sureties were not liable after that event (*g*).

Death of surety.—A. having guaranteed thus: "To C. I request you will credit B.; and, in consideration thereof, I guarantee the running balance;" it was held that the promise was not revoked by A.'s death without notice to C. from the executor (*h*). So, where a bond is given for the integrity of a person in consideration of the latter's being appointed to an office by the obligee of the bond, the liability of the surety will not, unless expressly so stipulated in the bond, be determined by the death of the surety (*i*). But, where the consideration is

(*b*) *Smith* v. *Bank of Scotland*, 1 Dow, 292.

(*c*) *Phillips* v. *Foxall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293; *Caxton Union* v. *Dew*, 68 L.J. Q.B. 380.

(*d*) *Hamilton* v. *Watson*, 12 Cl. & Fin. 119; *Wythes* v. *Labouchere*, 3 De G. & J. 595; 5 Jur. N.S. 499.

(*e*) *Owen* v. *Homan*, 4 H.L.Cas. 997, 1035.

(*f*) *Sparrow* v. *Sowgate*, W. Jones, 29; *Solvency Mutual Guarantee Co.* v. *Freeman*, 7 H. & N. 17; 31 L.J. Ex. 197.

(*g*) *Hastings Corporation* v. *Letton and Another*, 97 L.T. 582; 23 T.L.R. 456.

(*h*) *Bradbury* v. *Morgan*, 1 H. & C. 249; 31 L.J. Ex. 462; and see *Harriss* v. *Fawcett*, L.R. 8 Ch. 866, 869; 42 L.J. Ch. 502.

(*i*) *Gordon* v. *Calvert*, 2 Sim. 253; *Lloyd's* v. *Harper*, 16 Ch. D. 290; 50 L.J. Ch. 140; *Beckett* v. *Addyman*, 9 Q.B.D. 783; 51 L.J. Q.B. 597; *Crace, In re, Balfour* v. *Crace*, (1902) 1 Ch. 733; 71 L.J. Ch. 358.

not indivisible, as in the case just mentioned, it seems that after notice of the death a continuing guarantee is revoked as to subsequent advances (*k*).

Indemnification of sureties.—When the engagement of the surety is made with the consent of the principal, there is in point of law an implied request from the latter to the surety to intervene on his, the principal's, behalf, if the latter makes default; and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter (*l*). The surety need not wait for the commencement of an action against the principal (*m*); but he cannot accelerate the liability of the latter (*n*); and, if he pays money voluntarily which he was not under any legal obligation to pay, he has no ground of action against the principal until the time of payment is past. A surety who has paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree (*o*). If A. has expressly agreed to indemnify B. against a particular claim or demand, and an action is brought on that demand against B., B. may then give notice to A. to come in and defend the action, and if A. refuses to come in, B. may compromise at once on the best terms he can get, and then bring an action on the contract of indemnity. At the same time, if B. does not choose to trust A. with the defence to the action, he may if he pleases himself defend it, and judgment against him will be conclusive as between the parties (*p*).

If the principal covenants with the surety that he will pay the creditor by a day named, and makes default, the surety may sue him for the amount, although he has not himself, at the time of bringing the action, paid any portion of the debt (*q*).

Contribution between co-sureties.—It has already been stated that, if several persons together become surety for one principal in respect of the same debt, either jointly or severally, or by the same or different contracts (*r*), and one of such co-sureties, after

(*k*) *Coulthart* v. *Clementson*, 5 Q.B.D. 42; 49 L.J. Q.B. 204; *Silvester*, *In re*, (1895) 1 Ch. 573; 64 L.J. Ch. 390.

(*l*) *Kearsley* v. *Cole*, 16 M. & W. 128; 16 L.J. Ex. 115; *Boyd* v. *Brooks*, 34 L.J. Ch. 605; 34 Beav. 7. In equity a surety may compel the debtor to pay whether the latter be sued or not, *Ascherson* v. *Tredegar Dry Dock Co.*, (1909) 2 Ch. 401; 78 L.J. Ch. 697.

(*m*) *Small* v. *Currie*, 5 De G. M. & G. 159; 23 L.J. Ch. 746.

(*n*) A surety cannot prove in the bankruptcy of the principal debtor for estimated future liabilities under his original obligation: *Moss*, *In re*, *Hallet*, *Ex parte*, (1905) 2 K.B. 307; 74 L.J. K.B. 764.

(*o*) *Boyd* v. *Brooks*, *supra*.

(*p*) *Per* Mellish, L.J., *Parker* v. *Lewis*, L.R. 8 Ch. 1035, 1059; 43 L.J. Ch. 281.

(*q*) *Loosemore* v. *Radford*, 9 M. & W. 657; 11 L.J. Ex. 284.

(*r*) *Mayhew* v. *Crickets*, 2 Swanst. 185; and although they do not know

the liability of the principal has arisen, pays the debt, or satisfies the whole, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions (*s*), unless the plaintiff seeking contribution has promised to save the defendant harmless (*t*), or the defendant has become surety at the request of the plaintiff and for his accommodation (*u*). Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for the principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, the plaintiff then paying the residue, although no demand had been made upon him by the creditor for payment, it was held that the plaintiff was entitled to recover from the defendant, his co-surety, a moiety of the amount he had paid (*x*). All persons who by common consent put their names to an accommodation bill, whether as drawers, acceptors, or indorsers, in order that one of them may get the bill discounted for his own benefit, are co-sureties for the due payment of the bill; and, if the bill is dishonoured at maturity, and one of them is compelled to pay the amount and thus releases the other parties from their common liability upon the instrument, the one so paying is entitled to contribution from the others (*y*). Where one of three sureties had paid a sum of money, he was held entitled to recover one moiety from another of the co-sureties, the third having become insolvent (*z*). A surety against whom judgment has been obtained by the principal creditor for the full amount of the debt, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment (*a*). The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the claim of the principal creditor has been established against the surety (*b*).

If one of two co-sureties pays part of the debt only, and less than his moiety, he is not entitled to resort to his co-surety for

of each other's liability: *Dering* v. *Winchelsea* (*Earl*), 1 Cox, 318; *Whiting* v. *Burke*, L.R. 6 Ch. 342.

(*s*) *Craythorne* v. *Swinburne*, 14 Ves. 160; *Kemp* v. *Finden*, 12 M. & W. 421; 13 L.J. Ex. 137; *Denton's Estate, In re*, (1904) 2 Ch. 178; 73 L.J. Ch. 465.

(*t*) *Thomas* v. *Cooke*, 8 B. & C. 728; 7 L.J. (O.S.) K.B. 49.

(*u*) *Turner* v. *Davies*, 2 Esp. 478.

(*x*) *Pitt* v. *Purssord*, 8 M. & W. 539; 10 L.J. Ex. 174.

(*y*) *Reynolds* v. *Wheeler*, 10 C.B. N.S. 561; 50 L.J. C.P. 350.

(*z*) *Peter* v. *Rich*, 1 Ch.C. 34; *Hitchman* v. *Stewart*, 3 Drew. 271; 24 L.J. Ch. 690.

(*a*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; 62 L.J. Ch. 773.

(*b*) *Ib.*

contribution: for the latter might subsequently have to pay an equal or greater portion of the debt; in the former of which cases such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits if each co-surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then such part ought to be repaid by the others, and an action will lie for it (*c*).

The principal creditor is not entitled to the benefit of collateral securities given by the principal debtor to the surety (*d*). A surety is bound to bring into hotchpot for the benefit of his co-securities a security given to him by the principal debtor, even though he only consented to be surety upon having such security given to him, and though the other sureties were unaware of his having taken such security (*e*). Where the same default of the principal renders all the co-sureties responsible, all are bound to contribute; and the amounts of their respective contributions should be equal where they are bound in equal amounts and proportional to their several undertakings where they are bound in unequal amounts (*f*).

Death of co-sureties.—The death of one of the co-sureties does not determine the liability of the surviving co-surety (*g*).

Assignment of judgments and securities for surety's indemnification.—Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, is entitled (19 & 20 Vict. c. 97, s. 5) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, held by the creditor in respect of the debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such person is entitled to stand in the place of the creditor, and use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, indemnification

(*c*) Parke, B., *Davies* v. *Humphreys*, 6 M. & W. 153, 169; 9 L.J. Ex. 263; *Snowdon, Ex parte*, 17 Ch.D. 44; 50 L.J. Ch. 540.

(*d*) *Walker, In re*, (1892) 1 Ch. 621; 61 L.J. Ch. 234.

(*e*) *Steel* v. *Dixon*, 17 Ch.D. 825; 50 L.J. Ch. 591; *Arcedeckne, In re*, 24 Ch.D. 709; 53 L.J. Ch. 102; *Berridge* v. *Berridge*, 44 Ch.D. 168; 59 L.J. Ch. 533.

(*f*) *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q.B. 75; 65 L.J. Q.B. 173.

(*g*) *Beckett* v. *Addyman*, 9 Q.B.D. 783; 51 L.J. Q.B. 597; *Gordon* v. *Calvert*, 4 Russ. 581; 7 B. & C. 809.

for the advances made, and loss sustained, by the person who has paid the debt or performed the duty; and the payment or performance by the surety is not pleadable in bar of any such action or other proceeding by him; but no co-surety, co-contractor, or co-debtor is entitled to recover from any other co-surety, co-contractor, or co-debtor more than the just proportion to which, as between these parties themselves, the latter is justly liable (*h*). This section includes Crown debts, and therefore a surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority in the administration of the principal's estate (*i*). Where one of two co-sureties has paid the whole of the debt to the creditor, he is entitled to sue his co-surety under this section for the full amount of the debt; although he can only actually recover the proportion which as between the sureties the co-surety is liable to pay (*k*).

The creditor is bound to give to the surety the benefit of all securities held by him at the time of the contract, and is not in equity allowed in any way to vary the position of the surety with reference to those securities (*l*); and all securities of which the creditor has the benefit at the time the contract of suretyship is made are supposed to be discovered to the surety at the time he is entering into the obligation; his rights are not in abeyance until he is called upon to pay; and if, through any neglect on the part of the creditor, he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged (*m*). The indorser of a bill is a surety to the holder for the payment, and having paid the bill, he is entitled to the benefit of any securities deposited with the holder by the acceptor, even although he was ignorant of such deposit (*n*). The surety is not entitled to have an assignment of the principal security, unless he pays the debt in full (*o*). The terms of the surety's covenant also must always be carefully considered to ascertain what his rights exactly are (*p*).

Judgment against principal does not bind sureties.—A judg-

(*h*) *Batchellor* v. *Lawrence*, 9 C.B. N.S. 543; 30 L.J. C.P. 39; *Drew* v. *Lockett*, 32 Beav. 499; *Strange* v. *Fooks*, 4 Giff. 408.

(*i*) *Churchill, In re*, 39 Ch. D. 174; 58 L.J. Ch. 136.

(*k*) *Parker, In re*, (1894) 3 Ch. 400; 64 L.J. Ch. 6.

(*l*) *Pearl* v. *Deacon*, 24 Beav. 186; 26 L.J. Ch. 761.

(*m*) *Newton* v. *Chorlton*, 10 Hare, 650; *Strange* v. *Fooks*, 4 Giff. 408; *Forbes* v. *Jackson*, 19 Ch.D. 615; 51 L.J. Ch. 690; *Wulff* v. *Jay*, L.R. 7 Q.B. 756; 41 L.J. Q.B. 322. See also *Rainbow* v. *Juggins*, 5 Q.B.D. 422; 49 L.J. Q.B. 718; *Taylor* v. *Bank of N. S. W.*, 11 App.Cas. 596; 55 L.J. P.C. 47; *Dixon* v. *Steel*, (1901) 2 Ch. 602; 70 L.J. Ch. 794.

(*n*) *Duncan & Co.* v. *N. & S. Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355.

(*o*) *Ewart* v. *Latta*, 4 Macq. 983.

(*p*) *Nicholas* v. *Ridley*, (1904) 1 Ch. 192; 73 L.J. Ch. 145.

ment recovered against a principal does not bind a surety, who is entitled to have the case proved *de novo* (*q*).

Breach of contracts of indemnity—Bankruptcy of principal debtor.—If the principal debtor becomes bankrupt, or is discharged by a resolution under sect. 28 of the Bankruptcy Act, 1883, the surety remains liable (*r*), but if he has paid the debt, he has a right to stand in the place of the original creditor against the estate of the principal debtor; and, if the creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, or to have it deducted from the amount for which he is liable (*s*), and to have all future dividends secured to him (*t*), unless he has agreed to waive his right thereto for the benefit of the creditor (*u*). Where a surety guaranteed the payment of debts to be contracted from time to time by the principal debtor with the plaintiffs, not exceeding 400*l.*, and the balance due by the debtor was allowed to amount to 625*l.*, upon which sum, by a composition with his creditors, the debtor paid 8*s.* 7*d.* in the pound, it was held, in an action brought against the surety on the guarantee, that the dividend was to be deducted from the balance of 356*l.* claimed from the surety under the guarantee (*x*). So, where two persons separately guaranteed the payment of all goods supplied to A. B., their liability not to exceed 250*l.* each, and goods to the amount of 657*l.* were supplied to A. B., who then became bankrupt, and the creditor proved for the whole amount, and, having obtained 250*l.* from each of the guarantors, afterwards received 2*s.* 1*d.* in the pound on the 657*l.*, it was held that each of the guarantors was entitled to a part of this dividend bearing to the whole the same proportion as 250*l.* to 657*l.* (*y*).

Recovery of interest on money paid by sureties.—Where a surety has been compelled to pay money which the principal debtor ought to have paid, and has, consequently, lost the use of his money, he is entitled, in an action on the implied contract of indemnity against the principal, to recover interest on what

(*q*) *Young, Ex parte, Kitchin, In re*, 17 Ch.D. 668; 50 L.J. Ch. 824; *Parker* v. *Lewis*, L.R. 8 Ch. 1035; 43 L.J. Ch. 281.

(*r*) *Ellis* v. *Wilmot*, L.R. 10 Ex. 10; 44 L.J. Ex. 10; *Jacobs, Ex parte*, L.R. 10 Ch. 211; 44 L.J. Bank. 34; *London Chartered Bank of Australia, In re*, (1893) 3 Ch. 540; 62 L.J. Ch. 841; *Fitzgeorge, In re, Robson Ex parte*, (1905) 1 K.B. 462; 74 L.J. K.B. 322; 46 & 47 Vict. c. 52, s. 30 (4). As to the right of a surety under an agreement by the principal debtor to indemnify him, to prove for estimated future liabilities to the obligee, see *Moss, In re, Hallet, Ex parte*, (1905) 2 K.B. 307; 74 L.J. K.B. 764.

(*s*) *Gee* v. *Pack*, 33 L.J. Q.B. 49; *Hobson* v. *Bass*, L.R. 6 Ch. 792.

(*t*) *Thornton* v. *M'Kewan*, 1 Hem. & M. 525; 32 L.J. Ch. 69.

(*u*) *Midland Banking Co.* v. *Chambers*, L.R. 4 Ch. 398; 38 L.J. Ch. 478.

(*x*) *Bardwell* v. *Lydall*, 5 Moo. & P. 335; 9 L.J. (O.S.) C.P. 148; *Gee* v. *Pack*, 33 L.J. Q.B. 49.

(*y*) *Hobson* v. *Bass*, L.R. 6 Ch. 792; *Midland Bank Co.* v. *Chambers*, L.R. 4 Ch. 398; 38 L.J. Ch. 478.

he has been compelled to pay (*z*); for in every contract of indemnity the party damnified is entitled to recover all such damages, costs, and charges as reasonably result from the fulfilment by him of the obligation entered into on behalf of the principal debtor (*a*).

Guarantees in firm's name by one of several partners.—By sect. 7 of the Partnership Act, 1890 (*b*), where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless the partner in question is in fact specially authorised by the other partners; but the section does not affect any personal liability incurred by an individual partner (*c*). Where the debt secured was that of a third party, Lord Ellenborough held that there was no implied authority from the mere existence of a co-partnership to any one or more of the partners to pledge the partnership name for such a purpose (*d*). But, if the guarantee, when given, is notified to the firm, and they do not dissent from it, or if it refers to a partnership transaction, and is given to secure the payment of goods supplied, or money advanced to the firm, and added to the joint stock, or if it has been given to secure the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for or on behalf of the firm, it binds all the partners, and all are liable to be sued thereon (*e*). As to the effect of a change in the firm upon a continuing guarantee, see sect. 18 of the Partnership Act, 1890 (*ante*, p. 1087).

SECTION II.

OF MARINE INSURANCE.

Contracts of insurance.—The contract of insurance is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may

(*z*) *Petre* v. *Duncombe*, 20 L.J. Q.B. 242; *Bishop*, *Ex parte*, 15 Ch.D. 400; 50 L.J. Ch. 18.

(*a*) *Smith* v. *Howell*, 6 Exch. 737; 20 L.J. Ex. 377.

(*b*) 53 & 54 Vict. c. 39, s. 7.

(*c*) As to the liability of one who holds himself out to the creditor to be the partner of a firm, see *Good*, *Ex parte*, *Armitage*, *In re*, 5 Ch.D. 46; 46 L.J. Bank. 65.

(*d*) *Duncan* v. *Lowndes*, 3 Campb. 478; *Hasleham* v. *Young*, 5 Q.B. 833; 13 L.J. Q.B. 205; *Brettel* v. *Williams*, 4 Exch. 623; 19 L.J. Ex. 121.

(*e*) *Nolte*, *Ex parte*, 2 Glyn & J. 295; *Sandilands* v. *Marsh*, 2 B. & Ald. 679; *Gardom*, *Ex parte*, 15 Ves. 286; *West of England Bank*, *In re*, 14 Ch.D. 317; 49 L.J. Ch. 400.

be exposed, and covenants or promises, in consideration of a sum of money which the other contracting party pays or binds himself to pay to him as the price of the risk run, to indemnify the latter against these risks and accidents. The party who takes the risks upon himself, or undertakes to indemnify, is called the assurer or insurer, and commonly in our law the underwriter, from his subscribing his name at the bottom of the contract; the party protected by the contract, the assured or insured; and the money paid as the price of the indemnity, the premium for the risk; whilst the contract itself, or rather the written instrument evidencing or constituting it, is called a policy of insurance.

Mutual insurance consists in the association of different proprietors of property exposed to the same risk, with a view of indemnifying at the common expense those members who suffer loss. These are called mutual insurance associations or clubs. The members of such an association are at the same time insurers and insured; and the engagement which each of them contracts with the association at large as an insurer is the consideration or price of the indemnity which the society guarantees to him in return (*f*). The Marine Insurance Act, 1906 (*g*), s. 85, provides "(1) where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance (*h*). (2) The provisions of this Act relating to the premium (*i*) do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium. (3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association. (4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance." In general, it is now the association itself which is the insurer, not as formerly the individual

(*f*) See *Montgomerie* v. *U. K. Mutual Steamship Assoc.*, (1891) 1 Q.B. 370; 60 L.J. Q.B. 429; *U. K. Mutual Steamship Assoc.* v. *Nevill*, 19 Q.B.D. 110; 56 L.J. Q.B. 522; *Gt. Britain Steamship Assoc.* v. *Wyllie*, 22 Q.B.D. 710; 58 L.J. Q.B. 614; *British Marine Mutual Ins. Assoc.* v. *Jenkins*, (1900) 1 Q.B. 299; 69 L.J. Q.B. 177.

(*g*) 6 Edw. 7, c 41, s. 85.

(*h*) A mutual insurance association which consists of more than twenty members is, unless registered under the Companies Consolidation Act, 1908, illegal. *Padstow Total Loss Assoc.*, 20 Ch.D. 137; 51 L.J. Ch. 344. The consequence is that associations are now always registered under that Act, usually as unlimited companies, or companies limited by guarantee. See *Lion Mut. Mar. Ins. Co.* v. *Tucker*, 12 Q.B.D. 176; 53 L.J. Q.B. 185; *In re Bangor and North Wales Mut. Mar. Protection Assoc., Bird's Case*, 68 L.J. Ch. 521; (1899) 2 Ch. 593; *British Mar. Mut. Ins. Assoc.* v. *Jenkins*, 69 L.J. Q.B. 177; (1900) 1 Q.B. 299.

(*i*) The provisions as to the premiums are set out in ss. 20 (2), 31, 52—54, 82, 84, 88.

members, and the cause of action of the member as assured, is against the association itself, not against the other members. The consideration which the member gives for his insurance is his liability to contribute in the manner provided by the rules of the association to the losses of other members, and to the expenses of management, and often also the payment in addition of an initial premium or entrance fee (*k*).

Policies of insurance.—The owner of the property insured generally pays to the insurer a premium at a certain rate per cent.; and the latter then subscribes the ordinary written or printed instrument, called a policy of insurance, whereby he expresses that he "doth make assurance" and cause the party "to be insured" in a certain sum, on certain specified property, for a certain voyage or for a certain time in the case of a marine policy, against certain risks and perils which are set forth in the policy. The policy is frequently preceded by a "SLIP," which is a short memorandum of the terms of the insurance, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But the slip is often nothing more than an offer or proposal of terms preliminary to the contract (*l*). Where there is a duly stamped policy reference may be made to the slip or covering note in any legal proceeding (*m*).

Marine insurance—Definition.—A contract of marine insurance is defined by the Marine Insurance Act, 1906 (*n*), which came into operation on January 1, 1907, and is an Act to codify the law relating to this subject, as a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent agreed against marine losses, that is to say, the losses incident to marine adventure (*o*). The contract may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters (*p*) or on any land (*q*) risk which may be incidental to any sea voyage (*r*); and where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a

(*k*) For a series of modern rules fixing the liabilities of members, see *North-Eastern* 100 *A. SS. Ins. Co.*, 12 Com. Cas. 26.

(*l*) *Rogers* v. *Macarthey*, Park Ins. 39; *Parry* v. *Great Ship Co.*, 4 B. & S. 556; 33 L.J. Q.B. 41; *Mildred* v. *Massons*, 8 App.Cas. 874; 53 L.J. Q.B. 33. As to when the contract is deemed to be concluded, see 6 Edw. 7, c. 41, s. 21, *post*, p. 1124.

(*m*) 6 Edw. 7, c. 41, s. 89.

(*n*) 6 Edw. 7, c. 41.

(*o*) *Ib.* s. 1.

(*p*) See *Apollinaris Co.* v. *Nord Deutsche Ins. Co.*, (1904) 1 K.B. 252; 73 L.J. K.B. 62.

(*q*) See *Hyderabad (Deccan) Co.* v. *Willoughby*, (1899) 2 Q.B. 530; 68 L.J. Q.B. 862; *Robinson Gold Mining Co.* v. *Alliance Ins. Co.*, (1904) A.C. 359; 73 L.J. K.B. 898; *Schloss* v. *Stevens*, (1906) 2 K.B. 665; 75 L.J. K.B. 927.

(*r*) 6 Edw. 7, c. 41, s. 2 (1).

policy in the form of a marine policy, the provisions of the Act, in so far as applicable, apply thereto (*s*); but, except as provided by sect. 2, nothing in the Act alters or affects any rule of law applicable to any contract of insurance other than a contract of marine insurance as defined by the Act (*t*).

Subject to the provisions of the Act, every lawful marine adventure may be the subject of a contract of marine insurance. In particular there is a marine adventure where—(a) Any ship goods or other moveables (*u*) are exposed to maritime perils (*x*). Such property is in the Act referred to as "insurable property"; (b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils; (c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils (*y*).

Insurable interest—Definition.—Subject to the provisions of the Marine Insurance Act, 1906 (*z*), every person has an insurable interest who is interested in a marine adventure (*a*); and in particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof (*b*).

The fact of a person being named both shipper and consignee in a bill of lading is *primâ facie* but not conclusive evidence that he has an insurable interest in the goods; but if he is a mere agent without a lien on the goods, or possession of them as a bailee, or liability to account for their loss by the perils insured

(*s*) The stamping of a policy on ship under construction or repair, or on trial, is regulated by the Revenue Act, 1903 (3 Edw. 7, c. 46), s. 8.

(*t*) 6 Edw. 7, c. 41, s. 2 (2).

(*u*) In the Act unless the context or subject-matter otherwise requires,—"moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents; and "policy" means a marine policy (6 Edw. 7, c. 41, s. 90).

(*x*) "Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy (6 Edw. 7, c. 41, s. 3). As to the construction of the words "perils of the seas," etc. in a Lloyd's policy, see Sched. I., rr. 7—12.

(*y*) 6 Edw. 7, c. 41, s. 3.

(*z*) 6 Edw. 7, c. 41.

(*a*) *Ib.*, s. 5 (1). Walton, J., held in *Moran, Galloway & Co.* v. *Uzielli*, (1905) 2 K.B. 555; 74 L.J. K.B. 494, that agents of a foreign ship who advance money for necessaries under sect. 6 of the Admiralty Act, 1840, have an interest in the ship for balance of advances unsatisfied by exercising their lien on freight.

(*b*) *Ib.* s. 5 (2).

against, he has no insurable interest (*c*). Freight, which as interpreted by the Act of 1906 (*d*) includes the profit (*e*) derivable by a shipowner from the employment of his ship to carry his own goods (*f*) or moveables, as well as freight payable by a third party, but does not include passage money, is insurable. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss (*g*). It has been decided, but after the greatest possible difference of opinion, that the purchaser of a "cargo" at so much per cwt. cost and freight, which is to be loaded when a ship which is expected arrives, has no insurable interest (*h*). A defeasible interest is insurable, as also is a contingent interest (*i*); and in particular where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at seller's risk, by reason of the latter's delay in making delivery or otherwise (*k*). The interest which captors have in time of war in the prizes taken by them, or which the Crown has in prizes before condemnation, is defeasible interest(*l*). Therefore, in order to have an insurable interest, it is not necessary to have an absolute vested ownership or property in that which is insured; it is sufficient to have a right in the thing insured, or to have a right or be under a liability arising out of some contract relating to the thing insured of such a nature that the party insuring may have benefit from its preservation, or prejudice from its destruction (*m*).

Insurable interest—Wagering or gaming policies.—Every contract of marine insurance by way of gaming or wagering is void (*n*). A contract of marine insurance is deemed to be a gaming or wagering contract where the assured has not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest;

(*c*) *Seagrave* v. *Union Mar. Ins. Co.*, L.R. 1 Ch. 305; 35 L.J. C.P. 172.

(*d*) 6 Edw. 7, c. 41, s. 90.

(*e*) As to assurance on profits of goods laden on board a vessel being an assurance on goods, see *Smith* v. *Reynolds*, 1 H. & N. 223; 25 L.J. Ex. 337; *De Mattos* v. *North*, L.R. 3 Ex. 185; 37 L.J. Ex. 116; *Allkins* v. *Jupe*, 3 C.P.D. 375; 46 L.J. C.P. 824; *Berridge* v. *Man On Ins. Co.*, 18 Q.B.D. 346; 56 L.J. Q.B. 223.

(*f*) See *McSwinney* v. *Royal Exch. Assur. Co.*, 14 Q.B. 634; 18 L.J. Q.B. 193; *Chope* v. *Reynolds*, 5 C.B. N.S. 642; 28 L.J. C.P. 194.

(*g*) 6 Edw. 7, c. 41, s. 12.

(*h*) *Anderson* v. *Morice*, 1 App.Cas. 713; 46 L.J. C.P. 11; see *Inglis* v. *Stock*, 10 App.Cas. 263; 54 L.J. Q.B. 582; *Colonial Ins. Co.* v. *Adelaide Mar. Ins. Co.*, 12 App.Cas. 128; 56 L.J. N.C. 19; *Ajum Gorlam Hossen & Co.* v. *Union Mar. Ins. Co.*, (1901) A.C. 362; 70 L.J. P.C. 34.

(*i*) *Ib.*, s. 7 (1).

(*k*) *Ib.*, s. 7 (2).

(*l*) *Lucena* v. *Crauford*, 2 B. & P. N.R. 295; *Le Cras* v. *Hughes*, 2 Park. Ins. 568; 3 Dougl. 81 (as to this case see Arnold on Insurance, ss. 301—305); *Irving* v. *Richardson*, 2 B. & Ad. 193; 9 L.J. (O.S.) K.B. 225.

(*m*) See the *dictum* of Lawrence, J., in *Lucena* v. *Crauford*, 2 B. & P.N.R. 302.

(*n*) 6 Edw. 7, c. 41, s. 4 (1).

or where the policy is made "interest or no interest," or "without further proof of interest than the policy itself" (*o*), or "without benefit of salvage to the insurer," or subject to any other like term (*p*). Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer (*q*).

If any person effects a contract of marine insurance without having any *bonâ fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bonâ fide* expectation of acquiring such an interest; or if any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract is to be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it is liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding 100*l*., and in either case to forfeit to the Crown any money he may receive under the contract (*r*). Any broker or other person through whom, and any insurer with whom, any such contract is effected is liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of the Marine Insurance (Gambling Policies) Act, 1909 (*s*). Proceedings are not to be instituted without the consent of the Attorney-General (*t*).

Interest of any nature is insurable (*u*). The following persons have insurable interests: the insurer under a contract of marine insurance in his risk, who may re-insure in respect of it (*x*), but, unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance (*y*); the lender of money on bottomry or *respondentia* in

(*o*) See *Murphy* v. *Bell*, 4 Bing. 567; 6 L.J. (O.S.) C.P. 118.

(*p*) See *Gedge* v. *Royal Exchange Assurance*, (1900) 2 Q.B. 214; 69 L.J. Q.B. 506; *Reddich* v. *Indemnity Mut. Mar. Ins. Co.*, (1895) 2 Q.B. 380; 64 L.J. Q.B. 733.

(*q*) 6 Edw. 7, c. 41, s. 4 (2). The proviso contained in this section gives effect to the opinion of nine of the judges in *Lucena* v. *Crauford*, 2 B. & P.N.R. 302.

(*r*) 9 Edw. 7, c. 12, s. 1 (1).

(*s*) *Ib.*, s. 1 (2).

(*t*) *Ib.*, s. 1 (3).

(*u*) 6 Edw. 7, c. 41, s. 8. For instances see *Wilson* v. *Jones*, L.R. 2 Ex. 139; 36 L.J. Ex. 78; *Inglis* v. *Stock*, 10 App. Cas. 263; 54 L.J. Q.B. 582.

(*x*) 6 Edw. 7, c. 41, s. 9 (1).

(*y*) *Ib.*, s. 9 (2). As to the meaning of the words "in excess of 500*l*." in a re-insurance policy for 1,000*l*., see *South British Fire and Mar. Ins. Co. of New Zealand* v. *Da Costa*, (1906), 1 K.B. 456; 75 L.J. K.B. 276.

respect of the loan (*z*); the master or any member of the crew of a ship in respect of his wages (*a*); in the case of advance freight, the person advancing the freight, in so far as such freight is not repayable in case of loss (*b*); the assured, in the charges of any insurance which he may effect (*c*); a carrier in the goods entrusted to him to carry (*d*); a consignee with a lien on a cargo for advances (*e*). The interest which a purchaser has in specific, as ascertained, chattels bought by him, but which remain in the hands of the vendor, covered by the lien of the latter for the unpaid purchase money is an insurable interest (*f*); so also is the interest which the charterer of a vessel has in the property entrusted to him to be used for hire (*g*); or the interest which an agent may have in the commission to be earned on goods consigned to him for sale, in the event of their safe arrival (*h*).

Insurable interest—When it must attach.—The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected: provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance he was aware of the loss, and the insurer was not (*i*); but where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss (*k*).

If the assured, before the contract of insurance has been completed, has failed to disclose such a material fact as the loss of the subject-matter to the insurer, the latter may avoid the contract (*l*). The fact that at the time when a policy "lost or not lost" is concluded, the subject-matter has arrived in safety, does not prevent the policy attaching, and the premium is not returnable unless, at such time, the insurer knew of the safe arrival (*m*). A person who assigns away his interest in a ship

(*z*) 6 Edw. 7, c. 41, s. 10. These loans are, by usage, specially described in policies; see also s. 26 (4), *post*.

(*a*) *Ib.*, s. 11. Formerly, the crew of a ship could not insure their wages, upon the ground that it would be contrary to public policy (*Webster* v. *Du Tastet*, 7 T.R. 157).

(*b*) *Ib.*, s. 12.

(*c*) *Ib.*, s. 13.

(*d*) *Ebsworth* v. *Alliance Mar. Ins. Co.*, L.R. 8 C.P. 596; 42 L.J. C.P. 300. See further, s. 14 (2), *infra*.

(*e*) *Crowley* v. *Cohen*, 6 B. & Ad. 478; 1 L.J. K.B. 158.

(*f*) *Sparkes* v. *Marshall*, 3 Sc. 172; 5 L.J. C.P. 286; but see the observations on this case in the H. L. in *Anderson* v. *Morice*, 1 App.Cas. 717; 46 L.J. C.P. 11; *Colonial Ins. Co. of New Zealand* v. *Adelaide Mar. Ins. Co.*, 12 App.Cas. 128; 56 L.J. P.C. 19.

(*g*) *Flint* v. *Le Mesurier*, 2 Park on Ins. 563 (8th ed.).

(*h*) *Hobbs* v. *Hannam*, 3 Campb. 93.

(*i*) 6 Edw. 7, c. 41, s. 6 (1); *Sutherland* v. *Pratt*, 11 M. & W. 296; 12 M. & W. 237; 12 L.J. Ex. 235.

(*k*) 6 Edw. 7, c. 41, s. 6 (2).

(*l*) *Ib.*, s. 18.

(*m*) *Ib.*, s. 84 (3) (*b*); *Bradford* v. *Symondson*, 7 Q.B.D. 456; 50 L.J. Q.B.

or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit (*n*). If the party in whom interest is averred has parted with his interest after the loss, the underwriter cannot on that ground resist his claim on the policy (*o*).

Insurable interest—Quantum of interest.—Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage (*p*). Although the ownership of the mortgagee is distinguished in the register from the absolute ownership (*q*), the mortgagee of a ship may protect his interest therein by a general policy on the ship in the common form; and he may insure to the full value of the ship, but can only recover to the extent of his mortgage debt, unless in effecting the policy he intended to cover not his own interest only, but that of the mortgagor also (*r*).

A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit (*s*).

The amount recoverable under an open policy effected by a mortgagee depends upon his intention in effecting the policy. If he intended it to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under trust as to the surplus, to hold it for the mortgagor; if he intended it only to cover his own interest as mortgagee, and the insurance is for more than the mortgage debt, he can recover to the extent only of his charge (*t*). If, under such circumstances, he has recovered the whole sum in an action on the policy, and retains the surplus, it may be recovered back from him by the underwriters (*u*).

The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third

582; see also Sched. II., Rules for construction of Lloyd's Policy, r. 1.

(*n*) *Powles* v. *Innes*, 11 M. & W. 10; 12 L.J. Ex. 163; see also *Rhind* v. *Wilkinson*, 2 Taunt. 237.

(*o*) *Sparkes* v. *Marshall*, 2 Bing. N.C., 774; 5 L.J. C.P. 286.

(*p*) 6 Edw. 7, c. 41, s. 14 (1); see *Swan, &c. Co.* v. *Maritime Ins. Co.*, (1907) 1 K.B. 116; 76 L.J. K.B. 160.

(*q*) M. S. A., 1894 (57 & 58 Vict. c. 60), s. 34.

(*r*) *Irving* v. *Richardson*, 2 B. & Ad. 193; 9 L.J. (O.S.) K.B. 225.

(*s*) 6 Edw. 7, c. 41, s. 14 (2). See *Smith* v. *Lascelles*, 2 T.R. 187.

(*t*) *Carruthers* v. *Sheddon*, 6 Taunt. 17.

(*u*) *Irving* v. *Richardson*, 2 B. & Ad. 193; 9 L.J. (O.S.) K.B. 225.

person may have agreed, or be liable, to indemnify him in case of loss (*x*).

Insurable interest—Assignment of interest.—Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect; but these provisions do not affect a transmission of interest by operation of law (*y*).

A sea-policy, in its ordinary form, is not an incident of the property insured, so as to follow its transmission from hand to hand during the continuance of the risks; in other words, the purchaser of the property insured does not, by the simple fact of such purchase without more, entitle himself also to the protection of the policy. The contract of insurance is a personal contract on the part of the underwriter to indemnify the party originally insured against the consequences of the perils insured against; it is not a contract to indemnify anyone whatever who may become interested in the subject insured during the continuance of the risks. In order to enable a purchaser of the insured property to derive the substantial benefit of the insurance, there must have been an assignment to him of the policy by the party originally insured, or, at all events, an agreement or understanding to assign it, or to hold it for the benefit of the purchaser. A person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit (*z*). But, wherever he sustains a *bonâ fide* loss by the destruction of the subject-matter of the insurances, he is entitled to be indemnified, and may sue upon the contract, and the Court will not allow underwriters to get rid of their liability merely because the name of the party they have agreed to indemnify is not on the register (*a*). A contract for the sale of goods at a price to cover cost, freight and insurance contained the clause—"Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." Subsequently to the sale the sellers effected a policy

(*x*) 6 Edw. 7, c. 41, s. 14 (3).

(*y*) *Ib.*, s. 15.

(*z*) *Powles* v. *Innis*, (1843), 11 M. & W. 10; 12 L.J. Ex. 163; *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.*, L.R. 10 Q.B. 249; 44 L.J. Q.B. 121. As to when and how a policy of marine insurance is assignable, see sects. 50, 51, *post*, pp. 1114, 1115.

(*a*) *Hutchinson* v. *Wright*, 27 L.J. Ch. 834; 25 Beav. 444.

for a larger amount than 5 per cent. over net invoice, and handed that policy together with shipping documents to the buyers in exchange for the prices. A loss having occurred under the policy, the underwriters paid the buyers upon the whole amount insured. It was held, that the buyers were not, to the extent to which the money received by them from the underwriters exceeded the amount of their loss, trustees for the sellers, but were entitled to retain it to their own use (*b*).

Insurable interest—Assignment of marine policy.—A marine policy is assignable unless it contains terms expressly prohibiting assignment (*c*). It may be assigned either before or after loss (*d*). After a total loss, the only property covered by the policy is the assignor's interest in the damages to which he is entitled under the policy. Although, technically, a claim for a loss under a policy is for liquidated damages (*e*), the proposition that unliquidated damages cannot be assigned has no application to policies of marine insurance, and the effect of an assignment after loss is to transfer this *chose in action* to the assignee (*f*). Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name (*g*), and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected (*h*). It may be assigned by indorsement thereon or in other customary manner (*i*).

When the assignment is made by indorsement this may be put upon the back of the instrument, either at the time of the transfer of the property insured, or at any other time between the making of the policy and the bringing of the action (*j*).

(*b*) *Landauer v. Asser*, (1905) 2 K. B. 184 ; 74 L.J. K.B. 689.

(*c*) For a clause providing that a policy should "become cancelled" if the vessel insured were sold or transferred to new management, see *Pyman* v. *Martin*, 22 T.L.R. 834.

(*d*) 6 Edw. 7, c. 41, s. 50 (1).

(*e*) See *Pellas* v. *Neptune Mar. Ins. Co.*, 5 C.P.D. 34 ; 49 L.J. C.P. 153.

(*f*) *Lloyd* v. *Fleming*, L.R. 7 Q.B. 299, 303 ; *Swan* v. *Mar. Ins. Co.*, (1907) 1 K.B. 116, 123 ; 76 L.J. K.B. 160.

(*g*) *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.*, L. R. 10 Q.B. 249 ; 44 L.J. Q.B. 121.

(*h*) 6 Edw. 7, c. 41, s. 50 (2).

(*i*) *Ib.*, s. 50 (3). The present practice is to endorse the assignment on the policy, but no form of indorsement is given by the Act of 1906. It is possible, however, that the policy may be handed over without indorsement with the other shipping documents, as security for an advance ; see *De Mattos* v. *Saunders*, 7 C.P. 570, and the *dictum* of Channell, J. in *Swan, &c. Co.* v. *Maritime Ins. Co.*, 76 L.J. K.B. 160 ; (1907) 1 K.B. 116.

(*j*) In *Sparkes* v. *Marshall*, 2 Bing. N.C. 761 ; 5 L.J. C.P. 286, the assignment was not made till five months after the loss was known. Tindal, C.J., said : "We are not aware of any principle on which a change in the interest after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss," *i.e.*, where there has been an assignment of the policy.

Unless the policy (as is usually the case in insurances by mutual associations) (*k*) imposes such a condition, the consent of the underwriter is never necessary to the validity of an assignment.

Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative: provided that nothing in this section affects the assignment of a policy after loss (*l*).

Insurable value—Measure of value.—By sect. 16 of the Marine Insurance Act, 1906 (*m*), "subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—(1) In insurance on ship (*n*), the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole: the insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade; (2) In insurance on freight (*o*), whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured (*p*), plus the charges of insurance; (3) In insurance on goods (*q*) or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole; (4) In insurance on any other subject matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

The value of goods will be the values on board at the place of

(*k*) See *Laurie* v. *West Hartlepool Thirds Indemnity Association*, 4 Com. Cas. 322.

(*l*) 6 Edw. 7, c. 41, s. 51.

(*m*) *Ib.*, s. 16.

(*n*) As to what "ship" and "steamship" Lloyd's policy include, see Sched. I. r. 15.

(*o*) "Freight" in a Lloyd's S. G. policy "or other like form of policy where the context does not require otherwise," does not include passage money. See Sched. I., r. 16.

(*p*) See *United States Shipping Co.* v. *Empress Assur. Corp.*, (1907) 1 K.B. 259; 76 L.J. K.B. 225. Affirmed in C.A. on a question of fact, (1908) 1 K.B. 115; 77 L.J. K.B. 120, as to the right of a charterer subletting the ship to recover the whole freight without any deduction for the hire of the ship.

(*q*) "Goods" in a Lloyd's S. G. policy means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board; see Sched. I., r. 17. In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods, *ib.*

loading plus the premium of insurance and the commission. This may include advanced freight, if notified to the underwriter, and the merchant may also include in the valuation the fair estimated profit, though if the policy is undervalued he could not claim it. "The invoice price at the loading port, including premiums of insurance and commission, is for all purposes of either total or average loss the usual standard of calculation resorted to for the purpose of ascertaining the value in the case of an open policy" (*r*).

Disclosure and concealment by the assured—Insurance is uberrimæ fidei.—A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party (*s*).

"Subject to the provisions of" sect. 18 of the Marine Insurance Act, 1906, "the assured must disclose to the insurer, before the contract is concluded, every material circumstance (*t*) which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract (*u*). Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk" (*x*).

"In the absence of inquiry the following circumstances (*t*) need not be disclosed, namely:—(a) Any circumstance which diminishes the risk; (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) Any circumstance as to which information is waived by the insurer; (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty (*y*). Whether any particular circumstance (*t*), which is not disclosed, be material or not is, in each case, a question of fact" (*z*).

There are certain persons employed by shipowners and

(*r*) Per Lord Ellenborough in *Usher* v. *Noble*, 12 East, 646.

(*s*) 6 Edw. 7, c. 41, s. 17.

(*t*) The term "circumstances" includes any communication made to, or information received by, the assured. *Ib.*, s. 18 (5).

(*u*) 6 Edw. 7 c. 41, s. 18 (1).

(*x*) *Ib.*, s. 18 (2).

(*y*) 6 Edw. 7, c. 41, s. 18 (3). See *Schoolbred* v. *Nutt*, Park, 493; *Beckwith* v. *Sidebotham*, 1 Camp. 116; *Gandy* v. *Adelaide Mar. Ins. Co.*, 40 L.J. Q.B. 239; L.R. 6 Q.B. 746; but see *Gladstone* v. *King*, 1 M. & S. 35; *Foley* v. *Tabor*, 2 F. & F. 663; *Weir* v. *Aberdeen*, 2 B. & A. 320; *Haywood* v. *Rodgers*, 4 East, 590.

(*z*) 6 Edw 7, c. 41, s. 18 (4).

owners of cargo, such as masters and trading agents, whose duty it is to keep their employers informed of all matters affecting the property which it is sought to insure. If one of these agents has withheld information of a material fact from his principal, which he might in the ordinary course of things have communicated to the latter at the time when the insurance is effected, the contract can be avoided by the underwriter on account of the non-disclosure of this fact, which if the agent had done his duty the principal would have been able to disclose. In such a case it may be said that the knowledge of the agent is the knowledge of the principal (*a*).

The law requires that a full disclosure shall be made of all matters affecting the risk, as otherwise the assured would be entering into the contract with one set of facts before him, and the insurer would be contemplating a different state of facts, the result being that the minds of the parties would not be *ad idem*, and there would be no true agreement. Thus the existence of the highest good faith between the underwriter and the assured has always been regarded as of vital importance to the contract of marine insurance (*b*). The same principle applies to re-insurances (*c*). If before the contract is made any circumstances are known to exist which would affect the nature of the risk, and the amount of the premium to be paid, they ought to be disclosed (*d*). Facts of this nature are called material facts, and any party to the contract who omits to disclose material facts to the other party is guilty of concealment. Whether such suppression of the truth arises from fraud (that is, from a wilful intention to deceive for the party's own benefit), or merely from mistake, negligence or accident, the consequences will be the same (*e*). The ground, in short, on which the policy is avoided is that the party has been, in fact, deceived, not that the other party has intended to deceive him. If fraud is present in either form, whether of misrepresentation or concealment, it avoids the policy, although the subject misrepresented or concealed is not a material fact. Generally speaking, as the facts lie most within the peculiar knowledge of the assured, it is the underwriter who avails himself of the defence

(*a*) *Blackburn, Low & Co.* v. *Vigors*, 12 App.Cas. 540, 542 ; 57 L.J. Q.B. 114.

(*b*) *Ionides* v. *Pacific Fire Mar. Ins. Co.*, 41 L.J. Q.B. 190 ; L.R. 7 Q.B. 517.

(*c*) *China Traders Ins. Co.* v. *Royal Exchange Assurance Corporation* (1898), 2 Q.B. 193 ; 67 L.J. Q.B. 736.

(*d*) See *Lynch* v. *Hamilton*, 3 Taunt. 37 ; *Lynch* v. *Dunsford*, 14 East, 494 ; *Seaman* v. *Fonereau*, 2 Str. 1183.

(*e*) *Carter* v. *Boehm*, 3 Burr. 1909 ; *Ratcliffe* v. *Shoolbred*, 1 Park Ins. 413 ; *Ionides* v. *Pender*, 43 L.J. Q.B. 227 ; L.R. 9 Q.B. 537 ; *Shirley* v. *Wilkinson*, 1 Dougl. 306 ; *Rivaz* v. *Gerussi*, 6 Q.B.D. 222 ; 50 L.J. Q.B. 176.

of concealment; yet he, as well as the assured, is bound to disclose all circumstances peculiarly within his own knowledge in any degree affecting the risk. Thus, if the underwriter, at the time of subscribing the policy, knew that the ship had arrived safely, the contract will be void as to him, and an action will lie against him to recover back the premium (*f*). All information with regard to material facts which has been received must be disclosed, even if there are good grounds for doubting the correctness of the information. It is no defence to say, that the source of the information was unreliable, nor will the assured be protected if the information turns out to be untrue. His duty is to disclose the facts and their sources and to leave the underwriter to form his own opinion as to the correctness of the report and its effect on the proposed contract. Sir James Mansfield, C.J., observed (*g*):—"I cannot distinguish this from the case of *Seaman* v. *Fonereau*, where a letter received, stated that the vessel insured had been seen in the night leaky, and had disappeared the next day, and though that rumour was false, inasmuch as the ship kept her course, and was afterwards captured, it was held that, for want of that disclosure, the underwriters were not liable."

A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material, though if a particular fact be actually known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that that fact was not communicated; but, if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the insured to show that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated (*h*). In the case of a time policy, if the insured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance will be void on the ground of the concealment of a material circumstance(*i*).

(*f*) Per Lord Mansfield in *Carter* v. *Boehm*, 1 W. Bl. 594; 3 Burr. 1909; see also 3 Benecke System des Assecuranz c. x., pp. 90, 91.

(*g*) *Lynch* v. *Hamilton*, 3 Taunt. 45, and see *Seaman* v. *Fonereau*, 2 Str. 1183; *Morrison* v. *Universal Marine Ins. Co.*, 42 L.J. Ex. 115; L.R. 8 Ex. 197; *Willes* v. *Glover*, 1 B. & P. N.R. 14; *De Costa* v. *Scandret*, 2 P. Wms. 169.

(*h*) *Bates* v. *Hewitt*, L.R. 2 Q.B. 595; 36 L.J. Q.B. 282.

(*i*) Parke, B., *Gibson* v. *Small*, 4 H. L.C. 408.

If the insured has received a doubtful account of the loss of his ship such as "that a ship similar to his has been captured," and neglects to disclose the intelligence to the underwriter, the policy will be void (*k*); and so it will, if the assured keeps back any fact which, if disclosed, would in all probability have caused the underwriter to charge a higher premium (*l*); such as that the captain's judgment in the navigation of the vessel has been restricted by some unusual private instructions (*m*), or that the ship is a missing ship out of her time (*n*), or that she had encountered tempestuous weather, and that another ship, that sailed long before her, had arrived (*o*), or that she had taken the ground or struck on a rock, at an antecedent period, and had not since been surveyed or repaired (*p*), or that she had been met at sea in a leaky state (*q*), or had missed joining convoy and been driven out to sea (*r*), or that hostile privateers had been seen in pursuit of her (*s*), or that she was intended to be employed in a foreign smuggling transaction, or to carry simulated papers. But the insured, or the party effecting the policy, is not bound to disclose "loose rumours gathered together no one knows how" (*t*), nor matters which lie as much within the knowledge of the underwriter as of the party effecting the insurance, nor such things as it is the business of the underwriter to know or find out for himself; such as the ordinary risks attendant upon particular adventures, the usages of trade, the dangers of particular seas and rivers, the probability of hostilities between different foreign states; nor the build, age, history, or capabilities of the ship, although, if questions are put to him upon any of these points, he is bound to answer to the best of his information and belief, and, if he knowingly states that which is false, he is guilty of a fraudulent misrepresentation which avoids the policy (*u*). The insured is not bound to disclose to the underwriter the time of the ship's sailing, or to say whether she has sailed or not, unless the ship is a missing ship. "If the underwriter wants to know he ought to inquire" (*x*). If

(*k*) *Da Costa* v. *Scandret*, 2 P. Wms. 169.

(*l*) *Willes* v. *Glover*, 1 Bos. & P.N.R. 16.

(*m*) *Middlewood* v. *Blakes*, 7 T.R. 162.

(*n*) *M'Andrew* v. *Bell*, 1 Esp. 373.

(*o*) *Kirby* v. *Smith*, 1 B. & Ald. 672; *Elton* v. *Larkins*, 8 Bing. 198; *Bridges* v. *Hunter*, 1 M. & S. 20.

(*p*) *Gladstone* v. *King*, 1 M. & S. 35; *Russell* v. *Thornton*, 6 H. & N. 140; 30 L.J. Ex. 69; *Holland* v. *Russell*, 4 B. & S. 14; 32 L.J. Q.B. 297.

(*q*) *Lynch* v. *Hamilton*, 3 Taunt. 37; *Lynch* v. *Dunsford*, 14 East, 494.

(*r*) *Sawtell* v. *Loudon*, 5 Taunt. 359.

(*s*) *Beckwaite* v. *Nalgrove*, cited 3 Taunt. 41.

(*t*) *Durrell* v. *Bederley*, Holt, N.P. 285.

(*u*) *Carter* v. *Boehm*, 3 Burr. 1915; *Haywood* v. *Rodgers*, 4 East, 597; *Freeland* v. *Glover*, 7 East, 464; *Harrower* v. *Hutchinson*, L.R. 5 Q.B. 584; 39 L.J. Q.B. 229.

(*x*) *Fort* v. *Lee*, 3 Taunt. 381.

the assured satisfies the requirements of the contract by acting honestly in his disclosures and showing an endeavour to treat the underwriter fairly, he will not be held responsible for not explicitly disclosing a fact which afterwards turns out to be material, if the information which he has given discloses sufficient to warn the underwriter that such a fact existed. If the disclosure is one that should have put a careful man of business upon inquiry, the requirements of the contract will have been fulfilled. The fact that no such inquiry was made by the other party makes no difference, for he is presumed to have waived the need for specific information on the point in question. Lord Mansfield said (*y*): "The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waves being informed of." Mathew, J., briefly stated the rule thus (*z*):—"It is a well-settled principle of insurance law that underwriters are not entitled to be told what they waive all inquiry about. In this particular case they were told that there was a charter, and if they had wanted to learn the contents of that charter they had only to inquire." In the important judgment on this subject delivered by Lord Mansfield, his lordship said (*a*):—"There are many matters as to which the insured may be innocently silent; he need not mention what the underwriter knows—*Scientia utrinque par pares contrahentes facit*. An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waves being informed of. The underwriter needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance—the underwriter is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, &c. If an underwriter insures private ships of war, by sea and on

(*y*) *Carter* v. *Boehm*, 3 Burr. 1910.

(*z*) *Asfar & Co.* v. *Blundell*, (1895) 2 Q.B. 202; 64 L.J. Q.B. 573; and see S.C. (1896), 1 Q.B. 123; 65 L.J. K.B. 138. But cp. *Bates* v. *Hewitt*, L.R. 2 Q.B. 595; 36 L.J. Q.B. 282.

(*a*) *Carter* v. *Boehm*, 3 Burr. 1910.

shore, from ports to ports, and places to places, anywhere—he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waves the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two; or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation. Men argue differently, from natural phenomena, and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other. The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect."

Disclosure and concealment by agent effecting insurance.—Subject to the provisions of sect. 18 as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—(a) Every material circumstance (*b*) which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and (b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent (*c*).

If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship or cargo, purposely omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance by means of that agent, the insurance is void on the ground of concealment (*d*). But where the insurance is effected through another agent, and both he and the principal are ignorant of the material fact in question, the policy is not void, although a

(*b*) As to the meaning of "circumstance" see 6 Edw. 7, c. 41, s. 18 (5), *supra*.

(*c*) 6 Edw. 7 c. 41, s. 19. See also *Empress Assur. Corp.* v. *Bowring*, 11 Com. Cas. 107.

(*d*) *Fitzherbert* v. *Mather*, 1 T.R. 12, 16; *Gladstone* v. *King*, 1 M. & S. 35. These decisions have been dissented from by Mr. Justice Story, *Ruggles* v. *General Interest Insurance Co.* (4 Mason's Rep. 74), but have been upheld in *Proudfoot* v. *Montefiore*, L.R. 2 Q.B. 511; 36 L.J. Q.B. 225. See, however, *Blackburn, Low & Co.* v. *Vigors*, 12 App. Cas. 531; 57 L.J. Q.B. 114.

former agent who had endeavoured to effect the policy knew of the fact and concealed it from his principal (*e*); but the two transactions must be separate (*f*). The agent ought to communicate with the principal by electric telegraph, where that means of communication is in general use (*g*). Where the agent innocently omits to communicate with his principal, the policy is not void (*h*). But, when the slip has been initialed, the insured need not communicate to the underwriters facts which come to his knowledge afterwards, but before the policy is completed (*i*). Although it is fraud in an insured to insure a vessel which he knows to be lost, yet if an insurance has been effected before the loss but without his authority, he may ratify such insurance although he knows of the loss (*k*).

Representations pending negotiation of contract. — Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract (*l*). A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (*m*). A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief (*n*). A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer (*o*). A representation as to a matter of expectation or belief is true if it be made in good faith (*p*). A representation may be withdrawn or corrected before the contract is concluded (*q*). Whether a particular representation be material or not is, in each case, a question of fact (*r*).

The concealment or misrepresentation by the assured, whether wilful or not, of any facts which were calculated to influence, and did in fact influence the underwriter in taking the risk or

(*e*) *Blackburn, Low & Co.* v. *Vigors*, *ante*, p. 1121.

(*f*) *Blackburn, Low & Co.* v. *Haslam*, 21 Q.B.D. 144 ; 57 L.J. Q.B. 479.

(*g*) *Proudfoot* v. *Montefiore*, *supra*.

(*h*) *Stribley* v. *Imperial Marine Insurance Co.*, 1 Q.B.D. 507 ; 45 L.J.Q.B. 396. See, however, remarks of Lord Watson in *Blackburn, Low & Co.* v. *Vigors*, 12 App.Cas. 531, at p. 540.

(*i*) *Cory* v. *Patton*, L.R. 7 Q.B. 304 ; 41 L.J. Q.B. 195, n. ; *Lishman* v. *Northern Maritime Insurance Co.*, L.R. 8 C.P. 216 ; 42 L.J. C.P. 108.

(*k*) *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757 ; *Keighley Maxsted & Co.* v. *Durant*, (1901) A.C. 240 ; 70 L.J. K.B. 662 ; *Boston Fruit Co.* v. *British & For. Mar. Ins. Co.* (1906), A.C. 336 ; 75 L.J. K.B. 637.

(*l*) 6 Edw. 7, c. 41, s. 20 (1).

(*m*) *Ib.*, s. 20 (2).

(*n*) *Ib.*, s. 20 (3).

(*o*) *Ib.*, s. 20 (4).

(*p*) *Ib.*, s. 20 (5).

(*q*) *Ib.*, s. 20 (6).

(*r*) *Ib.*, s. 20 (7).

fixing the rate of premium will give the latter the right to avoid the policy. Between misrepresentation and concealment there is this difference: that whereas on concealment the undisclosed fact would tend to show the risk to be greater than it would otherwise seem to be in cases of misrepresentation the fact so stated would make the risk appear smaller than it was in reality. As in concealment, in order to affect the policy the representation must relate to a material fact. When the underwriter discovers that the representation is untrue, he is entitled to avoid the contract. "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand" (*s*). Misrepresentations charged against the assured must, to avail the underwriter, relate to a fact or facts material to the risk. There is one class of representations which is always material, that is, the class which consists of answers to questions put by the underwriter.

Fraudulent misrepresentation.—Oral evidence of representations made at the time the policy was effected is inadmissible to control the liability upon the policy, unless such representations are fraudulent representations (*t*). All material representations which are false to the knowledge of the party making them are fraudulent, and may be proved by oral testimony in order to deprive the plaintiff of his right of action upon the contract (*u*). A misrepresentation will be of a material fact, and will avoid the policy, if it be an assertion in time of war that the ship will sail with convoy or in company with other vessels, and carry a certain force (*x*). If the representation is true in substance, the policy will not be avoided, although it may be incorrect in minor details; nor will the policy be avoided if it is merely a representation of the parties' own opinion and belief; or if it is immaterial and does not affect the risk; or if the insurer has not been deceived; or if it is made concerning facts which lie as much within the knowledge of the insurer as the insured, and the party making the representation believes it to be true at the time it is made (*y*). But if the underwriter has been thrown off his guard and prevented from making those

(*s*) *Derry* v. *Peke*, 14 App.Cas. 359; 58 L.J. Ch. 864; *per* Lord Herschell.

(*t*) *Weston* v. *Emes*, 1 Taunt. 115.

(*u*) *Ante*, pp. 125, 126; *Assicurazioni Generali de Trieste* v. *Empress Assur. Corp., Ltd.*, 76 L.J. K.B. 980; (1907) 2 K.B. 814; *Macdowall* v. *Fraser*, 1 Doug. 260.

(*x*) *Edwards* v. *Footner*, 1 Campb. 530.

(*y*) *Driscol* v. *Passmore*, 1 Bos. & P. 200; *Hubbard* v. *Glover*, 3 Campb. 313; *Bowden* v. *Vaughan*, 10 East, 415; *Flinn* v. *Headlam*, 9 B. & C. 693; 7 L.J. (O.S.) K.B. 307.

inquiries which he would otherwise have made, the insured will be precluded from suing upon the policy, although the means of information may be within reach of the underwriter (*z*). A fraudulent misrepresentation, made to the first underwriter on a material point affecting the risk, is considered as a misrepresentation to every underwriter who underwrites the policy after him; because the obtaining of the signature of the first underwriter weighs with the others, and induces a misplaced confidence; but a misrepresentation to an intermediate underwriter has been held not to extend to the others (*a*).

When contract is deemed to be concluded.—A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped (*b*).

If a material fact comes to the knowledge of the owner soon after he has given instructions to effect an insurance, he must at once communicate with the broker, so that the new fact may be laid before the underwriter (*c*); but if notwithstanding all his exertions the contract has been already made, it will stand good; and in such cases the contract is deemed to be made when the slip has been initialed or signed, and the non-disclosure of facts which come to light after the slip is initialled will not vitiate the policy (*d*).

The policy—Contract must be embodied in policy.—By sect. 22 of the Act of 1906 (1) "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards" (*e*). By sect. 91 (1) nothing in the Act, or in any repeal effected thereby, is to affect the provisions of the Stamp Act, 1891 (*f*), or any enactment for the time being in force relating to the revenue (*g*). By sect. 93 (1) of the Act of 1891 (*h*), a contract

(*z*) *Mackintosh* v. *Marshall*, 11 M. & W. 116; 12 L.J. Ex. 337.

(*a*) *Barber* v. *Fletcher*, 1 Doug. 306; *Sibbald* v. *Hill*, 2 Dow., 266; *Forrester* v. *Pigou*, 1 M. & S. 9; *Bell* v. *Carstairs*, 2 Campb. 543.

(*b*) 6 Edw. 7, c. 41, s. 21.

(*c*) *Fitzherbert* v. *Mather*, 1 T.R. 12; *Proudfoot* v. *Montefiore*, 36 L.J. Q.B. 225; L.R. 2 Q.B. 511.

(*d*) *Cory* v. *Patton*, 41 L.J. Q.B. 195, n.; L.R. 7 Q.B. 304; 43 L.J. Q.B. 181; L.R. 9 Q.B. 577; *Lishmann* v. *Northern Maritime Ins. Co.*, 44 L.J. C.P. 185; L.R. 10 C.P. 179; *Ionides* v. *Pacific Fire & Mar. Ins. Co.*, 41 L.J. Q.B. 190; L.R. 7 Q.B. 517; *Hagedorn* v. *Oliverson*, 2 M. & S. 485; but cp. *Morrison* v. *The Universal Mar. Ins. Co.*, 42 L.J. Ex. 115; L.R. 8 Ex. 197.

(*e*) 6 Edw. 7, c. 41, s. 22.

(*f*) 54 & 55 Vict. c. 39.

(*g*) 6 Edw. 7, c. 41, s. 91.

(*h*) 54 & 55 Vict. c. 39, s. 93 (1).

for sea insurance (other than such insurance as is referred to in sect. 55 of the Merchant Shipping Act, 1862 (*i*)), is not valid unless expressed in a policy of sea insurance (*k*). No policy of sea insurance made for time is to be made for any time exceeding twelve months (*l*); and a policy of sea insurance is not valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months (*m*). A policy of insurance on a ship under construction or repair or on trial is sufficiently stamped for the purposes of the Stamp Acts, if stamped as a policy of sea insurance made for a voyage; and though made for a time exceeding twelve months, is not to be deemed to be a policy of sea insurance made for time (*n*); a policy of insurance which includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced (*o*), must be stamped in accordance with Schedule I. of the Act of 1891 (*p*), before it is signed or underwritten (*q*), but for the purpose of production in evidence a policy of sea insurance may be stamped after execution upon payment of a penalty of 10*l.* (*r*); where there is a duly stamped policy, reference may be made to the slip or covering note in any legal proceeding (*s*); and also for the purpose of showing when a proposal for a contract of marine insurance was accepted, although it be unstamped (*t*).

The policy—What it must specify.—Sect. 23 of the Act of 1906 (*u*), provides that "A marine policy must specify:—(1) The name of the assured, or of some person who effects the insurance on his behalf; (2) The subject-matter insured and the risk insured against (*x*); (3) The voyage, or period of time,

(*i*) 25 & 26 Vict. c. 63, s. 55 (repealed); see now sect. 506 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(*k*) See 54 & 55 Vict. c. 39, s. 92, as to meaning of "policy of sea insurance."

(*l*) 54 & 55 Vict. c. 39, s. 93 (2). See also 6 Edw. 7, c. 41, s. 25 (2).

(*m*) *Ib.*, s. 93 (3).

(*n*) 3 Edw. 7, c. 46, s. 8 (Revenue Act, 1903).

(*o*) 54 & 55 Vict. c. 39, s. 91. As to alterations which may be made in a policy after it has been underwritten, see sect. 96; and as to stamp duty chargeable on policies containing continuation clauses, see 1 Edw. 7, c. 7, s. 11 (Finance Act, 1901), *post*, p. 1381.

(*p*) *Ib.*, s. 1. See *Genforsikrings Aktisselskabet* v. *Da Costa*, (1911) 1 K.B. 137; 80 L.J. K.B. 236. The stamp duty on a voyage policy for every 100*l.* or fractional part of 100*l.* is 1*d.*; see Finance Act, 1908 (8 Edw. 7, c. 16), s. 5.

(*q*) *Ib.*, s. 95 (1).

(*r*) *Ib.*, s. 95 (2). Penalties are also imposed for assuring without having policy duly stamped, see sect. 97.

(*s*) 6 Edw. 7, c. 41, s. 89.

(*t*) *Ib.*, s. 21; *Ionides* v. *Pacific Ins. Co.*, L.R. 7 Q.B. 517; 41 L.J. Q.B. 190; *Thompson* v. *Adams*, 23 Q.B.D. 361; *Bhugwandass* v. *Netherlands India Co.*, 14 App.Cas. 83.

(*u*) 6 Edw. 7, c. 41, s. 23. As to what must be specified in an agreement to reinsure, see *Home Mar. Ins. Co.* v. *Smith*, (1898) 2 Q.B. 351; 67 L.J. Q.B. 777; and in a continuation clause for the purposes of the Stamp Act, 1891, s. 93 (3). See *Royal Exch. Assur. Corp.* v. *Sjoforsakrings Aktie-Bolaget Vega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739.

(*x*) As to the mode in which the subject-matter is to be designated, see s. 26, *post*.

or both, as the case may be, covered by the insurance; (4) The sum or sums insured; (5) The name or names of the insurers."

The policy—Signature of insurer.—A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal (*y*). The only persons who sign their names at the foot of the policies, that is, underwrite them, are the insurers, who are hence called the underwriters or subscribers. The signatures of the underwriters follow after the memorandum. In policies of insurance effected with private underwriters, the first underwriter to whom the policy is tendered subscribes the policy with his name, and the sum he intends to insure, which is generally written in words at length. The next underwriter to whom the policy is tendered then, in like manner, writes under the first subscription his name and the sum he intends to insure; and the rest follow in order until the aggregate of the separate sums written opposite to the name of each underwriter amounts to the sum which the party effecting the policy desires to protect by the insurance (*z*).

Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured (*a*). Therefore, each underwriter is, generally speaking, only liable, in case of total loss, to pay the assured to the extent of the sum he has thus written against his own name; or, in case of partial loss, some proportion or aliquot part of that sum (*b*).

The policy—Designation of subject-matter.—Sect. 26 of the Marine Insurance Act of 1906 (*c*) provides that:—"(1) The subject-matter insured must be designated in a marine policy with reasonable certainty; (2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy; (3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered (*d*); (4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured."

The subject-matter of the insurance must be so described that the things insured may be ascertained and identified and that it may be known to what articles the risk attaches, whether

(*y*) 6 Edw. 7, c. 41, s. 24 (1).
(*z*) See also Stamp Act, 1891, s. 93 (3), referred to *ante*, p. 1124.
(*a*) 6 Edw. 7, c. 41, s. 24 (2).
(*b*) See *Tyser* v. *Shipowner's Syndicate*, (1896) 1 Q.B. 135; 65 L.J. Q.B. 238.
(*c*) 6 Edw. 7, c. 41, s. 26.
(*d*) See *Allison* v. *Bristol Mar. Ins. Co.*, 1 App.Cas. 209.

it be to the ship, the freight, or the whole or part of the cargo(*e*). The policy need not be expressed to be a re-insurance, where such is the fact, but if such a fact were intentionally concealed and were material, the policy might be affected by the non-disclosure (*f*). Wherever the peculiar nature of the interest alters the risk such interest is the subject-matter of the insurance and should be stated in the policy (*g*).

If a person insures a cargo to be laden on board on the Brazilian coast, the policy will not cover and protect a cargo taken on board on the coast of Africa (*h*). If the ship only is insured, the policy will not, of course, cover and protect the merchandise laden on board (*i*); and if the insurance is merely on "the ship's tackle and furniture," it will not cover stores, harpoons, lines, and fishing-tackle, put on board to be used in the whale fishery (*k*), unless the vessel is described in the policy as a whaling vessel, and the insurance is declared to be made on a whaling adventure. The provisions of the crew are covered by a policy on "the furniture of the ship" (*l*). But, if a ship is disabled and puts into port to refit, or is detained by an embargo, the extraordinary wages and provisions for the crew during the detention cannot be charged against the underwriter of a policy on the ship, cargo, and furniture (*m*). A mere mistake in the name of the ship will not avoid the policy and discharge the underwriters, if the identity of the vessel with the vessel named in the policy is clearly established, and the underwriters have in nowise been prejudiced by the mistake(*n*). Whatever is considered, by the custom and usage of trade, to be comprehended under the term "goods, specie, and effects," will be covered by a policy upon such property. Money expended by the captain in the course of the voyage for the use of the ship, and for which *respondentia* interest was charged, is in some trades included by custom under these words (*o*). A general policy of insurance on goods laden on board a particular vessel extends to all goods which form part of the cargo, and will cover

(*e*) *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L.J. K.B. 158.

(*f*) See 6 Edw. 7, c. 41, ss. 18, 19, as to disclosure by an insurer or agent; *Mackenzie* v. *Whitworth*, 1 Ex. D. 36; 45 L.J. Ex. 233.

(*g*) *Mackenzie* v. *Whitworth*, *supra*.

(*h*) *Robertson* v. *French*, 4 East, 130.

(*i*) Molloy, b. 2, c. 7, s. 8.

(*k*) *Hoskins* v. *Pickersgill*, Park, Ins. 126.

(*l*) *Brough* v. *Whitmore*, 4 T.R. 206. As to meaning of "hull and machinery" in policy, see *Roddick* v. *Indemnity Mut. Mar. Ins. Soc.*, 1895 2 Q.B. 380; 64 L.J. Q.B. 733; as to "dunnage mats" in grain ships, see *Hoggarth* v. *Walker*, (1900) 2 Q.B. 283; 69 L.J. Q.B. 634.

(*m*) *Robertson* v. *Ewer*, 1 T.R. 132; *De Vaux* v. *Salvador*, 4 Ad. & E. 420; 5 L.J. K.B. 134; *Field S.S. Co.* v. *Burr*, (1899) 1 Q. B. 579; 68 L.J. Q.B. 426.

(*n*) *Le Mesurier* v. *Vaughan*, 6 East, 385; *Ionides* v. *Pacific Ins. Co.*, L. R. 7 Q.B. 517; 41 L.J. Q.B. 190.

(*o*) *Glover* v. *Black*, 1 Park, Ins. 10; see *Mackenzie* v. *Whitworth*, 45 L.J. Ex. 233; 1 Ex. D. 36.

and protect goods laden on deck, provided it is customary for goods to be so laden, and the risk of the insurer is not thereby increased beyond what must be presumed to have been contemplated at the time the insurance was effected (*p*). If the insurance is upon all goods that may be laden on board a particular vessel on an outward and homeward voyage, the policy will attach on any goods that may be carried out or brought back on board such vessel (*q*). If the insurance is on goods from "any port or ports in the East Indies" to "any port or ports" in this country, the insurance will cover any goods that may be shipped from the East Indies for England, whatever vessel may be selected for their conveyance (*r*). And, if an insurance is effected on goods on board "any ship or ships" that may sail during a particular period from one port to another, or from one part of the world to another, and goods of the assured are laden on board different vessels, some of which arrive safe and others are lost, the insured will have a right to apply the policy to the ships that are lost, and the underwriters cannot discharge themselves from liability by showing that ships answering the description in the policy have arrived safe (*s*). The words "warranted no iron" have been held to include "steel," because steel is wrought iron, and the object with which the words are inserted must be regarded (*t*). In construing an open policy in order to ascertain what risks are covered by the policy, the voyage insured must first be ascertained, and if the goods lost were never upon that voyage, the policy never attached (*u*).

Oral evidence is admissible to explain the customary meaning of terms used in a particular trade, but not to add a new term to the contract, or to show that more things were intended to be insured than are ordinarily or customarily included under the express terms of the contract (*ante*, p. 69).

General insurance on goods and merchandise—Deck cargoes.—"The term 'goods' (*x*) means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board" (*y*).

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the

(*p*) *Da Costa* v. *Edmunds*, 4 Campb. 142.

(*q*) *Grant* v. *Paxton*, 1 Taunt. 463.

(*r*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274.

(*s*) *Kewley* v. *Ryan*, 2 H.Bl. 343.

(*t*) *Hart* v. *Standard Mar. Ins. Co.*, 22 Q.B.D. 499; 58 L.J. Q.B. 284.

(*u*) *Simon* v. *Sedgwick*, (1893) 1 Q.B. 303; 62 L.J. Q.B. 163.

(*x*) See *Crowley* v. *Cohen*, 1 L.J. K.B. 158; 3 B. & Ad. 478; *Wilkinson* v. *Hyde*, 27 L.J. C.P. 116; *Brown* v. *Stapleton*, 4 Bing. 122; *Stock* v. *Inglis*, 53 L.J. Q.B. 356; 12 Q.B.D. 564; *Glover* v. *Black*, 3 Burr. 1394.

(*y*) 6 Edw. 7, c. 41; sched. 1, r. 17.

general denomination of goods (*yy*). In practice goods carried on deck are often expressly covered by what is known as an "in and over clause." Thus it is unnecessary, in most cases, for the merchant who wishes to insure his merchandise against sea risks to do more than give a general description of it as "goods" or "merchandise." Under such a policy, in case of loss, the merchant would, in general, recover for any goods of his which proved to be on board at the time of the loss. The term "goods" without any marginal addition, will cover substituted cargoes where the policy is "out and home," or when it insures voyages to successive ports, or is a time policy (*z*).

Deck cargoes.—Goods carried on deck are not protected against loss by jettison unless it is the custom so to carry them. If, however, the cargo is usually loaded in that way, then the underwriter assumes the liability for the loss of it, when occasioned by any of the perils insured against (*a*), and it seems that the rule against deck cargoes does not extend to inland river voyages at all (*b*).

If it is the known custom of the captains and masters in any particular trade to carry deck cargoes, and such a cargo is insured and washed overboard, the underwriters will be bound to make good the loss; but, as goods thus carried are exposed to greater hazard than goods carried in the ordinary way, they will be discharged from liability, unless the custom is clearly established, or the underwriters have express notice of the increased risk (*c*). But as a rule deck cargoes jettisoned are not entitled to general average contribution (*d*). By the Merchant Shipping Act, 1894 (*e*), deck cargoes are prohibited at certain periods of the year. A policy of insurance, therefore, entered into for the express purpose of protecting what the law has prohibited will be invalid (*f*); but the statute does not make the voyage absolutely illegal so as to affect innocent persons. It must be shown that the policy was effected with full knowledge by the insured that the goods were to be placed on deck, and that the vessel was to sail during the prohibited period; and the knowledge of the ship-master is not the knowledge of the ship-owner (*g*). A custom that underwriters are not liable under

(*yy*) 6 Edw. 7, c 41, sched. I. r. 17.

(*z*) *Hill* v. *Patten*, 8 East, 373; *Tobin* v. *Harford*, 34 L.J. C.P. 37.

(*a*) *Da Costa* v. *Edmunds*, 4 Campb. 142; *Gould* v. *Oliver*, 4 Bing. N.C. 134; *Milward* v. *Hibbert*, 3 Q.B. 120; 11 L.J. Q.B. 137.

(*b*) *Apollinaris Co.* v. *Nord Deutsche Ins. Co.*, (1904) 1 K.B. 252.

(*c*) *Milward* v. *Hibbert*, 3 Q.B. 120; 11 L.J. Q.B. 137.

(*d*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643; see *ante*, p. 1010.

(*e*) 57 & 58 Vict. c. 60, s. 451.

(*f*) *Cunard* v. *Hyde*, 29 L.J. Q.B. 6; 2 E. & E. 1.

(*g*) *Cunard* v. *Hyde*, E. B. & E. 670; 27 L.J. Q.B. 408; *Wilson* v. *Rankin*, 35 L.J. Q.B. 87; L.R. 1 Q.B. 162;

the ordinary form of policy for general average in respect of the jettison of goods stowed on deck is a valid custom and does not contradict the terms of the policy (*h*).

Risks covered by policy—Custom and usage.—Everything done in the usual course of navigation and trade is presumed to have been in contemplation by the parties to every contract of insurance at the time they entered into the engagement (*i*). If the policy is effected on the ship (*k*), tackle, boats, and furniture (*l*), and it is the custom to sling boats over the quarter outside the ship, the underwriter will be responsible for a boat lost by being so slung; for every underwriter is presumed to be acquainted with the practice of the trade he insures, and, "if he does not know, he ought to inform himself" (*m*). If the liberty of "unloading and re-shipping" is expressly given by the policy, that must be taken to mean an unloading and re-shipping according to the usage of the trade; and therefore, if it is the custom to put goods on board a store-ship to await the arrival of a vessel into which they can be re-shipped, and the goods are lost in such store-ship, the underwriters will be responsible (*n*). If it is the custom, for vessels insured "to depart with convoy," to sail from the loading port without convoy to the general place of rendezvous for ships wanting convoy, and a vessel is captured whilst proceeding thither unaccompanied to obtain convoy in the customary mode, the underwriters will be responsible for the loss (*o*). "The term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers and coals and engine stores, if owned by the assured" (*p*).

Intermediate voyages—Custom and usage.—On fishing voyages to the American seas, it is customary for vessels, after the termination of the outward voyage, to be employed in banking or fishing off the coasts of Newfoundland before they return;

Dudgeon v. *Pembroke*, L.R. 9 Q.B. 581; 43 L.J. Q.B. 220.

(*h*) *Miller* v. *Titherington*, 7 H. & N. 954; 31 L.J. Ex. 363.

(*i*) *Pelly* v. *Roy. Ex. Assur. Co.*, 1 Burr. 341.

(*k*) See 6 Edw. 7, c. 41, sched. 1, r. 15; and M. S. A., 1894, s. 742.

(*l*) Furniture includes separation cloths and dunnage mats required to make a ship in the grain trade seaworthy, though they were not in use at the time of the loss: *Hogarth* v. *Walker*, (1900) 2 Q.B. 283.

(*m*) *Blackett* v. *Roy. Ex. Assur. Co.*, 2 Cro. & J. 249: 1 L.J. Ex. 101; *Noble* v. *Kennoway*, 2 Doug. 513.

(*n*) *Tierney* v. *Etherington*, cited 1 Burr. 346.

(*o*) *Gordon* v. *Morley*, 2 Str. 1265; *Warwick* v. *Scott*, 4 Campb. 62.

(*p*) 6 Edw. 7, c. 41, sched. 1, r. 15. See also M. S. A., 1894, s. 742. "Hull" in a policy on "hull and machinery" does not cover coal, engine-room, and deck stores, provisions and cabin stores, port expenses and advances or premiums: *Roddick* v. *Indemnity Mutual Marine Ins. Co.*, (1895), 2 Q.B. 380; 64 L.J. Q.B. 733.

and, if a vessel is insured for the outward and homeward voyage, the insurance will cover the vessel during the intervening period occupied by fishing, if she is not detained longer than is customary and usual (*q*). If it is the custom, when several empty vessels arrive together at the port of lading and cannot all find cargoes, to employ some of them on a short intermediate voyage, and a vessel insured for the outward and homeward voyage is so employed, and then takes on board her return cargo and is lost on the homeward voyage, the liability of the underwriters in respect of the loss will not be discharged; but a usage for the employment of the vessel for an unreasonable space of time will not be sanctioned (*r*). The usages established amongst the underwriters at Lloyd's cannot affect their liability upon the policy, unless it be shown that the insured was cognizant of them, or was in the habit of transacting business at Lloyd's (*s*).

The policy—Voyage and time policies.—"Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a 'voyage policy,' and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time policy.' A contract for both voyage and time may be included in the same policy" (*t*). Subject to the provisions of the Finance Act, 1901 (*u*) (as to continuation clauses) a time policy which is made for any time exceeding twelve months is invalid (*x*). By sect. 11 of the Act of 1901, for the purposes of the section the expression "continuation clause" means an agreement to the following or like effect, namely, that in the event of the ship being at sea, or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance is to be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days (*y*). Notwithstanding anything contained in the Stamp Act, 1891 (*z*) a policy containing a continuation clause as so defined, is not invalid on the ground only that by reason of such a clause it may become available for a period exceeding twelve months (*a*). If the risk

(*q*) *Vallance* v. *Dewar*, 1 Campb. 503.

(*r*) *Ougier* v. *Jennings*, 1 Campb. 505, n. (*a*); *Phillips* v. *Irving*, 7 M. & G. 325; 13 L.J. C.P. 145; *Salvador* v. *Hopkins*, 3 Burr. 1707.

(*s*) *Scott* v. *Irving*, 1 B. & Ad. 605; 9 L.J. (O.S.) K.B. 89; *Gabay* v. *Lloyd*, 3 B. & C. 793; 3 L.J. (O.S.) K.B. 116.

(*t*) 6 Edw. 7, c. 41, s. 25 (1); *Gambles* v. *Ocean Marine Insur. Co.*, 1 Ex. D. 141; 45 L.J. Ex. 366. A policy for voyage and time is chargeable with two duties: 54 & 55 Vict. c. 39, s. 94.

(*u*) 1 Edw. 7, c. 7, s. 11. As to duty chargeable on policies containing continuation clauses see s. 11 (2), and *post*, p. 1381.

(*x*) 6 Edw. 7, c. 41 (2); see also 54 & 55 Vict. c. 39, s. 9 (2) (3). As to the law formerly, see *Royal Exch. Assur. Corp.* v. *Sjoforsakrings Aktiebolaget Vega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739.

(*y*) 1 Edw. 7, c. 7, s. 11 (4).

(*z*) 54 & 55 Vict. c. 39.

(*a*) 1 Edw. 7, c. 7, s. 11 (1).

covered by such a clause attaches, and a new policy is not issued covering the risk, the clause is to be deemed to be a new and separate contract of sea insurance expressed in the policy in which it is contained, but not covered by the stamp thereon (*b*).

The policy—Valued policy.—A policy may be either valued or unvalued (*c*). A valued policy is a policy which specifies the agreed value of the subject-matter insured (*d*). Subject to the provisions of the Act of 1906, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive (*e*) of the insurable value of the subject intended to be insured, whether the loss be total or partial (*f*). Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss (*g*).

The policy—Unvalued policy.—An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified (*h*). Where the value declared is the value of a full cargo, and at the time of the loss, there was not a full cargo on board, the insurers are not liable for the full amount of the declared value, but only for the real loss, the policy in such case being treated as an unvalued or open policy (*i*).

The policy—Floating policy by ship or ships.—Floating policies are very largely used by merchants at the present day, not only to protect particular consignments of goods actually ordered, but in order to cover all such property as the merchant expects to have at risk, to a certain specified amount, within stated limits of space and of time.

"A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration" (*k*).

(*b*) 1 Edw. 7, c. 7, s. 11 (3).

(*c*) 6 Edw. 7, c. 41, s. 27 (1).

(*d*) *Ib.* s. 27 (2); *Wilson* v. *Nelson*, 5 B. & S. 354; 33 L.J. Q.B. 220; *Balmoral S.S. Co.* v. *Marten*, (1902) A.C. 511; 71 L.J. K.B. 819.

(*e*) As to liability of insurer where thing insured has been overvalued see *Lewis* v. *Rucker*, 2 Burr. 1171; *Irving* v. *Manning*, 1 H.L.C. 287; *Barker* v. *Janson*, L.R. 3 C.P. 307; 37 L.J. C.P. 105; or where ship has been undervalued, see *S.S. Balmoral* v. *Marten*, (1902) A.C. 511; 71 L.J. K.B. 857; or where there is some mistake as to thing insured, see *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757; or where some question outside of the contract has arisen, see *Burnand* v. *Rhodocanachi*, 7 App.Cas. 333; 51 L.J. Q.B. 548.

(*f*) 6 Edw. 7, s. 27 (3).

(*g*) *Ib.* s. 27 (4). For definition of constructive total loss, see s. 60, *post*, p. 1185.

(*h*) *Ib.* s. 28. As to the mode of ascertaining the insurable value, see s. 16, *ante*, p. 1115, and as to the measure of indemnity see s. 67, *et seq.*, *post*, p. 1203.

(*i*) *Tobin* v. *Harford*, 17 C.B. N.S. 528; 34 L.J. C.P. 37; the same rule prevails in the case of a valued policy in freight; *Denoon v. Home & Colonial Assur. Co.*, L.R. 7 C.P. 341; 41 L.J. C.P. 162.

(*k*) 6 Edw. 7, c. 41, s. 29 (1).

With regard to the subsequent declaration by the assured of the name of the ship or ships when known to him, the practice generally is for the broker, on ascertaining the fact, to indorse the declaration of the name or names as a memorandum on the policy. As the merchant may be ignorant of the name of the exact port at which the goods may be loaded on board, an insurance on goods "on board ship or ships" will attach on goods loaded at any port within the limits of the voyage insured (*l*); though of course it would not cover a consignment sent from a different part of the world from that mentioned in the policy, or from any place, in short, not comprised within the limits of the risks, upon a fair construction of the terms of the policy (*m*). "The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner" (*n*). The declaration, when made, does not require the assent of the underwriters (*o*); it is generally put upon the policy for convenience, but this is not necessary, nor need it be in writing (*p*). The making of the declaration is not a condition precedent which must be fulfilled by the insured before the liability of the underwriters attaches; yet, in order to be available it must be made and communicated to the underwriters, or some one on their behalf before notice of loss of the subject-matter.

"Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment (*q*). They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith" (*r*). "Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy (*s*) as regards the subject-matter of that declaration" (*t*).

The policy—Form and construction of policy.—A policy may be in the form in the First Schedule to the Marine Insurance Act, 1906 (*u*). Subject to the provisions of that Act, and unless the context of the policy otherwise requires, the terms and ex-

(*l*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274.

(*m*) Arnould on Mar. Ins. (8th ed.), vol. i. s. 188.

(*n*) 6 Edw. 7, c. 41, s. 29 (2).

(*o*) *Ionides* v. *Pacific Ins. Co.*, L.R. 7 Q.B. 517; 41 L.J. Q.B. 190.

(*p*) *Robinson* v. *Touray*, 3 Campb. 158.

(*q*) See *Inglis* v. *Stock*, 10 App.Cas. 263, at p. 269; 54 L.J. Q.B. 582; as to a series of floating policies.

(*r*) 6 Edw. 7, c. 41, s. 29 (3).

(*s*) See *Harman* v. *Kingston*, 3 Campb. 150; *Robinson* v. *Touray*, *ib.*, 158.

(*t*) 6 Edw. 7, c. 41, s. 29 (4).

(*u*) *Ib.*, s. 30 (1).

pressions mentioned in the First Schedule to that Act shall be construed as having the scope and meaning in that schedule assigned to them (*x*).

Although the contract must be expressed in a policy, no particular form need to be adhered to so long as that which is used contains the essential requisites prescribed by the statute. The ordinary voyage policy is known as the Lloyd's Policy (*y*), and as such is sanctioned by statute; there are statutory rules for the meaning of the terms and expressions used therein, except where the context otherwise requires (*z*). Any clause may be added which is needed for the requirements of the particular case, such as the running down clause; rules as to General Average, such as the York Antwerp Rules; or warranties (*zz*). A policy of re-insurance on ship executed abroad by a foreign corporation according to the foreign laws, which was in English and the ordinary Lloyd's form, and being substantially identical with the original policy of insurance and an earlier policy of re-insurance providing that all claims thereunder were to be payable in London and any disputes thereunder should be decided by the English Courts was held to be construable according to English law, as this was the intention of the parties (*a*). As the policy is the only legal evidence of the terms of the contract, it cannot be materially altered without the consent of all parties to it; but until it is underwritten, it can be altered by one or the other party (*b*); and after subscription a mistake may be corrected if it is clear that the policy, as it stands, does not express the meaning of both parties to it, but this requires very strong evidence (*c*). A mistake by the assured in declaring interest under a policy may be rectified without the consent of the underwriter (*d*). By consent of both parties, subject to the stamp law provisions, any alterations may be made in the policy, if written and initialed by the underwriters; but they will only bind the underwriters who have thus acknowledged them (*e*).

The following have been held to be material alterations:— Alteration of time of sailing (*f*), adding an alternative *terminus*

(*x*) 6 Edw. 7, c. 41, s. 30 (2).

(*y*) For the difference between the rules of construction of the Lloyd's marine policy and other policies or guarantees, see *Anglo-Californian Bank* v. *London and Provincial M. and G. I. C.* (1904), 20 T.L.R. 665.

(*z*) See 6 Edw. 7, c. 41, sched. 1.

(*zz*) See Arnould, vol. i. p. 18 (8th ed.).

(*a*) *Royal Exchange Assur. Co.* v. *Sjoforsakrings Aktiebolaget Vega* (1902), 2 K.B. 384; 71 L.J. K.B. 739.

(*b*) *Robinson* v. *Tobin*, 1 Stark. 336.

(*c*) *Henkle* v. *Royal Exchange Assur. Corp.*, 1 Ves. Sen. 317; *Spalding* v. *Crocker*, 2 Com.Cas. 189, 193.

(*d*) *Robinson* v. *Touray*, 3 Campb. 158.

(*e*) *Forshaw* v. *Chabert*, 3 B. & B. 158.

(*f*) *Fairlie* v. *Christie*, 7 Taunt. 416.

ad quem (*g*), change of destination (*h*), and the insertion of a subject of insurance in a blank policy (*i*). On the other hand, immaterial alterations will not vitiate the policy (*k*). By sect. 96 of the Stamp Act, 1891 (*l*), it is enacted that—"Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration" (*m*).

Policy—Rules for construction of—Usage.—The principles which govern the construction of sea policies do not vary from those applicable to all other mercantile instruments. The language of sea policies is frequently indeterminate, ambiguous, or technical. When this is so, parol evidence, as in the case of other contracts, is admissible to explain it (*n*). The language of sea policies is also frequently incomplete as an expression of the meaning of the parties, because it is employed with reference to the usages of trade (*o*), and the meaning must therefore be explained by parol evidence of those usages, a knowledge of which in such cases forms the only available key to the real intention of the parties (*p*).

The Marine Insurance Act, 1906 (*q*), expressly recognises the effect of usage upon the construction of the contract. Sect. 87 enacts that:—"(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract; (2) The provisions of this section extend to any right,

(*g*) *Campbell* v. *Christie*, 2 Stark. 64.

(*h*) *Laird* v. *Robinson*, 4 Bro. P.C. 488.

(*i*) *Langhorn* v. *Cologan*, 4 Taunt. 330.

(*k*) See *Saunderson* v. *M'Callum*, 4 Moore, 5; *Clapham* v. *Cologan*, 3 Camp. 382; *Saunderson* v. *Symonds*, 1 B. & B. 426.

(*l*) 54 & 55 Vict. c. 39.

(*m*) See *Kensington* v. *Inglis*, 8 East, 273; *Ridsdale* v. *Shedden*, 4 Campb. 107; *Hubbard* v. *Jackson*, 4 Taunt. 169; *Hill* v. *Patten*, 8 East, 373; *Ramstrom* v. *Bell*, 5 M. & S. 267; *Sawtell* v. *London*, 5 Taunt. 359; *French* v. *Patten*, 9 East, 351; *Bhugwandass* v. *Netherlands India Sea Ins. Co.*, 14 App.Cas. 83.

(*n*) *Preston* v. *Greenwood*, 4 Doug. 28.

(*o*) "Not of trade in the largest sense of the word, but of that export and import trade which is conducted by navigation," 1 Duer. 180.

(*p*) *Mason* v. *Skurray*, Marsh. Ins. 185; *Schloss Bros.* v. *Stevens*, (1906) 2 K.B. 665; 75 L.J. K.B. 927, 931.

(*q*) 6 Edw. 7, c. 41.

duty, or liability declared by this Act which may be lawfully modified by agreement."

Every usage of a particular branch of maritime trade which is so well settled, or so generally known, that all persons engaged in that trade may fairly be taken as contracting with reference to it, is considered to form part of every sea-policy, designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference. Nor need any evidence be given in such cases that the usage has been communicated to the underwriter; for, as Lord Mansfield says, "every underwriter is presumed to be acquainted with the usage of the particular trade he insures, and if he does not know it, he ought to inform himself" (*r*). "Usage," says Lord Campbell, "may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; and a usage, consistent with a written contract, may be introduced into it; as both parties being aware of it, may be supposed to have intended that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract, would be contrary to all principle, and has been forbidden as often as the attempt has been made" (*s*).

The policy being a printed form with the blanks filled up in writing, it is a rule that if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words; inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning (*t*). But unless it can be shown that some special meaning is attached to the words, either by judicial decisions, by usage, or by the special circumstances or terms of the contract, the words are to be construed in their ordinary and popular sense. "If there be any one case, in which effect can be given to" the "words, understanding them in their ordinary and popular sense, they ought not to be extended beyond that sense" (*u*). If, however, any doubt arises as to the meaning and effect of the words, they are to be construed in the sense most favourable to the assured. "In the construction of policies, the *strictum jus* or *apex juris* is not to be laid

(*r*) Lord Mansfield in *Noble* v. *Kennoway*, 2 Doug. 513; and Lord Ellenborough in *Da Costa* v. *Edmunds*, 4 Camp. 143.

(*s*) *Hall* v. *Janson*, 4 E. & B. 504; 24 L.J. Q.B. 101.

(*t*) *Per* Lord Ellenborough in *Robertson* v. *French*, 4 East, 130; *per curiam* *Gumm* v. *Tyrie*, 33 L.J. Q.B. 97; *per* Blackburn, J., in *Joyce* v. *Realm Ins. Co.*, L.R. 7 Q.B. 583; 41 L.J. Q.B. 356; *Dudgeon* v. *Pembroke*, 2 App.Cas. 293; 46 L.J. Q.B. 409.

(*u*) *Per* Abbott, C.J., in *Lawrence* v. *Aberdein*, 5 B. & A. 111.

hold on; but they are to be construed largely; for the benefit of trade, and for the insured" (*x*).

"The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and, if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer" (*y*).

Commencement of risk—"Lost or not lost" claim.—The insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, and even if that loss be total, so that the subject-matter of the insurance is then non-existent. This is usually done by the words, "lost or not lost," which are introduced into most policies; but any language indicating the same purpose would have the same effect. Nor is there any sufficient reason why this already existing loss should be wholly unknown to both parties. If known to the assured, he must, of course, communicate it; but then, if neither the amount, nor any circumstances which would determine the amount are known, the insurers may, if they please, take this risk upon themselves (*z*). So, too, if insurance is effected on goods "lost or not lost," the underwriters are liable for a partial loss which took place before the insured acquired any interest in the goods (*a*). The effect of the words is thus stated in Rule I. of the Rules for the construction of the policy (*b*):—"Where the subject-matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the assured was aware of the loss, and the insurer was not."

Policy—Construction of—"At and from."—Where the subject-matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage insured" (*c*). "Where a ship is insured 'at and from' a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately (*d*). If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another

(*x*) *Per* Lee, C.J., in *Pelly* v. *Royal Exchange Assur. Co.*, 1 Burr. 349; and see *Carr* v. *Royal Exchange Ins. Co.*, 33 L.J. Q.B. 63; 5 B. & S. 433.

(*y*) *Per* Lord Lyndhurst. *Blackett* v. *Royal Exchange Assur. Co.*, 2 Cr. & J. 251; 1 L.J. Ex. 101.

(*z*) *Mead* v. *Davison*, 3 A. & E. 303; S.C. 4 Nev. & Man. 701.

(*a*) *Sutherland* v. *Pratt*, 11 M. & W. 296; 12 L.J. Ex. 235. See also *Hastie* v. *Couturier*, 9 Ex. 110, and 6 Edw. 7, c. 41, s. 6 (1), and *ib.*, s. 84 (3) (*b*).

(*b*) 6 Edw. 7, c. 41, sched. 1.

(*c*) 6 Edw. 7, c. 41; sched. 1, r. 2.

(*d*) *Ib.*, r. 3 (*a*); see also *ib.*, s. 42.

policy for a specified time after arrival" (*e*). When the risk is to commence "at and from" a particular place it will attach immediately on the ship's first arrival at the port in such a seaworthy condition as to be enabled to lie there in safety, although she is not safely moored, and will continue whilst she is lying at anchor preparing for the voyage for which she is insured (*f*).

The word "at" covers the risk in the port of departure, while the word "from" only covers the risk as soon as the ship has left the port, and so the combined effect of both terms is to cover the ship in the port of departure and on her voyage (*g*). "At and from" will protect the ship in calling at a number of places if they are named or implied (*h*). And these words will protect the ship in the named port if she is ever there in good safety (*i*), but she must have been at the port in good safety, otherwise she is not protected (*k*). A ship was insured "whilst at port or ports, place or places in New Caledonia," and on her way to a port in that island, she struck upon a reef and incurred losses. It was held that the words "place or places" occurring in connection with the words "port or ports," meant place or places at which the vessel might arrive with some object other than that of merely passing on her way to some other point; that the vessel was not, therefore, "at a port or ports, place or places in New Caledonia," within the meaning of the policy, and that the insurers were not liable (*l*).

If the words are "at and from" a certain port, although the insurance begins only at that port, the word may comprehend an open roadstead, or any places included naturally or usually within the port named as places at which vessels receiving cargoes are considered as "at" the port. It is sometimes a difficult question of mixed law and fact, whether a certain place is really within the scope of the word "port" or is a part of the place named, and this question can only be answered by usage and the nature of the case (*m*). The words "at and from" are often, if not always, especially in a home port, intended to cover

(*e*) 6 Edw. 7, c. 41, r. 3 (*b*).

(*f*) *Houghton* v. *Empire Mar. Ins. Co.*, L.R. 1 Ex. 206; 35 L.J. Ex. 117; but see *Chitty* v. *Selwyn*, 2 Atk. 359.

(*g*) *Motteux* v. *London Assur. Co.*, 1 Atk. 545; *Palmer* v. *Marshall*, 8 Bing. 79; 1 L.J. C.P. 19.

(*h*) *Cruickshank* v. *Janson*, 2 Taunt. 301; *Warre* v. *Miller*, 4 B. & C. 538; 4 L.J. (O.S.) K.B. 8.

(*i*) *Foley* v. *United K. & M. Ins. Co.*, L.R. 5 C.P. 155; 39 L.J. C.P. 206.

(*k*) *Parmeter* v. *Cousins*, 2 Campb. 235.

(*l*) *Maritime Ins. Co.* v. *Alliance Ins. Co.*, (1907) 2 K.B. 660; 77 L.J. K.B. 69.

(*m*) *Higgins* v. *Aguilar*, cited 2 Taunt, 406; *Moxon* v. *Atkins*, 3 Campb. 200. See generally as to the meaning of the word "port" *Hull Dock Co.* v. *Browne*, 2 B. & Ad. 43; *Stockton Ry. Co.* v. *Barrett*, 7 Man. & G. 870; *Cockey* v. *Atkinson*, 2 B. & Ald. 460; *Sailing Ship Garston Co.* v. *Hickie*, 15 Q.B.D. 580; *Hunter* v. *Northern Marine Ins. Co.*, 13 App.Cas. 717.

a ship while in the port preparing for her voyage, as well as after she begins it. And there may not only be a "deviation" in the port, springing from unreasonable slowness or entire suspension of the preparations, but the policy may never attach from the want of the preparations, or its attachment be delayed by a delay in the preparations; so that where a vessel has been a long time in a port, the risk seems not to commence until preparations are begun for the voyage insured (*n*). With regard to a ship lying at the *terminus a quo* when the policy is effected, it appears that the mere presence of the ship in port will not under all circumstances cause the policy to attach. She must be there "in good safety" and therefore the policy will not attach unless the ship is in a reasonable state of fitness for the harbour risk (*o*). Thus, where a ship, though leaky, was able to lie for a month loading in a river, it was held that the policy had attached (*p*). Of course the vessel must subsequently be made seaworthy for the marine risk.

The word "port" in a marine policy is to be understood in its popular, or business or commercial sense, it does not in such a document, necessarily, mean "port" as defined for revenue or pilotage purposes (*q*). "Port" or "ports" may be construed "place or places" and so comprise an open roadstead (*r*). "'Port of discharge,' includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel" (*s*). In the warranty of "freedom from seizure" in port of discharge, "the word 'port' is not to be taken in its narrow or strict legal sense, but rather as meaning the place of discharge agreed upon by the assured and underwriters" (*t*). "Port of discharge" in marine policies, is in common use where it is intended to limit the risk to such port; and where the policy says to "any port or place," without more, it covers ports of loading as well as ports of discharge (*u*). If the policy be "at and from a port or ports" or "place or places" in the alternative it must be supposed that

(*n*) *Chitty* v. *Selwyn*, 2 Atk. 358; *Lambert* v. *Liddard*, 5 Taunt. 480.

(*o*) *Forbes* v. *Wilson*, 1 Park, 472; see also *Annen* v. *Woodman*, 3 Taunt. 299; *Parmeter* v. *Caisins*, 2 Campb. 238.

(*p*) *Annen* v. *Woodman*, 3 Taunt. 299.

(*q*) *Sailing Ship Garston Co.* v. *Hickie*, 15 Q.B.D. 580, in which tests for determining the business meaning of "port" were considered.

(*r*) *Cockey* v. *Atkinson*, 2 B. & Ald. 460; cp. *Price* v. *Livingstone*, 53 L.J. Q.B. 118; 9 Q.B.D. 679; *Caffin* v. *Aldridge*, 64 L.J. Q.B. 736; (1895) 2 Q.B. 648; 65 L.J. Q.B. 85; *Brown* v. *Tayleur*, 5 L.J. K.B. 57; *Nicholson* v. *Williams*, 40 L.J. M.C. 159; *Maritime Ins. Co.*, v. *Alianza Ins. Co. of Santander*, 77 L.J. K.B. 69; (1907) 2 K.B. 660.

(*s*) *Whitwell* v. *Harrison*, 2 Exch. 127; 18 L.J. Ex. 465, and cases there cited.

(*t*) 1 Maude & P. 507 (ed. 4); and cases there cited.

(*u*) *The Aiksham*, 9 T.L.R. 605; *Crocker* v. *Sturge*, 66 L.J. Q.B. 142; (1897) 1 Q.B. 330.

the insurer meant to incur the greater risk of letting the ship sail to several places in order to take in her cargo (*x*). But where a ship was insured "at and from her port of loading," the Court held that the expression "port of loading" pointed to one single place, and did not allow of the ship loading at two distinct places (though both lying within seven miles of one another in the same bay), in either of which there might have been a loading (*y*).

The words "at and from" do not imply a warranty or representation that the ship is, at the time of effecting the policy, in the port in question; but it has been decided that the ship must be there within such a time afterwards that the risk shall not be materially varied; and that any delay between the making of the policy and the commencement of the risk, whether such delay be voluntary or involuntary, which has the effect of materially varying the risk, will prevent the policy from attaching (*z*). On this subject sect. 42 of the Marine Insurance Act, 1906 (*a*) lays down the following rules:—"(1) Where the subject-matter is insured by a voyage policy 'at and from' or 'from' a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract; (2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition."

Where the policy has once attached, length of time occupied in necessary repairs, though considerable, does not take the ship out of the protection of the policy, supposing those repairs to be made with an ultimate view of sending the ship on the voyage insured (*b*); nor does any other reasonable delay, if justified by necessity, or *bonâ fide* incurred for the purposes of the voyage (*c*). The principle, in short, established by the cases is, that where the risk "at and from" has once attached, a "detention, for a reasonable time for the purposes of the adventure insured, must be allowed; and that, whether the time is

(*x*) *Brown* v. *Tayleur*, 4 Ad. & E. 241; 5 L.J. K.B. 57.

(*y*) *Brown* v. *Tayleur*, *supra*. There may, however, be a usage to the contrary: *Kingston* v. *Knibbs*, 1 Camp. 508, n.

(*z*) *Hull* v. *Cooper*, 14 East, 479; *De Wolf* v. *Archangel Mar. Bank & Ins. Co.*, L.R. 9 Q.B. 451; 43 L.J. Q.B. 147; *Maritime Ins. Co.* v. *Stearns*, (1901) 2 K.B. 912; 71 L.J. K.B. 86.

(*a*) 6 Edw. 7, c. 41.

(*b*) See 6 Edw. 7, c. 41, s. 49 (*c*); *Motteux* v. *London Assur. Co.*, 1 Atk. 545, 548.

(*c*) *Smith* v. *Surridge*, 4 Esp. 25; *Grant* v. *King*, 4 Esp. 175; *Langhorn* v. *Allnutt*, 4 Taunt, 511; *Raine* v. *Bell*, 9 East, 195.

reasonable or not, must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be" (*d*). A reasonable time is a question of fact (*e*). The general rule as to the attachment of the policies is subject to be modified by the usages of particular trades (*f*).

Insurance on freight.—"Where chartered freight is insured 'at and from' a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety" (*g*). "Where freight, other than chartered freight, is payable without special conditions, and is insured 'at and from' a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo" (*h*). The word freight in insurance law has a more extensive signification than in the general law of shipping, and is used comprehensively to denote "the benefit derived by the shipowner from the employment of his ship" (*i*). Freight, strictly speaking, as between the shipowner and the freighter, is the price to be paid by the latter to the former for the carriage of goods in the ship, and is only payable on the arrival of the goods at their port of destination; but in policies of insurance it also denotes that which is less properly called freight, viz., the price agreed to be paid by the charterer to the shipowner for the hire of his ship, or a part of it, under a charter party or other contract of affreightment (*k*), and also the benefit which the shipowner expects to derive from the carriage of his own goods in his own ship, in the shape of their increased value to him at the port of delivery (*l*). "'Freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money" (*m*). The party who insures freight must have an inchoate right to it, in order to

(*d*) *Per* Tindal, C.J., in *Phillips* v. *Irving*, 7 M. & G. 328; 13 L.J. C.P. 145.

(*e*) 6 Edw. 7, c. 41, s. 88.

(*f*) *Vallance* v. *Dewar*, 1 Campb. 503, and other cases there collected.

(*g*) 6 Edw. 7, c. 41, sched. 1., r. 3 (*c*).

(*h*) *Ib.*, r. 3 (*d*).

(*i*) *Per* Lord Tenterden in *Flint* v. *Flemyng*, 1 B. & Ad. 48; 8 L.J. (O.S.) K.B. 350.

(*k*) *Per* Lord Tenterden in *Winter* v. *Haldimand*, 2 B. & Ad. 649; *per* Lord Ellenborough in *Forbes* v. *Aspinall*, 13 East, 323, 325.

(*l*) *Flint* v. *Flemyng*, 1 B. & Ad. 45; *De Vaux* v. *J'Anson*, 8 L.J. C.P. 284; 5 Bing, N.C. 519.

(*m*) 6 Edw. 7, c. 41, s. 90; see *Denoon* v. *Home and Colonial Assur. Co.*, L.R. 7 C.P. 341; 41 L.J. C.P. 162.

entitle him so to insure, *i.e.*, he must be in such a position with regard to the expected freight that in the ordinary course nothing would prevent him from ultimately having a perfect right to it but the intervention of the perils insured against, or other maritime perils incident to the voyage. The charterer may insure advanced freight (*n*), *i.e.*, money advanced by him to the shipowner under their agreement as part payment of the freight specifically, *e.g.*, as "advances on account of freight," or "advances against freight" (*o*).

The freight to be earned by the vessel on the performance of the voyage may be insured as well as the vessel itself, and the cargo laden on board (*p*). The object of the contract is to protect the insured from being deprived by any of the perils insured against of the profit he would otherwise earn from the carriage of the goods. It is incumbent, therefore, on the insured to prove that, unless some of the perils insured against had intervened, some freight would have been earned, and evidence must be given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by perils insured against, would have been entitled to demand freight (*q*). Prepaid freight cannot be recovered back from the shipowner (*r*). When an express contract of affreightment, under which the shipowner is entitled to the freight insured, can be proved, the risk on the policy will commence from the time that the shipowner has put himself into a condition to earn the freight, by making the vessel ready for sea and placing her at the disposal of the charterer, whether any goods have or have not been actually shipped on board under the contract (*s*). Thus, if a vessel is chartered for a voyage from A. to B., the interest in the freight commences on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B., so long as she is starting solely with a view to the chartered freight (*t*). But, if no express contract of affreightment can be

(*n*) 6 Edw. 7, c. 41, s. 12.

(*o*) *Price* v. *Maritime Ins. Co.*, (1901) 2 K.B. 412 ; 70 L.J. K.B. 780 ; *Wilson* v. *Martin*, 11 Ex. 684 ; 25 L.J. Ex. 217 ; *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757, 761 ; see *Blakey* v. *Dixon*, 2 B. & P. 321 ; *Winter* v. *Haldimand*, 2 B. & Ad. 649, 653, 658 ; *Etches* v. *Aldan*, 1 Man. & R. 157 ; *Kirchner* v. *Venus*, 12 Moore, P.C.C. 361, 390 ; *per* Blackburn, J., *Allison* v. *Bristol Marine Ins. Co.*, 1 App.Cas. 229.

(*p*) As to insuring advances on freight, see *Price* v. *Maritime Ins. Co.*, (1901) 2 K.B. 412 ; 70 L.J. K.B. 780.

(*q*) Lord Ellenborough : *Forbes* v. *Aspinall*, 13 East. 325 ; *Patrick* v. *Eames*, 3 Campb. 441.

(*r*) *Allison* v. *Bristol Ins. Co.*, 1 App.Cas. 209.

(*s*) *Thompson* v. *Taylor*, 6 T.R. 478 ; *Truscott* v. *Christie*, 2 B. & B. 320 ; *Devaux* v. *J'Anson*, 5 Bing. N.C. 519 ; 8 L.J. C.P. 284.

(*t*) *Barber* v. *Fleming*, L.R. 5 Q.B. 59 ; 39 L.J. Q.B. 25 ; *Foley* v. *United Fire Assur. Co.*, L.R. 5 C.P. 155 ; 39 L.J. C.P. 206 ; *Mercantile Steam Co.* v. *Tyser*, 7 Q.B.D. 73.

proved, the risk will not attach on the policy until goods have been actually shipped on board under circumstances giving the shipowner a right to freight (*u*).

When the insurance is on the freight to be earned on the outward and homeward voyage, and there is an express contract of charter-party for the outward and homeward voyage, the liability of the insurer will continue all through the outward and homeward voyage, whether any of the homeward cargo had or had not been taken on board at the time of the loss (*x*); but, if the insurance is on freight to be earned out and home, and the insured has only made a contract of affreightment for the outward voyage, the liability of the insurer, as respects the homeward voyage, will not commence until an express contract of affreightment for the homeward voyage has been entered into, or until a return cargo or return merchandise has been shipped on board, giving the shipowner a right to homeward freight(*y*). Freight may be insured for a portion of the voyage as well as a cargo of goods; and, if an insurance on freight is effected on a voyage from A. to B., the risk is not varied, and the underwriters are not discharged, because the vessel is in reality sailing from A. to C., touching at B., and the insured has neglected to disclose that fact to the underwriters (*z*). But, if the voyage is altogether a different voyage from the one insured, as, for instance, if the insurance is on the freight to be earned under a contract of affreightment for a particular voyage, and the voyage is subsequently altered, the underwriter will be discharged (*a*).

Insurance on passage money.—When the insurance has been effected on passage-money, and the ship is disabled and obliged to put into port for repairs, and great expenses are incurred in maintaining the passengers, there is no loss for which the underwriters are liable, if the vessel ultimately completes the voyage and earns the money (*b*).

Insurance on profits.—Profits may be insured equally by valued and open policies (*c*); but, whether insured by one or the other, it has been held that the assured cannot recover unless he proves that but for the intervention of the perils insured against some profit would in fact have been realised by the sale of his goods on arrival (*d*). When profits expected

(*u*) *Tonge* v. *Watts*, 2 Str. 1251.
(*x*) *Davidson* v. *Willasey*, 1 M. & S. 313; *Atty* v. *Lindo*, 1 B. & P. N.R. 236.
(*y*) *Williamson* v. *Innes*, 8 Bing. 81, n.
(*z*) *Taylor* v. *Wilson*, 15 East, 330.
(*a*) *Sellar* v. *M'Vicar*, 1 B. & P. N.R. 23.
(*b*) *Willis* v. *Cooke*, 5 E. & B. 647; 25 L.J. Q.B. 16; as to insurance against the charges and liabilities which may be incurred under the Passengers Act, 1852, see *Gibson* v. *Bradford*, 4 E. & B. 586; 24 L.J. Q.B. 159.
(*c*) *Eyre* v. *Glover*, 3 Campb. 276; 16 East, 218.
(*d*) *Hodgson* v. *Glover*, 6 East, 316.

to be realised from the carriage of merchandise are insured from the ordinary perils of the sea, and the ship is lost by a peril insured against, but the merchandise is brought safe to the port of destination by another vessel, there is no loss of profit within the meaning of the policy, and the underwriters are not responsible (*e*).

A charterer who enters into a sub-charter or contracts to carry goods in the ship may insure his expected profit which is properly described as "profit on charter" (*f*).

A person may also insure the sums which he is to receive by way of commission on the sale of merchandise; and if the merchandise from the sale of which such commissions were to arise was only prevented from arriving at the place of sale by the perils insured against, the assured may recover to the extent of his loss (*g*). The commission or brokerage which a ship's husband or shipbroker expects to earn under a binding contract can no doubt be insured if the earning thereof is liable to be prevented by maritime perils affecting the ship (*h*).

Insurance on bottomry and respondentia loans.—Loans on bottomry, or respondentia, are in the strictest sense maritime loans. A loan on bottomry is a loan on the security of the ship, whilst a loan on respondentia is a loan on the security of the goods. But in both cases it is of the essence of these maritime loans that the debt is not recoverable, if the ship be lost, or if the goods be lost. Loans on bottomry and respondentia, though themselves a species of insurance, may yet be the subjects of insurance, inasmuch as they are an interest exposed to risk from the perils of the sea (*i*). The lender (*k*) alone can insure the sum advanced; the nature of the contract shows this. Where the loan is made repayable in any event, the lender cannot insure it as a bottomry loan (*l*). The bond should always describe the risk which the lender assumes; and it is only against these risks that he has an insurable interest; for if the ship be lost by a peril, or from a cause, not at the risk of the lender, as, for example, if the ship be lost through the mis-

The law is different in the United States. See 1 Parsons, Ins., 194, 195.

(*e*) *Chape* v. *Reynolds*, 5 C.B. N.S. 651; 28 L.J. C.P. 194.

(*f*) See *Asfar & Co.* v. *Blundell*, (1896) 1 Q.B. 123; 65 L.J. Q.B. 138, for the nature of such an insurance.

(*g*) *Flint* v. *Le Mesurier*, before Lord Kenyon, 2 Park, Ins. 563; *Barclay* v. *Cousins*, 2 East, 544; *King* v. *Glover*, 2 B. & P. N.R. 206.

(*h*) See *Buchanan* v. *Faber*, 4 Com. Cas. 223; and *per* Lord Mansfield, as to prize agents, in *Le Cras* v. *Hughes*, 2 Park, Ins. 569.

(*i*) 1 Emerigon, c. viii., s. 11, pp. 241, 243; Pothier, Traité d'Assurance, Nos. 30, 31; *Glover* v. *Black*, 3 Burr. 1394; 1 W. Bl. 405.

(*k*) 6 Edw. 7, c. 41, s. 10.

(*l*) *Stainbank* v. *Fenning*, 11 C.B. 51; 20 L.J. C.P. 226; *Stainbank* v. *Shepard*, 13 C.B. 418; 22 L.J. Ex. 341; and see *Simonds* v. *Hodgson*, 6 Bing. 114; S. C. in error 3 B. & Ad. 50; 1 L.J. K.B. 51.

conduct of the master or owner, the debt survives. The risks which the lender assumes are generally the perils of the sea, and any words which import that the money borrowed is not to be paid unless she arrives safely are sufficient to indicate this. Whatever be the phraseology of the bond, the insurable interest in the lender on bottomry is the risk he runs of having the bond discharged, by the perils which he assumes.

Respondentia and bottomry loans must be specifically described in the policy; they cannot be insured under the general denomination of goods and merchandise (*m*). Yet if it can be shown to be the usage of any particular course of trade to insure these interests under the general words, they may be recovered under a policy containing such words only (*n*).

Commencement of risk on goods.—"Where goods or other moveables are insured 'from the loading thereof,' the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship" (*o*).

The clause deferring the commencement of the risk is in Lloyd's policy in the following form:—"Beginning the adventure upon the said goods and merchandises upon the loading thereof aboard the said ship . . . upon the said ship, &c., and shall so continue and endure during her abode there, upon the said ship, &c. And further until the said ship with all her ordnance tackle apparel &c. and goods and merchandises whatsoever shall be arrived at upon the said ship &c. until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed" (*p*).

The common form of policy in this country affords no protection against those dangers to which the goods are exposed in being carried in boats or lighters from the quays or wharves of the port of loading to the ship's side. In this respect our practice differs from that of almost all continental states, which either decree by their laws or stipulate in their policies that the risk of the underwriters on goods shall commence directly the goods leave the shore in order to be loaded on board the ship. Of course goods even in this country may be protected while thus in transit from quay to ship by an express clause in the

(*m*) See *Glover* v. *Black*, 3 Burr. 1394; 1 W. Bl. 399, 405, 422; *Simonds* v. *Hodgson*, 3 B. & Ad. 50; 1 L.J. K.B. 50. *Glover* v. *Black* was commented on in *Mackenzie* v. *Whitworth*, L.R. 10 Ex. 142; 1 Ex. D. 36; 45 L.J. Ex. 233; 6 Edw. 7, c. 41, s. 10.

(*n*) *Gregory* v. *Christie*, 3 Doug. 419; 1 Marshall, Ins. 326.

(*o*) 6 Edw. 7, c. 41, sched. 1, r. 4.

(*p*) *Ib.*, sched. 1.

policy duly framed for the purpose. Thus, where a policy on goods at and from St. Petersburg to London contained this clause—"Beginning the adventure on the said goods from and immediately following the loading thereof on board boats at St. Petersburg"—it was not disputed that the risk on the goods commenced directly they were put on board boats at St. Petersburg to be loaded (in the usual course of trade there) on board the ship at Cronstadt (*q*). The risk as regards goods in the common form of policy commences from the "loading" and terminates with the "landing," while the risk upon the ship terminates when she has been moored at anchor twenty-four hours in good safety. Where there is an express stipulation in a policy of insurance on goods—as is usually the case—to the effect that the risk upon the policy shall commence from the loading of the goods on board the ship, and whenever an insurance is effected on goods laden on board a particular vessel, the risk on the policy does not commence until the goods are safely shipped on board. If they are lost by the upsetting of boats or lighters whilst they are being conveyed from the shore to the ship preparatory to the voyage the underwriters will not be responsible for the loss (*qq*).

Whenever, by the express terms of the policy, the adventure is to begin from the loading of goods on board at a particular place, the risk on the policy will not attach if no goods are taken on board at the place specified (*r*), or if the vessel is lost before she arrives at the port of loading (*s*); and the policy will not cover and protect goods previously taken on board, as the adventure had not commenced when those goods were received; but this, being a strict construction, has been relaxed when there is anything on the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board (*t*); and, therefore, if the policy is expressed to be made in continuation of a former policy, which former policy covered the antecedent cargo, the goods previously laden on board, as well as those received on board at the subsequent place of load-

(*q*) *Harry* v. *Royal Exchange Assur. Co.*, 2 B. & P. 430; see *per* Heath, J., *ib.* 435. A clause such as "including risk of craft to and from the vessel" is commonly inserted in English policies. It is now also common to insert in Lloyd's policies a clause, called the "warehouse to warehouse" clause, which covers "all and every risk in craft to and from the vessel or vessels, and all risks, including fire, from the warehouse of the consignor by any conveyances by land or by water, and until safely delivered into the warehouse of the consignees and/or their agents: see *Tole* v. *Chalmers*, 5 Com. Cas. 213.

(*qq*) Arnould, vol. 1, p. 30 (ed. 8).

(*r*) *Royal Exchange Assur. Co.* v. *McSwiney*, 19 L.J. Q.B. 222; 14 Q.B. 661.

(*s*) *Halhead* v. *Young*, 6 E. & B. 312; 25 L.J. Q.B. 290.

(*t*) *Mellish* v. *Allnutt*, 2 M. & S. 106; *Rickman* v. *Carstairs*, 5 B. & Ad. 663; 3 L.J. K.B. 28.

ing designated in the subsequent policy, will be protected (*u*). And, if the adventure is to commence on the goods "whereso-ever loaded," the Courts will give the words the largest signification, so as to cover all antecedent shipments (*x*). Where part of an antecedent shipment was taken out at the loading port mentioned in the policy as the port from whence the adventure was to commence, and the whole cargo was inspected by custom-house officers for adjusting duties which were paid on it at that port, and was then put on board again with the knowledge of the underwriter, this was held to be in substance a re-loading of the whole cargo, so as to make it a cargo laden on board at the loading port mentioned in the charter-party (*y*).

The policy, however, protects goods loaded at a "liberty port" under the following or any similar clause:—"With liberty for the ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever for any purpose whatsoever without being deemed a deviation" (*z*).

As regards "freight," the policy may attach from the moment the insurable interest exists, but to effect this the policy must be specially worded. A ship was chartered to carry a cargo from Liverpool to Lagos, there discharge, and reload another cargo for the United Kingdom, in consideration of a lump sum by way of freight, payable half before sailing from Liverpool, half on delivery of the homeward cargo. The shipowner effected an insurance on freight "at and from Lagos," and the policy contained a clause whereby the insurance company agreed that the insurance "shall commence upon freight and goods on merchandise aforesaid from the loading of the goods or merchandise on board the said ship or vessel at as above." The ship was lost before she had shipped any of her homeward cargo. It was held that this clause precluded the assured from recovering against the underwriters, although the freight was chartered freight (*a*). In another case the assured assigned a policy on chartered freight of the vessel *Napier* on a voyage to Baker's Island, and from Baker's Island to a port of destination in the United Kingdom. They then caused themselves to be re-insured, "lost or not lost, upon freight payable in respect to this present voyage

(*u*) *Bell* v. *Hobson*, 16 East, 240; *Joyce* v. *Realm Insur. Co.*, L.R. 7 Q.B. 580; 41 L.J. Q.B. 356.

(*x*) *Gladstone* v. *Clay*, 1 M. & S. 418.

(*y*) *Norman* v. *Kettlewell*, 16 East, 188; *Carr* v. *Montefiore*, 33 L.J. Q.B. 57, 257; 5 B. & S. 408.

(*z*) *Grant* v. *Delacour*, 1 Taunt. 466; and see *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274; affirmed 9 L.J. (O.S.) Ex. 118; *Barclay* v. *Stirling*, 5 M. & S. 6; *Violett* v. *Allnutt*, 3 Taunt, 419; cp. *Grant* v. *Parton*, 1 Taunt. 463.

(*a*) *Beckett* v. *West of England Mar. Ins. Co.*, 25 L.T. 739; *Hopper* v. *Wear Marine Ins. Co.*, 46 L.T. 107; *Truscott* v. *Christie*, 5 Moore, 33.

to be performed by the vessel *Napier* from Baker's Island to a port of discharge in the United Kingdom; the insurance on the freight beginning from the loading of the vessel." The *Napier* arrived at Baker's Island, and was wrecked after taking in about two-thirds of her homeward cargo. It was held, that the assured were not entitled to recover as for a total or partial loss of the freight—by Blackburn, J., on the ground that it was not intended that the risk should commence until the vessel sailed on her voyage from Baker's Island, and that the words "beginning from the loading of the vessel" did not extend the liability of the underwriters, but only added the further statement that they would not be liable for freight until the goods were actually loaded—by Mellor, J., and Lush, J., on the ground that these words did create a liability before the voyage commenced, but that the word "loading" must be taken to mean "complete loading" so that as the cargo was never fully loaded, the policy did not attach, and nothing could be recovered (*b*).

Duration and termination of risk on goods.—Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases (*c*). Whether the ship has arrived or not is a question of fact, but the rule is that a ship has arrived when she has reached "the place at which ships of her character ordinarily anchor. Underwriters must take notice of the usual practices prevailing in such cases" (*d*). The question of what is a "reasonable time" is a question of fact (*e*). The risk on "goods" may be of longer duration than the risk on ship when the policy is in the common form, and it will be so in all such cases where the ship cannot discharge within the twenty-four hours during which the protection extends; but the goods must be landed within a reasonable time. By "safely landed" is meant safely delivered on shore, at the ordinary wharves and quays or customary landing-places within the limits of the port of discharge (*f*). These limits are to be ascertained in case of doubt by the evidence of mercantile

(*b*) *Jones* v. *Neptune Mar. Ins. Co.*, 41 L.J. Q.B. 370; L.R. 7 Q.B. 702; see also *Atty* v. *Lindo*, 1 Bos. & P. (N.R.) 236; *Mackenzie* v. *Shedden*, 2 Campb. 431; *Sellar* v. *McVicar*, 1 Bos. & P. (N.R.) 23; *Foley* v. *United Fire and Mar. Ins. Co.*, 39 L.J. C.P. 206; *Williamson* v. *Innes*, 8 Bing. 81; *Horncastle* v. *Stuart*, 7 East, 400; *Thompson* v. *Taylor*, 6 T.R. 478.

(*c*) 6 Edw. 7, c. 41, sched. 1, r. 5.

(*d*) *Per* Martin, B., in *Lindsay* v. *Janson*, 4 H. & N. 705; 28 L.J. Ex. 315. See also *Stone* v. *Mar. Ins. Co. of Gothenburg*, 1 Ex.D. 81; 45 L.J. Ex. 361; *Samuel* v. *Royal Exchange Assur.*, 8 B. & C. 119; 6 L.J. (O.S.) K.B. 315.

(*e*) 6 Edw. 7, c. 41, s. 88.

(*f*) See *Gatliffe* v. *Bourne*, 4 Bing. N.C. 314; *Bourne* v. *Gatliffe* (in error), 3 M. & G. 643; S.C. before the House of Lords, 7 M. & G. 850

usage (*g*). It is frequently necessary to employ smaller craft, such as lighters, boats, &c., to carry the goods from the ship to the shore. Whenever it is established that such a usage exists by the general course of trade, the underwriters are liable for any loss or damage that may happen to the goods in the course of their being so carried; for they are being landed in the customary manner (*h*). "The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual or necessary, would be done. . . . Therefore, when goods are insured 'till landed,' without express words, the insurance extends to the boat, the usual method of landing goods out of a ship, upon the shore. If it is usual to stay so long at a port, or to go out of the way, the insurer is considered as understanding that usage" (*i*). In the port of London public lighters being employed in the general course of trade to unload ships' goods on such lighters, while being conveyed from the ship to the wharf are under the protection of this policy; but if the merchant sends his own lighter, the underwriter is discharged (*k*). This last statement of the law was questioned by Mathew, J., who said: "The case of Sparrow *v.* Carruthers (*l*) was decided in 1746 under a course of business totally different from that obtaining at the present time. Though the judgment in that case was assented to by a jury of merchants, it would appear to-day to be a very extraordinary decision to arrive at. Similarly with the later case of Strong *v.* Natally (*m*). But in any case the difficulty raised by those cases was obviated by inserting the clause 'including risk of craft.' That clause must cover carriage in a hired lighter, and why should it not also cover it in a lighter belonging to the assured, the person most concerned for the safety of the cargo?" (*n*). A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely

(*g*) See *per* Lord Esher in *Sailing Ship Garston Co.* v. *Hickie*, 15 Q.B.D. 580.

(*h*) *Hurry* v. *Royal Exchange Assur.*, 2 B. & P. 430; *Rucker* v. *London Assur. Co.*, 2 B. & P. 432; *Matthie* v. *Potts*, 3 B. & P. 23; *Stewart* v. *Bell*, 5 B. & A. 238.

(*i*) *Per* Lord Mansfield in *Pelly* v. *Royal Exchange Assur. Co.*, 1 Burr. 348.

(*k*) *Rucker* v. *London Assur. Co.*, 2 B. & P. N.R. 432; *Stewart* v. *Bell*, 5 B. & Ald. 238. See also *Strong* v. *McAlly*, 1 B. & P. N.R. 16, doubted in *Paul* v. *Ins. Co. of North America*, 15 T.L.R. 534.

(*l*) 2 Str. 1236.

(*m*) 1 B. & P. N.R. 16.

(*n*) *Paul* v. *Ins. Co. of North America*, 15 T.L.R. at p. 535.

landed " does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel. Bowen, L.J., said (*o*): " The risk insured against is the risk of the transit upon the lighters which have in the ordinary course of business to convey the goods to the shore. The nature of this risk can be perfectly appreciated and estimated by the parties to the contract. Landing goods means putting them upon the land, or upon that which by custom of the port is its equivalent. In the present case, instead of placing the goods on lighters to carry them to the shore, the goods were placed upon lighters which were to take them to an export vessel and there to load them as soon as she was ready to receive them. Such transhipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A lighter which has to land its cargo has only to make for the quay and to wait its turn in accordance with the usages of the port. A lighter which is intended to tranship the goods to another ship may have to wait for its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather and of collision with other vessels or barges in the dock. In the smaller London docks lighters may be comparatively safe, but in the larger docks they are often swamped by the wind and by the waters; and yet might be obliged to wait days or possibly weeks for the arrival of the export vessel to which the goods were consigned." The risk on goods, therefore, ends directly they are put on *terra firma*, unless they are placed there only for a temporary purpose, subsidiary to the main purpose of the voyage, or under such circumstances as to be protected by the usage of the trade (*p*), or unless there be a special agreement to prolong the risk.

On an insurance of goods on a voyage policy, until the same are safely landed at the port of discharge, " including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose (*q*). If a vessel is disabled and obliged to put into port before the voyage is completed, and is not worth repairing, and is consequently abandoned, and the master transhipps the goods, and

(*o*) *Houlder & Co.* v. *The Merchants Marine Ins. Co., Ltd.*, 17 Q.B.D. 354; 55 L.J. Q.B. 420. See also *Stewart* v. *Bell*, 5 B. & Ald. 238.

(*p*) *Harrison* v. *Ellis*, 7 E. & B. 465; 25 L.J. Q.B. 239. See also *Australian Agricultural Co.* v. *Saunders*, L.R. 10 C.P. 668; 44 L.J. C.P. 391.

(*q*) *Lane* v. *Nixon*, L.R. 1 C.P. 412; 35 L.J. C.P. 243.

after such transhipment the goods are lost, the underwriters will be liable upon the policy (*r*).

Duration and termination of risk on vessel.—It is generally expressly provided in the policy that the risk shall continue, as regards the ship, until she has arrived at her port of destination or port of discharge, and has been moored at anchor in safety twenty-four hours, and, as regards the goods, until they have been safely discharged and landed. Where a ship was insured "at and from" Jamaica, and was lost in coasting from one port of the island to another, it was held that she was protected by the policy in moving from port to port in the discharge of her cargo, and in taking fresh cargo, in the prosecution of the outward and homeward voyage in the ordinary and usual manner (*s*). Of course, the protection of the policy may be extended by express terms to the "final" or "last" port of discharge, not necessarily the last port originally intended, but the last port available (*t*); or it may be the port finally determined upon for any reason, even of necessity (*u*). But a vessel is not protected in going about from port to port, or cruising round the whole island, in order to dispose of her cargo, in a manner that is not warranted by the ordinary usage and custom of trade, as the risk is thereby increased to the detriment of the underwriter to an extent not contemplated at the time the insurance was effected. If the policy is on the ship until her arrival at the last port of discharge, and several ports are named in the policy, some of which are blockaded, the risk on the policy will cease on the arrival of the vessel at the last unblockaded port (*x*). But, if the vessel deviates from the voyage insured, and enters upon a fresh adventure, or goes to ports not named in the policy, through fear of the breaking out of hostilities, and of the ports of destination becoming hostile ports, the underwriters will be discharged (*y*). Where a ship was insured for the outward voyage "to all or any of the ports or places in the East Indies, China, or elsewhere, until arrival at the last place of discharge on the outward voyage," it was held that the outward voyage terminated as soon as the outward

(*r*) *Plantamour* v. *Staples*, 3 Doug. 1; 1 T.R. 611, n.; *Shipton* v. *Thornton*, 9 Ad. & E. 337; 8 L.J. Q.B. 73.

(*s*) *Cruickshank* v. *Janson*, 2 Taunt. 301; *Warre* v. *Miller*, 4 B. & C. 538; 4 L.J. (O.S.) K.B. 8; *Inglis* v. *Vaux*, 3 Campb. 437; *Moore* v. *Taylor*, 1 A. & E. 25; *Leigh* v. *Mather*, 1 Esp. 412.

(*t*) *Clason* v. *Simmonds*, 6 T.R. 533; *Brown* v. *Vigne*, 12 East, 283; *Neilson* v. *Delacour*, 2 Esp. 619.

(*u*) *Parkin* v. *Tunno*, 11 East, 22; *B lachenhagen* v *London Assur. Co.*, 1 Campb. 454. See also *Crocker* v. *Sturge* (1897), 1 Q.B. 330; 66 L.J. Q.B. 142; *The Aiksham*, 9 T.L.R. 605; *Spalding* v. *Crocker*, 2 Com. Cas. 189; *Crocker* v. *The Gen. Ins. Co. of Trieste*, 2 Com. Cas. 233.

(*x*) *Doyle* v. *Powell*, 4 B. & Ad. 267.

(*y*) *Oliverson* v. *Brightman*, 8 Q.B. 781; 15 L.J. Q.B. 274.

cargo had been discharged, and that the risk could not be prolonged so as to cover goods taken on board at intermediate places, to be carried onwards to the more distant ports or places named in the policy (*z*).

"Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment" (*a*).

In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination (*b*). If a ship puts into a port justifiably, the captain may trade there, as there is no implied condition or warranty that a ship shall not trade in the course of her voyage, provided (1) That she does not stay longer than would be justified by the necessity that drove her into port; (2) That she does not thereby alter the risk insured (*c*).

Where, in a policy of insurance on a vessel for the outward voyage, there is a clause giving her liberty to "touch, stay, &c., at any ports whatsoever to take on board and land goods," the clause will protect the vessel while she is stopping for the *bonâ fide* discharge of the outward cargo, and is at the same time availing herself of the opportunity of taking in merchandise, being at the time in the due prosecution of the outward voyage; but "the captain has no right to mix up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceases to be the sole reason for his stay at" a particular port, "these underwriters are discharged" (*d*). If the party effecting the insurance is ignorant of the particular port at which the goods will be shipped, as well as of the name of the ship and of the species of the goods, he may protect himself against loss by a general insurance of goods of a certain value to be sent to him

(*z*) *Richardson* v. *Lond. Assur. Co.*, 4 Campb. 94.

(*a*) 6 Edw. 7, c. 41, s. 59.

(*b*) 6 Edw. 7, c. 41, sched. 1, r. 6.

(*c*) *Raine* v. *Bell*, 9 East, 195, followed in *Cormack* v. *Gladstone*, 11 East, 346, and approved in *Laroche* v. *Oswin*, 12 East, 130. See also *Company of African Merchants* v. *British and Foreign Mar. Ins. Co.*, L.R. 8 Ex. 154; 42 L.J. Ex. 60.

(*d*) Lord Ellenborough, *Inglis* v. *Vaux*, 3 Campb. 437; *Moore* v. *Taylor*, 1 Ad. & E. 25; 3 L.J. K.B. 132.

by sea whatever may be the ship they are sent in, or the place at which they are put on board (*e*).

Arrival at port of destination—Mooring in safety (*f*).—The limits of the "port of discharge" are regulated by usage; and the term as used in policies of insurance includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. Where the destination is general—*e.g.*, the Baltic, or Jamaica, or to "ports of discharge"—the risk ceases when the ship has been "moored at anchor twenty-four hours in good safety" at the first port of discharge at which she calls to discharge the bulk of her cargo (*g*). Where a ship's place of destination was "her Majesty's Dockyard at Deptford," and the vessel got to the dock gates, but could not get into the dock by reason of ice which blocked up the entrance, and she was accordingly moored in the river alongside the dock gates, and was there driven on shore and totally lost, it was held that the underwriters continued liable, as she had never been moored in safety at her place of destination within the terms of the policy (*h*). But, where a vessel was chartered for a voyage from Quebec to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo, and the vessel arrived in the Mersey and was towed abreast of Wallasey Pool, but could get no further by reason of her great draught of water, and the captain then began to discharge the cargo in lumpers, and also discharged his crew, and after several days, when a considerable portion of the cargo had been discharged, the ship fell over on her side and was injured, it was held that the vessel had arrived at her place of destination, and that the risk on the policy ceased after she had been moored twenty-four hours in safety, although it appeared that the captain intended ultimately to carry the vessel into Wallasey Pool with as much of the cargo as he could carry over the shallow part of the river intervening between his original anchorage and that port (*i*). The risk is frequently prolonged by express stipulation in the policy beyond the usual period of twenty-four hours (*k*). By a policy of insurance a ship was insured from

(*e*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274; affirmed, 1 Cr. & J. 423; 9 L.J. (O.S.) Ex. 118.

(*f*) *Lindsay* v. *Janson*, 4 H. & N. 704; 28 L.J. Ex. 315.

(*g*) *Cruickshank* v. *Janson*, 2 Taunt. 301; *Leigh* v. *Mather*, 1 Esp. 412; *Inglis* v. *Vaux*, 3 Campb. 437.

(*h*) *Samuel* v. *Royal Ex. Assur. Co.*, 8 B. & C., 123; 6 L.J. (O.S.) K.B. 315; *Stone* v. *Marine Ins. Co.*, 1 Ex.D. 81; 45 L.J. Ex. 361.

(*i*) *Whitwell* v. *Harrison*, 2 Exch. 127; 18 L.J. Ex. 465.

(*k*) See Magens, p. 23, on the necessity of this. See *Gambles* v. *Ocean Mar. Ins. Co.*, 1 Ex.D. 141; 45 L.J. Ex. 366; *Mercantile Mar. Ins. Co.* v. *Titherington*, 34 L.J. Q.B. 11; *Pearson* v. *Commercial Union Assur. Co.*, 1 App.Cas.

Liverpool to any port in the Pacific Ocean, "and during thirty days' stay in her last port of discharge." In another part of the policy there was the usual printed clause, by which she was to be insured "until she hath moored at anchor twenty-four hours in good safety." She arrived at her port of discharge at 7 P.M. on the 25th May, and anchored there, and at 3.45 A.M. on the 24th June she was driven ashore and lost. It was held, that the loss was covered by the policy, as the thirty days had not expired when she was so lost (*l*). If a vessel has sprung a leak or received her "death wound at sea," but comes into port and casts anchor in apparent safety for twenty-four hours, and the mischief is not discovered until after the expiration of the time limited for the continuance of the risk on the policy, the underwriter will nevertheless continue liable, as it is obvious that the vessel never was in reality moored in safety at all (*m*). But, although a ship is damaged, yet if she is not a mere wreck or in a sinking state at the time of her arrival, and is moored as a ship in the possession and control of her owners, she is "moored in safety" (*n*). If an embargo is laid on all English vessels at a foreign port, and the vessel enters in ignorance thereof, and remains at anchor twenty-four hours, and is subsequently seized, the underwriters are liable; "for she is in the power of the enemy the very moment she enters the port, and is not for one minute moored in safety" (*o*). And if, by reason of quarantine regulations or other laws of the port, the vessel is not lawfully moored, but is liable to be sent out of port to perform quarantine, or to be examined or fumigated, the risk continues on the policy, although the vessel may have remained at anchor more than twenty-four hours before any actual removal takes place, and before the port regulations against her mooring are enforced (*p*). But, where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but was afterwards seized in consequence of the master having smuggled before her arrival, it was held that the terms of the

498; *Hunter* v. *Northern Mar. Ins. Co.*, 13 App.Cas. 717; *Sailing Ship Garston* v. *Hickie*, 15 Q.B.D. 580; 56 L.J. Q.B. 38; *Cornfoot* v. *Royal Exchange Assur.* (1904), 1 K.B. 40; 73 L.J. K.B. 22; *Lidgett* v. *Secretan*, L.R. 5 C.P. 190; 40 L.J. C.P. 257.

(*l*) *Mercantile Mar. Ins. Co.* v. *Titherington*, 34 L.J. Q.B. 11; 5 B. & S. 765.

(*m*) *Meretony* v. *Dunlope*, cited 1 T.R. 260, where it is stated that the verdict was given for the insured, whereas the court, in *Knight* v. *Faith*, 19 L.J. Q.B. 517; 15 Q.B. 649, treat the case as if the verdict had been for the insurer. See also *Shawe* v. *Felton*, 2 East, 110.

(*n*) *Lidgett* v. *Secretan*, L.R. 5 C.P. 190; 39 L.J. C.P. 196.

(*o*) *Minett* v. *Anderson*, Peake, 277.

(*p*) *Waples* v. *Eames*, 2 Str. 1243; *Horneyer* v. *Lushington*, 15 East, 46.

policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk (*q*).

It is not the fact of unloading at any port into which the ship runs in the course of the voyage which puts an end to the risk on the ship, when insured either generally to an island or country, or to her port or ports of discharge. It is not until she has moored twenty-four hours in good safety at a port at which she was intended to unload, and at which the master actually breaks bulk for the purpose of unloading either the whole or the greater part of her cargo, that the risk on the ship will be held to terminate. If indeed the port into which she puts is one to which she was originally destined, then, if she is lost after having moored there twenty-four hours in good safety, the risk will no doubt be at an end, even although she has not actually broken bulk, but is only preparing to unload her cargo at the time of the loss (*r*).

The result of the cases as to what constitutes a mooring in good safety appears to be that a ship cannot be considered to have been moored for twenty-four hours in good safety unless she has been moored for that space of time in the harbour of her port of discharge: (1) in such a state of physical safety that she can keep afloat while her cargo is being unloaded; (2) in such a state of political safety (*s*) that she shall not have been subjected during that time to any embargo, seizure, or capture on the part of the government of the port or of strangers; (3) under such circumstances as to have had an opportunity of unloading and discharging. What is meant is not that there must have been nothing to prevent the immediate discharge of the ship, but that there shall have been no legal obstacles to the discharge; such as one arising from the quarantine regulations of the port (*t*). If the twenty-four hours' clause were struck out of the policy, the risk on the ship would still continue until her safe arrival at her port of destination, but would cease immediately on her being at her moorings (*u*).

The policy—Premium.—Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable (*v*). The question what is reasonable

(*q*) *Lockyer* v. *Offley*, 1 T.R. 252.

(*r*) *Camden* v. *Cowley*, 1 W. Bl. 417, 418; *Barrass* v. *London Assur. Co.*, 1 Park, Ins. 74; *Inglis* v. *Vaux*, 3 Campb. 437; *Leigh* v. *Mather*, 1 Esp. 412; 1 Phillips, ss. 960, 962.

(*s*) *Minett* v. *Anderson*, Peake, N.P.R. 277; *Horneyer* v. *Lushington*, 15 East, 46; *Lockyer* v. *Offley*, 1 T.R. 252.

(*t*) *Waples* v. *Eames*, 2 Str. 1243; *Angerstein* v. *Bell*, 1 Park, 54; 1 Marsh., Ins. 263; *Samuel* v. *Royal Exch. Co.*, 8 B. & C. 119; 6 L.J. (O.S.) K.B. 315. See *Stone* v. *Mar. Ins. Co. of Gothenburg*, 1 Ex. D. 81; 1 Phillips on Insur., s. 968.

(*u*) See *per* Bramwell, B., in *Stone* v. *Mar. Ins. Co. of Gothenburg*, 1 Ex. D. 85; 45 L.J. Ex. 361.

(*v*) 6 Edw. 7, c. 41, s. 31 (1).

is a question of fact (*x*). Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable (*y*). The rate is usually a percentage on the value of the subject-matter insured—*e.g.*, ten shillings per cent.—and varies with all the possibilities of the risks. The contract is not joint, but several, the underwriters being bound "each one for his own part," and each is therefore only liable for the proportion for which he signs (*z*). Almost all policies are effected by insurance brokers, whose business it is to act as middlemen between those merchants and shipowners who wish to insure their property, on the one hand, and the private underwriters or public insurance companies on the other. The broker is the agent of the assured, not of the underwriter, and therefore he owes no duty in the transaction to the latter, on which an action for negligence can be founded (*a*).

Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium (*b*).

Policy effected through broker.—Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium (*c*). The rule of law, founded on mercantile custom, by which the broker and not the assured, is liable to the underwriter for the premium upon a policy of marine insurance, is not limited to the ordinary form of Lloyd's policy, but extends also to a "company's policy," which contains a promise by the assured to pay the premium (*d*).

Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any

(*x*) 6 Edw. 7, c. 41, s. 88.

(*y*) *Ib.*, s. 31 (2).

(*z*) *Tyser* v. *Shipowners' Syndicate, (Reassured)*, (1896) 1 Q.B. 135; 65 L.J. Q.B. 238. See also 6 Edw. 7, c. 41, s. 24 (2).

(*a*) *Empress Assur. Corp.* v. *Bowring & Co.*, 11 Com. Cas. 107.

(*b*) 6 Edw. 7, c. 41, s. 52.

(*c*) *Ib.*, s. 53 (1). See *Wavertree Sailing Ship Co.* v. *Love*, 66 L.J. P.C. 77; (1897) A.C. 373.

(*d*) *Universo Ins. Co. of Milan* v. *Merchant's Mar. Ins. Co.* (1897), 2 Q.B. 93; 66 L.J Q.B. 564.

insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent (*e*).

Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker (*f*).

Premium—Return of.—Where the premium, or a proportionate part thereof is, by the Marine Insurance Act (*g*), declared to be returnable,—(a) If already paid, it may be recovered by the assured from the insurer; and (b) If unpaid, it may be retained by the assured or his agent (*h*).

Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured (*i*).

Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured (*k*). Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured (*l*). In particular—(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable: (b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable: Provided that where the subject-matter has been insured "lost or not lost" (*m*) and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival; (c) Where the assured has no insurable interest throughout the currency of the risk, the premium

(*e*) 6 Edw. 7, c. 41, s. 53 (2).
(*f*) *Ib.*, s. 54. See *Dalzell* v. *Mair*, 1 Campb. 532; *De Gamende* v. *Pigou*, 4 Taunt. 246; *Foy* v. *Bell*, 3 Taunt. 493.
(*g*) 6 Edw. 7, c. 41.
(*h*) *Ib.*, s. 82.
(*i*) *Ib.*, s. 83. See *Gorsedd S.S. Co.* v. *Forbes*, 5 Com. Cas. 413; *Pyman* v. *Marten*, 22 T.L.R. 834; *Ib.*, 13 Com. Cas. 64.
(*k*) 6 Edw. 7, c. 41, s. 84 (1).
(*l*) *Ib.*, s. 84 (2).
(*m*) See *ante*, p. 1137.

is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering; (d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable: (e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable; (f) Subject to the foregoing provisions, where the assured has over-insured by double insurance (*n*), a proportionate part of the several premiums is returnable: Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable (*o*).

If there are separate voyages and several risks to be run, some of the premiums may be returnable and others not; but, if there is one entire voyage, and one risk, and the risk has commenced, there can be no return of premium (*p*). If the vessel sails in an unseaworthy condition, and there is no fraudulent representation or warranty of seaworthiness in the policy, and no evidence of fraud, the premium is returnable, as the underwriter's risk upon the policy never commenced, by reason of the seaworthiness of the vessel being, as we have before seen, a condition precedent to his liability (*q*). If the policy be on goods to be laden on board the particular vessel, and no goods are put on board, the premium is returnable (*r*); and, if part only of the goods covered by the policy are put on board, a portion of the premium corresponding with the deficiency may be claimed back (*s*). But, if the policy be on freight, the risk may, as we have seen, attach, although no goods have been put on board; and, if the risk once attaches, the premium cannot be recovered back(*t*). Where several policies have been effected, and, before the risk thereon has commenced, the interest turns out to be less than the amount insured on the whole, the insured is entitled to a reasonable return of premium upon all the policies; but, where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterwards signed, and a loss happens between the signing of the first and subsequent policies, the underwriters

(*n*) See 6 Edw. 7, c. 41, s. 32.

(*o*) 6 Edw. 7, c. 41, s. 84 (3).

(*p*) *Bermon* v. *Woodbridge*, 2 Doug. 781.

(*q*) *Penson* v. *Lee*, 2 Bos. & P. 330.

(*r*) *Martin* v. *Sitwell*, 1 Show. 151.

(*s*) *Horneyer* v. *Lushington*, 15 East, 46.

(*t*) *Moses* v. *Pratt*, 4 Camp. 297.

on the first will be liable in proportion to their subscriptions to the extent of the whole sum insured, and therefore, the risk having been incurred by them, a return of the premium cannot be claimed (*u*). Where property has by mistake been insured for more than it is worth, the underwriter is bound to return the overplus premium; and, whenever it is established to be the custom and usage of trade to return a certain portion of the premium upon certain contingencies, the insured will be entitled to avail himself of the custom (*x*). Where an insurance was effected on a ship for a year, and part of the premium was to be returned "for every uncommenced month if sold or laid up," and the vessel had been laid up for several months within the year, but was employed again within the year, this was held not to be such a laying up as entitled the insured to a return of premium (*y*).

Void policy—Return of premium.—If a policy is rendered null and void by reason of a written misrepresentation or misstatement made by the insured by mistake and without fraud, the insured will be entitled to a return of his premium (*z*). But, if the insured has effected a fraudulent insurance with the view of cheating the underwriters, the law will not enable him to recover back the premium he has paid (*a*). If the insurance is illegal, as, for instance, if it has been effected upon an unlawful voyage or adventure, such as a smuggling enterprise, or a trading with foreign enemies, or a trading in breach of the navigation laws, and is consequently void, the premium cannot be recovered back if the unlawful voyage or adventure has been undertaken and both parties are *in pari delicto;* but there is a *locus pœnitentiæ,* so long as the contract continues executory (*b*). And, if an insurance be effected on a trading adventure with foreign enemies, and be consequently illegal in its inception, so that the risk never commences, yet, if it was always in the contemplation of the parties to obtain a licence legalising the trade, and they intended to insure a legal and not an illegal voyage, but from some mistake or misapprehension the licence was not obtained in sufficient time to legalise the adventure and enable the insured to recover upon the policy, the premium paid for such insurance is recoverable, as there was no intention on the part of the insured to violate the law (*c*). So, if the

(*u*) *Fisk* v. *Masterman*, 8 M. & W. 165; 10 L.J. Ex. 306.

(*x*) *Long* v. *Allen*, 2 Park, Ins. 797 (ed. 8).

(*y*) *Hunter* v. *Wright*, 10 B. & C. 714; 8 L.J. (O.S.) K.B. 259.

(*z*) *Feise* v. *Parkinson*, 4 Taunt. 640.

(*a*) *Chapman* v. *Fraser*, 1 Park, Ins. 456.

(*b*) *Johnston* v. *Sutton*, 1 Doug. 254; *Lubbock* v. *Potts*, 7 East, 449.

(*c*) *Hentig* v. *Staniforth*, 5 M. & S 122

insured was ignorant of the illegality of the voyage at the time he effected the insurance and paid the premium, as, for instance, if he did not know that hostilities had broken out, and that the parties with whom he was trading had at the time become foreign enemies, the premium is recoverable (*d*). Non-compliance with the requirements of the Merchant Shipping Act respecting the engagement of the crews of British vessels does not render the voyage illegal, but only furnishes ground for proceedings against the master for the breach of the statute (*e*). "Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative: Provided that nothing in this section affects the assignment of a policy after loss" (*f*).

Double insurance—Over-insurance—Right of contribution.—"Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act (*g*), the assured is said to be over-insured by double insurance" (*h*).

"Where the assured is over-insured by double insurance:—(a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act; (b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured (*i*); (c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy; (d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves" (*k*).

Where the assured is over-insured by double insurance, each

(*d*) *Oom* v. *Bruce*, 12 East, 225.

(*e*) *Redmond* v. *Smith*, 8 Sc. N.R. 268; 13 L.J. C.P. 159.

(*f*) 6 Edw. 7, c. 41, s. 51; *Powles* v. *Innes*, 11 M. & W. 10; 12 L.J. Ex. 163; *North of England Oil Cake Co.* v. *Archangel Ins. Co.*, L.R. 10 Q.B. 249; 44 L.J. Q.B. 121.

(*g*) See 6 Edw. 7, c. 41, s. 67 (1), as to indemnity in case of unvalued policy being the insurable value, and in case of valued policy the full value. As to return of premium in case of over-insurance by double insurance, see s. 84 (3) (e).

(*h*) 6 Edw. 7, c. 41, s. 32 (1).

(*i*) See *Bruce* v. *Jones*, 1 H. & C. 769; 32 L.J. Ex. 132.

(*k*) 6 Edw. 7, c. 41, s. 32 (2).

insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract (*l*). If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt (*m*). Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance (*n*).

Warranties.—There are certain stipulations, either expressly or impliedly, in a marine policy undertaken by the assured and known as warranties. They differ from representations (*o*) in being part of the policy, and requiring a literal fulfilment, whether material to the risk or not, and they cannot be controlled or excluded from the policy by representations. Warranties are generally expressed thus: "Warranted to sail on or before the 6th May, 1909." "Warranted neutral ship and neutral property"; or the word "warranted" is altogether omitted, and the words "to sail," &c., alone inserted.

A warranty in sects. 33—41 of the Marine Insurance Act, 1906 (*p*), relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts (*q*). A warranty may be express or implied (*r*). A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date (*s*).

Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law (*t*). Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and

(*l*) 6 Edw. 7, c. 41, s. 80 (1).
(*m*) *Ib.*, s. 80 (2).
(*n*) *Ib.*, s. 81.
(*o*) See *ante*, p. 1122.
(*p*) 6 Edw. 7, c. 41.
(*q*) 6 Edw. 7, c. 41, s. 33 (1).
(*r*) *Ib.*, s. 33 (2).
(*s*) *Ib.*, s. 33 (3).
(*t*) *Ib.*, s. 34 (1).

the warranty complied with, before loss (*u*). A breach of warranty may be waived by the insurer (*x*).

Implied warranty of seaworthiness of ship.—In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (*y*). Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port (*z*). Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage (*a*). A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured (*b*). In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (*c*).

Before the insured, however, can recover against the underwriter upon a voyage policy, he is bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly equipped with sails and stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching; and, if they are not complied with, so that the perils are enhanced, from whatever cause this may arise, and though no fraud was intended by the insured, the underwriters have a right to say they are not liable (*d*); but the insured is not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk (*e*). The insured warrants that

(*u*) 6 Edw. 7, c. 41, s. 34 (2).

(*x*) *Ib.*, s. 34 (3).

(*y*) *Ib.*, s. 39 (1). *Cohen* v. *Davidson*, 2 Q.B.D. 455; 46 L.J. Q.B. 305; this implied warranty is not excluded by a provision in the policy that the ship's fittings should be approved by a surveyor: *Sleigh* v. *Tyser*, (1900) 2 Q.B. 333; 69 L.J. Q.B. 626; *Greenock S.S. Co.* v. *Maritime Ins. Co.*, 72 L.J. K.B. 868; (1903) 2 K.B. 657.

(*z*) *Ib.*, s. 39 (2).

(*a*) *Ib.*, s. 39 (3).

(*b*) *Ib.*, s. 39 (4).

(*c*) *Ib.*, s. 39 (5). *Fawcus* v. *Sarsfield*, 6 E. & B. 200; 25 L.J. Q.B. 249; *Thompson* v. *Hopper*, 6 E. & B. 172; 25 L.J. Q.B. 240; *Gibson* v. *Small*, 4 H.L. Cas. 353; *Michael* v. *Tredwin*, 17 C.B. 551; 25 L.J. C.P. 83; see also *Dudgeon* v. *Pembroke*, 2 App.Cas. 284; 46 L.J. Q.B. 409.

(*d*) Lord Ellenborough, *Wedderburn* v. *Bell*, 1 Campb. 1; *Douglas* v. *Scougall*, 4 Dow, 269.

(*e*) *Jenkins* v. *Heycock*, 8 Moo. P.C. 361; *Biccard* v. *Shepherd*, 14 Moo. P.C.

the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself, because the deck cargo is such as may be readily jettisoned in such weather (*f*). The insurer is entitled to expect that the shipowner will do all that can reasonably be expected to be done, to limit the risk covered by the insurance to those perils incidental to navigation which the care and skill of man cannot provide against. But, where the nature of the adventure, and the size and class of vessel to be employed, are known to both parties, the implied warranty of the shipowner cannot be carried further than that he shall do his utmost to make the particular vessel as fit for the voyage as she can possibly be made. Therefore, in sending a river steamer across the ocean, the warranty of seaworthiness is complied with, if the nature of the adventure is disclosed to the underwriter, and the owner does as much as can reasonably be done to make her fit for the voyage, though she may not be considered seaworthy in the ordinary sense of the term as applied to ordinary sea-going vessels (*g*).

Non-compliance with the requirements of the statutes respecting the engagement of the crew does not render a vessel unseaworthy; it must be shown that the crew was actually insufficient in number, or that there was a want of capacity in the master or other officers (*h*). If a ship becomes leaky or founders without any adequate cause as soon as she leaves the port, the presumption is that the vessel was unseaworthy at the time she put to sea (*i*). If the vessel is not properly found with cables, anchors, and ground tackling, she is unseaworthy (*k*); and so she is, if she has an insufficient crew, or an incompetent captain, or has no pilot on board at those parts of the voyage where a pilot is required (*l*); but, if a competent master, and crew and pilot have been provided in the first instance, the insurer is not discharged by their negligence or want of skill; "for there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and

471; *Thin* v. *Richards*, (1892) 2 Q.B. 141; 62 L.J. Q.B. 39.

(*f*) *Daniels* v. *Harris*, L.R. 10 C.P. 1; 44 L.J. C.P. 1.

(*g*) *Burges* v. *Wickham*, 3 B. & S. 669; 33 L.J. Q.B. 17; *Clapham* v. *Langton*, 34 L.J. Q.B. 46; 5 B. & S. 729.

(*h*) *Redmond* v. *Smith*, 7 M. & Gr. 457; 13 L.J. C.P. 159.

(*i*) *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73.

(*k*) *Watson* v. *Clark*, 1 Dow, 336; *Parker* v. *Potts*, 3 *ib.* 23; *Wilkie* v. *Geddes*, *ib.* 57.

(*l*) *Tait* v. *Levi*, 14 East, 481.

crew" or pilot "during the whole course of the voyage" (*m*). If the master is unable, from stress of weather or other causes, to procure a pilot, this is a risk covered by the policy, and the insurer remains liable (*n*). And, if by accident or mistake a vessel sails out of port in an unseaworthy state, and the defect is remedied before any loss occurs, and she then sails again in a seaworthy state, the insurer will be liable on the policy for a subsequent loss (*o*). The parties may make any stipulations they think fit in the policy respecting the seaworthiness of the vessel; and the insurer may consent to take her as seaworthy, or insure conditionally on certain repairs being done. The insured also impliedly warrants that a loss shall not happen through his own personal default, and that he will himself do nothing to enhance the risk. If he neglects to have the ship properly documented according to her national character, or if he furnishes her with simulated papers without the knowledge of the underwriters, these last will be released from all liability upon the policy in respect of losses occasioned by the neglect, as such increased risk is not the risk they intended to take upon themselves (*p*).

If the insurance attaches before the voyage commences, it is enough if the state of the ship is commensurate with the then risk; and if the voyage is such as to require a different complement of men or state of equipment in different parts of it, as if it be a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at the time when she enters upon each stage of the navigation properly manned and equipped for it (*q*).

When the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable (*r*) time, and that if the adventure be not so commenced the insurer may avoid the

(*m*) *Sadler* v. *Dixon*, 8 M. & W. 895; 11 L.J. Ex. 435.

(*n*) *Phillips* v. *Headlam*, 2 B & Ad. 383; 9 L.J. (O.S.) K.B. 238.

(*o*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320; but see *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, L.R. 3 P.C. 234; 39 L.J. P.C. 53.

(*p*) *Oswell* v. *Vigne*, 15 East, 70; *Pipon* v. *Cope*, 1 Campb. 434; but if the master violates the 57 & 58 Vict. c. 60, s. 451, *ante*, p. 1129, by stowing a portion of the cargo on deck, and sails without a certificate of clearance, the absence of that document does not create a statutory unseaworthiness so as to discharge the underwriter: *Wilson* v. *Rankin*, L.R. 1 Q.B. 162; 35 L.J. Q.B. 87.

(*q*) *Sadler* v. *Dixon*, *supra*; *Bouillon* v. *Lupton*, 15 C.B. N.S. 138; 33 L.J. C.P. 37; *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, *supra*; *Hedley* v. *Pinkney & Sons' S.S. Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

(*r*) Reasonable time is a question of fact. See 6 Edw. 7, c. 41, s. 88.

contract (*s*). The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition (*t*). It is a question for the jury whether the fact of the ship proving unseaworthy shortly after starting shows that it was so before starting. The burden of proof is upon the underwriters to show that the ship was unseaworthy at starting (*u*).

The rule of law that in voyage policies there is an implied warranty of seaworthiness or fitness does not extend to time policies. The ship may be at sea when the policy attaches, and may have encountered heavy weather which has rendered her unseaworthy; or again, during the currency of such a policy the ship may run short of tackle or necessaries; therefore the parties could not have contemplated that the ship should be made seaworthy at sea for the purposes of a new time policy attaching at sea. Even in a voyage policy, there is no warranty that the ship should be kept in a state of seaworthiness after the voyage has commenced and the policy has attached (*x*).

No implied warranty that goods are seaworthy.—In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy (*y*). In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy (*z*).

Warranty as to nationality.—There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk (*a*).

Warranty as to lawful adventure.—There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner (*b*).

Express warranties.—An express warranty may be in any form of words from which the intention to warrant is to be

(*s*) 6 Edw. 7, c. 41, s. 42 (1); *De Wolf* v. *Archangel, &c. Ins. Co.*, L.R. 9 Q.B. 451; 43 L.J. Q.B. 147.

(*t*) 6 Edw. 7, c. 41, s. 42 (2).

(*u*) *Pickup* v. *Thames Ins. Co.*, 3 Q.B.D. 594; 47 L.J. Q.B. 749.

(*x*) See *Dudgeon* v. *Pembroke*, 2 App. Cas. 284; 46 L.J. Ex. 409; *Thompson* v. *Hopper*, E. B. & E. 1038; 27 L.J. Q.B. 441; *Ballantyne* v. *Mackinnon*, (1896) 2 Q.B. 455; 65 L.J. Q.B. 616.

(*y*) 6 Edw. 7, c. 41, s. 40 (1). See *Koebel* v. *Saunders*, 33 L.J. C.P. 310; 17 C.B.N.S. 71; *Boyd* v. *Dubois*, 3 Campb 133. As to warranty of fitness of goods as between shipowner and shipper, see *Acatos* v. *Burns*, 3 Ex. D. 282; 47 L.J. Ex. 566.

(*z*) *Ib.*, s. 40 (2).

(*a*) 6 Edw. 7, c. 41, s. 37; *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q.B. 144.

(*b*) 6 Edw. 7, c. 41, s. 41. See *Fracis* v. *Sea Ins. Co.*, 79 L.T. 28; *Wilson* v. *Salamandra Ins. Co.*, 88 L.T. 96.

inferred (*c*). An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy (*d*). An express warranty does not exclude an implied warranty, unless it be inconsistent therewith (*e*). Every positive averment on the face of a policy of insurance of facts material to the risk, forming the basis of the contract, "amounts to a warranty or condition; and, if such allegation be not strictly true, the insured cannot recover on the policy to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty, or wholly independent of it; for it is a condition on which the contract is to take effect, which failing, the contract fails" (*f*). But every representation inserted in a contract does not, as we have seen (*ante*, p. 545), amount to a warranty. A written memorandum or representation does not become part of the policy from being folded up in it, or pinned thereto (*g*); but, if the policy refers to it or to any separate writing, the two documents may then be placed in juxtaposition and read together (*h*).

"*Well*" *and* "*in good safety.*"—"Where the subject-matter insured is warranted 'well' or 'in good safety' on a particular day, it is sufficient if it be safe at any time during that day" (*i*), so that, if the vessel should have been lost in the morning of that day, and the insurance be effected in the afternoon, the underwriters will be liable (*k*). The warranties most frequently met with in maritime policies are warranties of the time of sailing, of departure with convoy, and warranties of neutrality.

Time of sailing.—When the vessel is warranted to sail by a particular day, the underwriter will be discharged if she does not sail at the time appointed; and the circumstance of her being prevented by inevitable accident, or detention of princes, does in nowise exonerate the insured from the consequences of his breach of contract (*l*). When the vessel has left her loading port with all her cargo and clearances on board, with no other object in view than to get in the safest way she can to the port of delivery, this is a sailing within the meaning of the warranty, although she does not proceed straight to sea, but sails to some general place of rendezvous to wait for convoy (*m*). But she

(*c*) 6 Edw. 7, c. 41, s. 35 (1).
(*d*) *Ib.*, s. 35 (2).
(*e*) *Ib.*, s. 35 (3).
(*f*) Le Blanc, J., *Lothian* v. *Henderson*, 3 Bos. & P. 515; *De Hahn* v. *Hartley*, 1 T.R. 343; *Ollive* v. *Booker*, 1 Ex. 416; 17 L.J. Ex. 21.
(*g*) *Pawson* v. *Ewer*, 1 Doug. 11, n.
(*h*) *Routledge* v. *Burrell*, 1 H.Bl. 254; *Worsley* v. *Wood*, 6 T.R. 710.
(*i*) 6 Edw. 7, c. 41, s. 38.
(*k*) *Blackhurst* v. *Cockell*, 3 T.R. 360.
(*l*) *Hore* v. *Whitmore*, Cowp. 784.
(*m*) *Bond* v. *Nutt*, Cowp. 601; *Wright* v. *Shiffner*, 11 East, 515; *Thellusson* v. *Fergusson*, 1 Doug. 361; *Cockrane* v.

must be actually out of port or be sailing down a river towards the sea, and have made a *bonâ fide* commencement of the voyage, in order to satisfy a warranty to sail (*n*). If the warranty be to sail after a specific day, and the ship sails before, or if it be not to sail during a particular period of the year, and the ship sails during the prohibited period, the liability on the policy does not attach, as the risk is a different risk from the one agreed to be run by the underwriter (*o*).

Warranties—Sailing with convoy.—If a vessel warranted "to depart with convoy" is proceeding from her loading port to the nearest place of rendezvous for convoy and is captured, the underwriters are nevertheless responsible, as the vessel was fulfilling the warranty at the time of the capture in the only mode in which it could be fulfilled, and was proceeding to secure convoy and departing with convoy, in the mercantile sense of the term, and according to the usage of trade (*p*). A warranty that the vessel shall "depart with convoy" does not mean merely that she is to sail out of port or from the place of general rendezvous with convoy, but that she is to have convoy for the whole voyage insured, unless prevented by stress of weather (*q*), or unless it is the usage for ships to be convoyed only part of the distance, and convoy beyond a certain point is not deemed necessary and is not provided by the government (*r*). The mode of the convoy is regulated by mercantile usage; and it is never considered necessary for the ship to be convoyed throughout by the same vessels, there being in general relays of convoy from stage to stage (*s*).

Neutrality.—Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk (*t*).

Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say,

Fisher, 1 Cr. M. & R. 809; 4 L.J. Ex. 328; *Lang* v. *Anderdon*, 3 B. & C. 495; 3 L.J. (O.S.) K.B. 62; *Sea Ins. Co.* v. *Blogg*, (1898) 2 Q.B. 398; 67 L.J. Q.B. 757.

(*n*) *Moir* v. *Royal Exch. Assur. Co.*, 4 Campb. 84; *Ridsdale* v. *Newnham*, 3 M. & S. 456; *Graham* v. *Barras*, 5 B. & Ad. 1011.

(*o*) *Vezian* v. *Grant*, 2 Park, Ins. 673; *Colledge* v. *Harty*, 6 Exch. 205; 20 L.J. Ex. 146.

(*p*) *Anderson* v. *Pitcher*, 2 Bos. & P. 164.

(*q*) *Jefferyes* v. *Legendra*, 1 Show. 297; *Lilly* v. *Ewer*, 1 Doug. 72.

(*r*) *D'Eguino* v. *Bewicke*, 2 H. Bl. 551.

(*s*) *De Garey* v. *Clagget*, 2 Park, Ins. 708.

(*t*) 6 Edw. 7, c. 41, s. 36 (1).

that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract (*u*).

Whenever property is insured as neutral property which is not neutral property, there is no contract, and no action can be maintained on the policy. But, if the property is neutral at the time the insurance is effected and the risk attaches on the policy, the circumstance of its ceasing to be so at a subsequent period does not affect the underwriter's liability (*x*). "If a war break out the next day, the underwriter is liable" (*y*). It is no answer to an action on a policy of insurance that the goods were contraband of war, and were shipped for the purpose of being sent to a belligerent port, unless facts establishing a fraudulent concealment (*infra*) are set forth (*z*). The sentence of a foreign court of admiralty, or prize court, falsifying the warranty of neutrality, will be conclusive evidence of the breach thereof (*a*), unless it appears on the face of such sentence that the grounds of the adjudication are erroneous, or the adjudication itself is involved in doubt (*b*).

Deviation from voyage insured.—Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach (*c*). Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach (*d*). Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage (*e*). Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs (*f*).

(*u*) 6 Edw. 7, c. 41, s. 36 (2).

(*x*) *Eden* v. *Parkinson*, 2 Doug. 732; and see *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q.B. 144.

(*y*) *Salucci* v. *Johnson*, 2 Park, Ins. 716.

(*z*) *Hobbs* v. *Henning*, 34 L.J. C.P. 117; 17 C.B. N.S. 791; and see *Chavasse, Ex parte*, 34 L.J. Bk. 17. "Contraband of war" in its natural sense and in the absence of special circumstances, is applicable to goods only and not to persons. See *Yangtaze Ins. Assoc.* v. *Indemnity Mut. Mar. Assoc.*, 77 L.J. K.B. 995; (1908) 2 K.B. 504.

(*a*) *Bolton* v. *Gladstone*, 5 East, 155; *Baring* v. *Clagett*, 3 Bos. & P. 201; *Garrels* v. *Kensington*, 8 T.R. 230.

(*b*) *Dalgleish* v. *Hodgson*, 7 Bing. 495; 9 L.J. (O.S.) C.P. 138; *Hobbs* v. *Henning, supra*; *Tabbs* v. *Bendelack*, 3 Bos. & P. 207, n.

(*c*) 6 Edw. 7, c. 41, s. 43.

(*d*) *Ib.*, s. 44.

(*e*) *Ib.*, s. 45 (1).

(*f*) *Ib.*, s. 45 (2).

Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs (*g*).

There is a deviation from the voyage contemplated by the policy—(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from (*h*). The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract (*i*). Every policy of insurance is effected upon the implied understanding that the vessel will proceed straightway and without unnecessary delay to her place of destination. If, therefore, she voluntarily deviates from her course to put into port, and is afterwards lost, the underwriters will be discharged (*k*), unless it be shown that she went there under the pressure of necessity (*l*); or for necessary repairs or purposes essential to the safe prosecution of the voyage (*m*), or to avoid pirates, or icebergs, or other dangers of navigation (*n*), or that she went out of her way for the purpose of succouring a ship in distress (*o*), or of procuring convoy (*p*), or had liberty by the charter-party to make deviations or to call at different ports for trading purposes.

It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased (*q*). If the voyage insured has been actually abandoned, and it has been determined to alter the ship's destination, the underwriters will be discharged; but a mere meditated change of destination, not carried into effect by an actual abandonment of the voyage, will not have that effect (*r*). If a ship insured for one voyage sails upon another, and the same track for part of the distance leads towards both places of destination, and the vessel is taken before she arrives at the dividing point for the two voyages, the underwriters are

(*g*) 6 Edw. 7, c. 41, s, 46 (1).
(*h*) *Ib.*, s. 46 (2).
(*i*) *Ib.*, s. 46 (3).
(*k*) *Elliott* v. *Wilson*, 4 Bro. P.C. 470; *Leduc* v. *Ward*, 20 Q.B.D. 475; 57 L.J. Q.B. 379.
(*l*) *Scott* v. *Thompson*, 1 B. & P. N.R. 181; see *Phelps* v. *Hill*, (1891) 1 Q.B. 605; 60 L.J. Q.B. 382.
(*m*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320; *Delaney* v. *Stoddart*, 1 T.R. 22.
(*n*) *The Teutonia*, L.R. 4 P.C. 171, 179.
(*o*) Arnould, Ins. 405; *The Jane*, 2 Hag. Adm. 345.
(*p*) *Bond* v. *Nutt*, Cowp. 601.
(*q*) Phillips on Insurance, 983; *Hartley* v. *Buggin*, 3 Doug. 39; *Company of American Merchants* v. *British & Foreign Ins. Co.*, L.R. 8 Ex. 154; 42 L.J. Ex. 60.
(*r*) *Tasker* v. *Cunninghame*, 1 Bligh, 87; *Driscol* v. *Bovil*, 1 Bos. & P. 313.

nevertheless discharged, because the voyage was other than the particular voyage insured (*s*). But, if there is an actual inception of the voyage insured, and there exists only an intention to deviate, and no deviation had in fact taken place at the time of the loss, the underwriters will remain liable (*t*). And, if a loss occurs before any actual deviation has taken place, and the vessel afterwards deviates, the loss will fall upon the underwriters (*u*). But a vessel, or goods, or freight, may be insured for part of a voyage as well as the whole distance; and, if a vessel is chartered from A. to C., touching at B., and the vessel is insured from A. to B., there is no pretence for saying that the underwriters are discharged merely because the vessel is going on to an ulterior place of destination which is not disclosed at the time they accept the risk (*x*). And, if a ship is compelled by adverse circumstances in the course of her voyage to enter a port to victual, or repair, or re-fit, or if she is compelled to cast anchor, to pay toll, or to await a fair wind, she may avail herself of the opportunity to take in some additional cargo, provided no additional delay is thereby created (*y*). But, if the circumstances rendering it necessary to go into port or to cast anchor have been designedly brought about by the insured, this is a fraud upon the underwriters which discharges them from liability.

Deviation—When excused.—Deviation or delay in prosecuting the voyage contemplated by the policy is excused—(a) Where authorised by any special term (*yy*) in the policy: or (b) Where caused by circumstances beyond the control of the master and his employer; or (c) Where reasonably necessary in order to comply with an express or implied warranty; or (d) Where reasonably necessary for the safety of the ship or subject-matter insured; or (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger (*z*); or (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or (g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against (*a*). When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch (*b*).

(*s*) *Way* v. *Modigliana*, 2 T.R. 32.
(*t*) *Foster* v. *Wilmer*, 2 Str. 1249; *Heselton* v. *Allnutt*, 1 M. & S. 46.
(*u*) *Green* v. *Young*, 2 Ld. Raym. 840; 2 Salk. 444; *Hare* v. *Travis*, 7 B. & C. 14; 5 L.J. (O.S.) K.B. 343.
(*x*) *Taylor* v. *Wilson*, 15 East, 330.
(*y*) *Laroche* v. *Oswin*, 12 East, 131.
(*yy*) *Mentz, Decker & Co.* v. *Mar. Ins. Co.*, (1910) 1 K.B. 132; 79 L.J. K.B. 104.
(*z*) *Scaramanga* v. *Stamp*, 5 C.P.D. 295; 49 L.J. C.P. 674.
(*a*) 6 Edw. 7, c. 41, s. 49 (1).
(*b*) *Ib.*, s. 49 (2).

If a ship with goods on board, insured on a voyage to a foreign port, learns in the course of the voyage thither that an embargo has been laid on all ships of her nation at that port, but there is a prospect of the speedy removal of the embargo, and she accordingly goes into port as near as she can safely get to the port of destination, and there waits a short time for the removal of the embargo with the intention of continuing the voyage, she will be protected by the policy in so doing. But, if she abandons the voyage and sails back to her port of outfit and is lost on the homeward voyage (*c*), or if, through reasonable fear of an embargo, or of the ports of destination becoming hostile ports, she sails to a port not named in the policy, and so embarks on a new voyage or adventure, the underwriters will be discharged, as the new risk then run is not the risk they insured against (*d*). If the vessel goes out of her course in order to avoid a peril not insured against and is lost, the underwriters will be discharged, but not if the peril sought to be avoided was covered by the policy. Thus, where loss from capture in a particular port was excepted from the policy, and the vessel ran out to sea and out of her course to avoid capture, and sailed to an adjoining port, and was lost from peril of the sea, it was held that the underwriters were not liable (*e*); but, where the vessel was insured against capture in port, and put to sea, and deviated from her course to avoid capture, it was held that they were liable (*f*). Where there is a deviation clause in a charter-party which is contained in general words on a printed form, it is allowable to look at the main object of the charter-party, and the general words used may be limited so as not to defeat that main object (*g*).

Delay in voyage.—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable (*h*). Unreasonable delay at any place at which the vessel is authorised to touch is equivalent to a deviation; for it is an implied term of every contract of insurance that the voyage shall be performed without delay, unless liberty is given to the vessel to halt in her course; and consequently, if there are unnecessary stoppages, the adventure becomes a different adventure from that which the

(*c*) *Blackenhagen* v. *Lond. Assurance*, 1 Campb. 454.
(*d*) *Oliverson* v. *Brightman*, 8 Q.B. 781; 15 L.J. Q.B. 274.
(*e*) *O'Reilly* v. *Royal Exch. Assur.*, 4 Campb. 246.
(*f*) *O'Reilly* v. *Gonne*, 4 Campb. 249.
(*g*) *Glynn* v. *Margetson*, (1893) A.C. 351; 62 L.J. Q.B. 466.
(*h*) 6 Edw. 7, c. 41, s. 48.

underwriters agreed to insure (*i*). But, if the delay is necessary and reasonable, the risk on the policy will continue, and the underwriters remain chargeable (*k*).

Insurances on voyages to several ports and places.—Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation (*l*).

Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation (*m*).

Where a policy was "at and from Martinique and all or any of the West India Islands" to London, and the vessel sailed from Martinique to St. Domingo to take in her cargo, which was far away from the direct course from Martinique to London, it was held that there was no deviation (*n*).

Licences to touch at different ports and places.—"In the absence of any further licence or usage, the liberty to touch and stay 'at any port or place whatsoever' does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination" (*o*). When, by the express terms of the policy, the vessel is to be "at liberty, in the outward or homeward bound voyage, to proceed, sail to, touch, and stay at, any ports or places whatsoever, without the same being deemed a deviation," the liberty extends only to such places as are in the usual course of the voyage, and customarily resorted to by traders making such voyages (*p*). A licence of this kind will not enable the captain to alter the regular course of the voyage, or touch at any place or port for purposes unconnected with the main adventure (*q*), or to stay an unreasonable time at places he is authorized to touch at (*r*); and, if he sails with convoy, it will not authorize him voluntarily to stay at places,

(*i*) *Mount* v. *Larkins*, 8 Bing. 122; 1 L.J. C.P. 20.

(*k*) *Phillips* v. *Irving*, 7 M. & G. 325; 13 L.J. C.P. 145.

(*l*) 6 Edw. 7, c. 41, s. 47 (1). See *Bratson* v. *Haworth*, 6 T.R. 531; *Marsden* v. *Reid*, 3 East, 577; *Gairdner* v. *Senhouse*, 3 Taunt. 16.

(*m*) *Ib.*, s. 47 (2). See *The Dunbeth*, (1897) P. 133; 66 L.J. P. 66; *Laird* v. *Robertson*, 4 Brown P.C. 488; *Lambert* v. *Liddard*, 5 Taunt. 480; *Andrews* v. *Mellish*, 5 Taunt. 502.

(*n*) *Bragg* v. *Anderson*, 4 Taunt. 229; *Ashley* v. *Pratt*, 16 M. & W. 471; 17 L.J. Ex. 135.

(*o*) 6 Edw. 7, c. 41, sched. 1, r. 6; see also *ante*, p. 1152.

(*p*) *Lavabre* v. *Wilson*, 1 Doug. 284.

(*q*) *Bottomley* v. *Bovill*, 5 B. & C. 210; 4 L.J. (O.S.) K.B. 237.

(*r*) *Urquhart* v. *Barnard*, 1 Taunt. 450.

when by so doing he will part company with the convoy (*s*). Whenever a vessel is on a seeking voyage, and is to look about for some safe port of discharge, and has consequently "liberty to touch at any port or ports" in a particular sea "for orders, or any other purpose," the insured will be entitled to make every call, stay, or delay which may be necessary for safety and for the due accomplishment of the object of the voyage(*t*). Where the name of the place to which the vessel is to sail comprehends a particular town and harbour, and also an extensive district of coast, the policy will cover and protect only a voyage from the particular town and harbour, unless it appears that by maritime custom and usage the whole line of coast is considered, for insurance purposes, to be included under the name used in the policy (*u*). An open roadstead is a port within the meaning of the term "port" in a policy, if it is used as such by seafaring persons, and is resorted to by shipping for the discharge and loading of cargoes (*x*). Sometimes vessels are expressly insured for a general voyage to any ports or places whatsoever, in port and at sea, in all places, at all times, and in all services, to the intent that the risk may be covered by the policy, whatever may be the employment of the vessel, and however long the duration of the voyage.

Included and excluded losses.—Subject to the provisions of the Marine Insurance Act, 1906 (*y*), and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. In particular,—(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew; (b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the

(*s*) *Williams* v. *Shee*, 3 Campb. 469.

(*t*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274; affirmed 1 Cr. & J. 423; 9 L.J. (O.S.) Ex. 118.

(*u*) *Constable* v. *Noble*, 2 Taunt. 403.

(*x*) *Sea Ins. Co.* v. *Gavin*, 4 Bligh, N.S. 578; *Brown* v. *Tayleur*, 4 Ad. & E. 241; 5 L.J. K.B. 57; *Cockey* v. *Atkinson*, 2 B. & Ald. 460; *Harrower* v. *Hutchinson*, L.R. 5 Q.B. 584; 39 L.J. Q.B. 229.

(*y*) 6 Edw. 7, c. 41, s. 55. As to the statutory limitation of a shipowner's responsibility for damage caused to goods, or to another ship, by the acts of the master or mariners, see Merchant Shipping Act, 1894, ss. 502, 503. Sect. 506 of the same Act provides for the legality of insurance against the happening without the owner's actual fault or privity of any of the events in respect of which their liability is so limited, and such insurances are specially exempted from the requirements of the Stamp Act 1891, s. 93, sub-s. (i.).

delay be caused by a peril insured against; (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils (*z*).

Loss by perils of the sea—Negligence and misconduct of master and mariners.—The risks that the underwriters generally take upon themselves by the common form of policy are perils of the sea, fire, pirates, letters of mart and countermart, takings at sea, restraint of princes and people, barratry of the masters and mariners, &c. "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves" (*a*). "I am of opinion that 'perils of the sea' is a phrase having the same meaning in bills of lading and charter-parties as in policies of insurance" (*b*). Loss by pirates is a peril of the sea (*c*), and so are losses "by the swell of the tide in a dry harbour (*d*); by the wilful but not barratrous act of the crew in throwing the ballast overboard; or by a stranding rendered necessary by leakage produced by the careless loading of the cargo" (*e*); and it would seem that every accidental stranding is a peril of the sea(*f*). But damage to a ship by her being hove down on a beach to repair, is not a peril of the sea (*g*). Neither fire nor lightning is a peril of the sea (*h*). Direct damage done to cargo by rats is not a peril of the sea(*i*); but damage caused by the incursion of sea-water through rat holes, or a strained rivet hole, is a peril of the sea, and if the shipowner has not been guilty of neglect or default, he may rely on the exception (*k*). A damage whilst a vessel is in port is not covered by an insurance against "perils of the sea." As between the

(*z*) See *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Ins. Co.*, 67 L.J. Q.B. 666; (1898) 2 Q.B. 114.

(*a*) 6 Edw. 7, c. 41, sched. 1, r. 7. See *Bensaude* v. *Thames & Mersey Mar. Ins. Co.*, (1897) A.C. 609; 66 L.J. Q.B. 666; *Paterson* v. *Harris*, 1 B. & S. 306; 30 L.J. Q.B. 354.

(*b*) *Per* Lord Bramwell, *Hamilton* v. *Pardorf*, 12 A.C. 527; 57 L.J. Q.B. 29. See also *Wilson* v. *The Xantho*, 12 A.C. 503; 56 L.J. P. 116. As to whether a loss by sea-worms or barnacles is a "peril of the sea," see judgment of Esher, M.R. *Pandorf* v. *Hamilton*, 55 L.J. Q.B. 550. A snow-storm is not.

(*c*) See judgment of Bowen, L.J., *Pandorf* v. *Hamilton*, 55 L.J. Q.B. 553; 17 Q.B.D. 674.

(*d*) *Fletcher* v. *Inglis*, 2 B. & Ald. 315.

(*e*) 1 Maude & P. 355, and the cases there cited.

(*f*) *Per* Lord Herschell, *The Xantho*, *supra*.

(*g*) *Thompson* v. *Whitmore*, 3 Taunt. 227.

(*h*) *Per* Lord Bramwell, *Hamilton* v. *Pandorf*, *supra*.

(*i*) *Lavaroni* v. *Drury*, 22 L.J. Ex. 2; 8 Exch. 170; *Kay* v. *Wheeler*, L.R. 2 C.P. 302; 36 L.J. C.P. 180.

(*k*) *The Cressington*, (1891) P. 152; 60 L.J. P. 25; *Hamilton* v. *Pandorf*, *supra*. See also *The Thrunscoe*, 66 L.J. P. 172; (1897) P. 301; *The Freedom*, 38 L.J. Adm. 25; *Ballantyne* v. *Mackinnon*, 65 L.J. Q.B. 616; (1896) 2 Q.B. 455.

carrier of goods by sea and the owner of such goods, losses which, though caused immediately by the violence of the winds and waves, are imputable to the ignorance or negligence of the master or mariners, are not losses by perils of the sea; but a different rule prevails in cases of insurance, where the immediate and not the remote cause of loss is regarded, so that if a vessel is stranded and wrecked through the incompetency or misconduct or barratry of the captain and crew, the loss is nevertheless, as between the insurer and the insured, a loss by perils of the sea, and is covered by the policy, provided the insured, if the insurance is on the vessel itself, had appointed a sufficient crew, and a captain who appeared to have competent skill at the commencement of the voyage (*l*). And generally a loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy (*m*). If, by reason of the wilful extinguishment of a particular light by a hostile force, the captain miscalculates his position and the ship goes ashore, the loss is a loss by perils of the sea, although it might never have occurred if hostilities had not broken out (*n*). And if a ship is wrecked on a foreign coast, and the cargo gets into the hands of the authorities there, and the owners, in order to recover it, are compelled to pay a sum of money to such authorities, the loss of that sum, being an immediate consequence of the wreck, is a loss by perils of the sea (*o*). A loss occasioned by another vessel's running down the ship insured is a loss by perils of the sea (*p*), although there has been negligence and want of skill on the part of the master and crew of the ship insured (*q*). If a ship takes the ground on entering or leaving port, the loss is a loss by perils of the sea; but if she is hove down on a beach within the tideway, or placed in a graving dock to be repaired or cleaned, and rolls over, or is blown over by the wind, and is bilged or damaged, the loss is not a loss from perils of the sea; for the sea is not in such a case the proximate cause of the mischief (*r*). The collision clause now frequently inserted in policies to secure the ship-

(*l*) *Redman* v. *Wilson*, 14 M. & W. 483; 14 L.J. Ex. 333; *Jackson* v. *Mumford*, 9 Com. Cas. 114.

(*m*) *Dudgeon* v. *Pembroke*, 2 App. Cas. 284; 46 L.J. Q.B. 409.

(*n*) *Ionides* v. *Univ. Mar. Ins. Co.*, 14 C.B. N.S. 259; 32 L.J. C.P. 170.

(*o*) *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q. B. 144.

(*p*) *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 18 Q.B.D. 17; 56 L.J. Q.B. 38; *The Xantho*, 12 App. Cas. 503; 56 L.J. P. 116.

(*q*) *Smith* v. *Scott*, 4 Taunt, 126. See, however, *The Xantho*, *supra*; *De Vaux* v. *Salvador*, 4 Ad. & E. 420; 5 L.J. K.B. 134.

(*r*) *Thompson* v. *Whitmore*, 3 Taunt. 227; *Phillips* v. *Barber*, 5 B. & Ald. 161. See *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73; *Reischer* v. *Borwick*, (1894) 2 Q.B. 548; 63 L.J Q.B. 753.

owner against damage, which he may be compelled to pay for injury done to others by his vessel coming into collision with another, does not extend to damages paid by the insured in respect of loss of life or personal injury (*s*). But where goods were carried on the terms of an ordinary bill of lading, excepting perils of the sea but not excepting negligence, and the loss apparently fell within the exception of perils of the sea, the burden of showing that the shipowners were not entitled to the benefit of the exception by reason of negligence fell upon the shippers (*t*). Loss or damage resulting from ordinary wear and tear, or from some inherent vice or defect (*u*), is not covered by the policy. There must be something fortuitous or accidental in the nature of the damage (*x*). If a vessel founders at sea in consequence of her hull having been eaten into by worms during the voyage, the loss is a loss by perils of the sea, as the sea is the proximate cause of the mischief. But if the vessel gets safe to some intermediate port at which she was authorised to touch, and is then unable to put to sea again in consequence of the ravages made in her hull by the worms, or in consequence of her bottom having been eaten into by rats while she was lying in port, the loss is not a loss from perils of the sea, but a loss from the ravages of worms and rats, as the worms and the rats are then the proximate, and not the remote cause of the mischief (*y*). Where a cargo was damaged by heat in consequence of the ventilators having to be closed during a storm of exceptional severity, it was held that the loss was occasioned by "accidents of the seas" (*z*).

Losses from old age and decay and other causes—Sea perils.—If a vessel is old, and her timbers decay during the voyage, and the bolts and fastenings become loosened, and she founders in a gale of wind which a younger and stouter vessel would in all probability have ridden out in safety, the loss is a loss by perils of the sea (*a*); but, if she gets safe into port and there drops to pieces, or is found to be unfit to go to sea again from

(*s*) *Taylor* v. *Dewar*, 5 B. & S. 58; 33 L.J. Q.B. 141. As to the meaning of the word "collision" see *Union Mar. Ins. Co.* v. *Borwick*, (1895) 2 Q.B. 179; 64 L.J. Q.B. 679; *The Zeta*, (1893) A.C. 468; 63 L.J. P. 17; *Chandler* v. *Blogg*, (1898) 1 Q. B. 32; 67 L.J. Q.B. 336; *The Munroe*, (1893) P. 248; *Burger* v. *Indemnity Mut. Mar. Assur. Co.*, (1900) 2 Q.B. 348; 69 L.J. Q.B. 838; *Xenos* v. *Fox*, L.R. 4 C.P. 665; 38 L.J. C.P. 351.

(*t*) *The Glendarroch*, (1894) P. 226; 63 L.J. P. 89.

(*u*) Byles, J., *Koebel* v. *Saunders*, 17 C.B. N.S. 79; 33 L.J. C.P. 312. See also *Jackson* v. *Mumford*, 8 Com. Cas. 61.

(*x*) *Paterson* v. *Harris*, 1 B. & S. 336; 30 L.J. Q.B. 354.

(*y*) *Hunter* v. *Potts*, 4 Campb. 203. See also *Magnus* v. *Buttemer*, 11 C.B. 876; 21 L.J. C.P. 119; *Corcoran* v. *Gurney*, 1 E. & B. 456; 22 L.J. Q.B. 113.

(*z*) *The Thrunscoe*, (1897) P. 301; 66 L.J. P. 172

(*a*) *Phillips* v. *Nairne*, 4 C.B. 358; 16 L.J. C.P. 194.

age and decay, the loss is not a loss from perils of the sea, but from old age.

Where a policy was effected on merchandise laden on board a vessel, and the ship was disabled in a storm and obliged to put into port to refit, and the master, in order to defray the expense, sold part of the goods, and applied the proceeds in payment of such expense, it was held that, as it was want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods, the loss was not a loss from a peril of the sea (*b*). If a cargo of living animals is insured "free from mortality and jettison," and the beasts are killed by the rolling of the ship in a storm, the underwriter is nevertheless liable, as the exception extends only to death from natural causes, and the death in such a case arises immediately from a peril of the sea (*c*). If a cargo of hemp or cotton is put on board in a damp and dangerous state, and it ferments and catches fire or becomes damaged, this is not a loss by perils of the sea, but from an inherent defect in the article itself (*d*); nor is it a loss by perils of the sea where meat is spoiled by reason of mere delay occasioned by stormy weather (*e*). A loss from capture or robbery by pirates is a loss by "perils of the sea" (*f*). If a vessel has sailed out of port on her intended voyage, and does not arrive at her port of destination within a reasonable period, and no intelligence can be obtained respecting her, this is evidence of the loss of the vessel from perils of the sea (*g*). Where one of the risks insured against was "all risks incident to steam navigation," and by failure of machinery the ship was detained so long that the charterers cancelled their charter-party under the terms contained in it, it was held that the loss was occasioned by such cancelling and not by the breaking down of the machinery (*h*).

Perils of fire and jettison.—When fire is one of the perils insured against, and "the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident,

(*b*) *Powell* v. *Gudgeon*, 5 M. & S. 437; *Sarquy* v. *Hobson*, 2 B. & C. 7; 1 L.J. (O.S.) K.B. 222. In such a case the owner of the goods must resort to the shipowner for an indemnity against the loss. *Hodgson* v. *Malcolm*, 2 Bos. & P. N.R. 336.

(*c*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 107; *St. Paul Fire and Mar. Ins. Co.* v. *Morice*, 11 Com. Cas. 153; *Jacob* v. *Gaviller*, 87 L.T. 26; *Montoya* v. *Lond. Assur. Co.*, 6 Exch. 451; 20 L.J. Ex. 254; *Brown* v. *Fleming*, 7 Com. Cas. 245; *Cator* v. *G. W. Ins. Co. of New York*, L.R. 8 C.P. 552; 42 L.J. C.P. 266; *Lysaght* v. *Coleman*, (1895) 1 Q.B. 49; 64 L.J. Q.B. 175.

(*d*) *Boyd* v. *Dubois*, 3 Campb. 133; Byles, J., *Koebel* v. *Saunders*, 17 C.B. N.S. 79; 33 L.J. C.P. 312.

(*e*) *Taylor* v. *Dunbar*, L.R. 4 C.P. 206; 38 L.J. C.P. 178; *Pink* v. *Fleming*, 25 Q.B.D. 396; 59 L.J. Q.B. 559.

(*f*) 2 Roll. Abr. 248, fol. 10. See also *Hagedorn* v. *Whitmore*, 1 Stark. 157.

(*g*) *Green* v. *Brown*, 2 Str. 1199; *Koster* v. *Reed*, 6 B. & C. 19.

(*h*) *Merc. Steamship Co.* v. *Tyser*, 7 Q.B.D. 73. As to meaning of term "cancellation," see *Jamieson* v. *Newcastle S.S. Freight Ins. Assoc.*, (1895) 2 Q.B. 90; 64 L.J. Q.B. 560.

or by lightning, or by an act done in duty to the state," to prevent the vessel from falling into the hands of the enemy (*i*), or by the gross negligence of the captain or crew (*k*). "Fire is still the *causa causans;* and the loss is covered by the policy." Where a vessel insured against fire was described in the policy as "lying in the Victoria Dock, with liberty to go into a dry dock," it was held that the ship was not covered by the policy whilst she was lying in the Thames not *in transitu* to the dry dock (*l*). When jettison (*m*) is one of the risks insured against, the policy will cover a loss occasioned by the throwing of the goods overboard to prevent their falling into the hands of the enemy (*n*). It is not an implied condition that the insured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance; and, when the underwriters have paid him, they will be entitled to stand in his place with respect to the general average contribution (*o*).

Loss by capture and seizure.—Capture, properly so called, is a taking by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken. "Capture" by itself probably means belligerent capture only. Seizure, however, includes other seizures, such as one by revenue or sanitary officers of a foreign state (*p*). The mere capture of a vessel does not divest the owner of his property therein; it, however, entitles him, if she is insured, to give notice of abandonment to the underwriters. But when the vessel is condemned in a Prize Court the effect of that decision is to pass the property in her to the captors as from the date of the capture (*q*). Where an insurance was effected against capture only, and the vessel was driven on the enemies' coast in a stiff gale of wind, but received no damage, and, whilst she remained stranded on the shore, she was seized and confiscated, it was held that this was a loss by capture (*r*). But, if the vessel had been disabled or totally

(*i*) *Gordon* v. *Rimmington*, 1 Campb. 123.

(*k*) *Busk* v. *Royal Exch. Assur. Co.*, 2 B. & Ald. 73.

(*l*) *Pearson* v. *Commercial Un. Assur. Co.*, 33 L.J. C.P. 85; 15 C.B. N.S. 304; L.R. 8 C.P. 548; 42 L.J. C.P. 548; 1 App. Cas. 498; 45 L.J. Ex. 761.

(*m*) Jettison is the voluntary sacrifice in time of peril of something in or upon the ship by throwing it overboard with the intention of preserving the residue of the ship and cargo. See *The Gratitudene*, 3 C. Rob. 240.

(*n*) *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*o*) *Dickenson* v. *Jardine*, L.R. 3 C.P. 639; 37 L.J. C.P. 321.

(*p*) *Cory* v. *Burr*, 8 A.C. 393; *Miller* v. *Law Accident Ins. Co.*, (1903) 1 K.B. 712; 72 L.J. K.B. 428; *St. Paul Fire and Mar. Ins. Co.* v. *Morice*, 11 Com. Cas. 153; *Robinson Gold Mining Co.* v. *Alliance Ins. Co.*, (1904) A.C. 359; 73 L.J. K.B. 898; *Bolivia Republic* v. *Indemnity Mut. Mar. Ins. Co.*, 78 L.J. K.B. 596; (1909) 1 K.B. 785.

(*q*) *Anderson* v. *Marten*, 77 L.J. K.B. 959; (1908) A.C. 334.

(*r*) *Green* v. *Elmslie*, Peake, 278.

wrecked, it would have been a loss from perils of the sea (*s*). The circumstance that the capture has been occasioned by the barratry of the master, or that it is an illegal capture, does not render the capture less a capture (*t*). As insurances on voyages to ports blockaded by a British squadron are illegal, no action can be maintained for indemnity in respect of losses resulting from an attempt to break such a blockade, if it appears that the party bringing the action knew of the blockade and intended to break it at the time he effected the insurance. If he had no knowledge of the blockade or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid (*u*). Insurances by British subjects of foreign vessels and cargoes from capture do not extend to captures made by order of the government of this country; for all insurances of enemies' property against *British* capture are null and void, as being contrary to the public policy of the law (*x*). This principle does not apply to insurance against seizure by a belligerent government of the property of its own subjects (*y*). In every policy of insurance there is an implied term, that the insurance shall not extend to cover any loss from capture of enemies' property by the British government on the breaking out of hostilities (*z*). But the property of neutrals will be covered by the policy (*a*); and so will the property of all persons who have received a licence to trade from the crown (*b*). If a foreigner consigns goods to merchants in this country on his own account and risk, and the consignees make advances to such foreign consignor in respect of the consignment, and insure the goods on his account, and a war breaks out which prevents the consignor from suing upon the policy in the courts of this country, the consignees cannot avail themselves of the policy for the purpose of recovering the amount of their advances from the underwriters, although it was made in their names as interest

(*s*) *Hahn* v. *Corbett*, 2 Bing. 205; 2 L.J. (O.S.) C.P. 253; *Ionides* v. *Universal Mar. Ins. Co.*, 14 C.B. N.S. 259; 32 L.J. C.P. 170, *ante*, p. 1175.

(*t*) *Arcangelo* v. *Thompson*, 2 Campb. 620; *Powell* v. *Hyde*, 5 E. & B. 611; 25 L.J. Q.B. 65; *Palmer* v. *Naylor*, 10 Exch. 382; 23 L.J. Ex. 323; *Cory* v. *Burr*, 8 App. Cas. 393; 52 L.J. Q.B. 657.

(*u*) *Harratt* v. *Wise*, 9 B. & C. 712; 7 L.J. (O.S.) K.B. 309; *Naylor* v. *Taylor*, 9 B. & C. 718.

(*x*) *Furtado* v. *Rogers*, 3 B. & P. 191; *Esposito* v. *Bowden*, 7 E. & B. 763; 27 L.J. Q.B. 17.

(*y*) *Driefontein Gold Mines* v. *Jansen*, (1901) 2 K.B. 419; 70 L.J. K.B. 881; aff. H.L., 71 L.J. K.B. 857; (1902) A.C. 484; *Nigel Gold Mining Co.* v. *Hoade*, (1901) 2 K.B. 849; 70 L.J. K.B. 1006. As to meaning of "seizure," see *Robinson Gold Mining Co.* v. *Alliance Mar. & General Assur. Co.*, (1902) 2 K.B. 489; 71 L.J. K.B. 942.

(*z*) *Brandon* v. *Curling*, 4 East, 417; *Kellner* v. *Le Mesurier*, *ib.* 396. See also *Nickels* v. *Lond. and Prov. Mar. and Gen. Ins. Co.*, 70 L.J. K.B. 29.

(*a*) *Visger* v. *Prescott*, 5 Esp. 186.

(*b*) *Usparicha* v. *Noble*, 13 East, 332.

might appear. They should have insured their interest in the first instance (*c*). When a capture has been made, whether legal or not, the underwriters are liable for the expenses of a compromise made *bonâ fide* to prevent the ship's being condemned as a prize (*d*). If the capture does not take place until after the goods have been landed, the underwriters are not liable, as the voyage is terminated, although the goods may never have come to the possession of the consignees (*e*).

Arrests, restraints and detainments of kings, princes and people.—"The term 'arrests, &c., of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process "(*f*). Whenever the ruling power in a state prevents the owner or his agents from enjoying the lawful right of user of the property insured, by an act which is not as against the state of which the assured is a subject—an act of war—the assured is entitled to recover any loss occasioned thereby from his underwriters under these words (*g*). A "restraint" does not necessarily involve the use of actual physical force; an authoritative prohibition on the part of the governing power is sufficient. But the master must have yielded to compulsion; if he act voluntarily there is no "restraint" (*h*). Capture is the forcible taking of a ship, &c., in time of war, with a view to appropriating it as prize. Arrest is a temporary detention of ship, &c., with a view to ultimately releasing it, or repaying its value. Embargoes are the most common cases of "arrests, restraints, and detainments" of princes. An embargo is an order of government (generally, but not always, issued in contemplation of hostilities) prohibiting the departure of ships, or goods from some or all of the ports within its dominions. The word "people" comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. "It means the supreme power of the country, whatever it may be;" and, therefore, if a corn vessel is seized and detained by a hungry mob or a party of rebels, the loss resulting therefrom is not covered by the policy; for it is not a detention by "the

(*c*) *Conway* v. *Gray*, 10 East, 536; but see *Aubert* v. *Gray*, 32 L.J. Q.B. 50; 3 B. & S. 163.

(*d*) *Berens* v. *Rucker*, 1 W. Bl. 313.

(*e*) *Brown* v. *Carstairs*, 3 Campb. 161.

(*f*) 6 Edw. 7. c. 41, sched. 1, r. 10.

(*g*) *Rodocanachi* v. *Elliott*, L.R. 9 C.P. 518; *Robinson Gold Mining Co.* v. *Alliance Ins. Co.*, (1901) 2 K.B. 919; 73 L.J. K.B. 898; *Stringer* v. *English and Scottish Mar. Ins. Co.*, L.R. 5 Q.B. 599; 39 L.J. Q.B. 214; *Aubert* v. *Gray*, 3 B. & S. 163; 32 L.J. Q.B. 50; *Smith* v. *Rosario Nitrate Co.*, (1894) 1 Q.B. 174; *Schroder* v. *Thompson*, 7 Taunt. 462.

(*h*) *Miller* v. *Law Accident Ins. Co.*, (1903) 1 K.B. 712; 72 L.J. K.B. 428; *Mansell* v. *Hoade*, 20 T.L.R. 150; *St. Paul Fire and Mar. Ins. Co.* v. *Morice*, 11 Com. Cas. 153; *Yuill* v. *Scott Robson*, (1908) 1 K.B. 270; 77 L.J. K.B. 259.

people" (*i*). But, if it be made by order of the executive officers of a foreign government, or by any foreign prince, potentate, or power, it is otherwise (*k*). It is not necessary in order to render the underwriters liable that there should be an intention to keep the ship; but where a ship was seized and the cargo plundered by natives, it was held to be within the policy (*l*). The clause does not extend to losses by detention by the British government, or by officers acting under its authority, unless the detention be unlawful. A foreigner, therefore, cannot sue any British subject in the courts of this country for such losses (*m*), unless he can show that it was an erroneous or unlawful detention (*n*). The insurance against the risk of detention by princes will not extend to cover any loss happening in the course of any contraband adventure in which the goods become liable to seizure as forfeited by the laws of this country (*o*), or by the laws of any foreign country, unless the underwriter has notice of the intention of the insured to engage in a foreign smuggling transaction, and accepts the increased risk, in which case he will be liable upon the policy, as our courts do not take notice of the revenue laws of foreign governments (*p*). If the detention arises from the captain's having carried simulated papers, or from his having neglected to provide proper national documents for his vessel, the underwriters will be discharged (*q*), unless they have received notice of the intention so to trade, and have accepted the increased risk, and the trading with simulated or defective papers is not unlawful by the laws of this country, but is resorted to in the furtherance of British commerce (*r*). If, by reason of a hostile embargo suddenly laid on the destined port, the further prosecution of the voyage becomes impracticable, and the ship returns, and the voyage is lost, the loss is not a loss by detention (*s*). Goods are detained where they are by the application of a hostile force prevented from being carried to their destination, as where they are in a blockaded port or a besieged town (*t*). The meaning of the term "restraint of princes" is not confined to an actual physical restraint, but includes a restraint arising from a

(*i*) *Nesbitt* v. *Lushington*, 4 T.R. 783.

(*k*) *Rotch* v. *Edie*, 6 T.R. 413; *Miller* v. *Law Accident Ins. Soc.*, (1903) 1 K.B. 712; 72 L.J. K.B. 428.

(*l*) *Johnston* v. *Hogg*, 10 Q.B.D. 432; 52 L.J. Q.B. 343.

(*m*) *Touteng* v. *Hubbard*, 3 Bos. & P. 291.

(*n*) *Mullett* v. *Shedden*, 13 East, 304; *Lozano* v. *Janson*, 28 L.J. Q.B. 337; 2 E. & E. 60.

(*o*) *Brandon* v. *Curling*, 4 East, 416.

(*p*) *Planché* v. *Fletcher*, 1 Doug. 251; *Holman* v. *Johnson*, Cowp. 343.

(*q*) *Bell* v. *Carstairs*, 14 East, 374.

(*r*) *Bazett* v. *Meyer*, 5 Taunt. 824.

(*s*) *Forster* v. *Christie*, 11 East, 205.

(*t*) *Rodocanachi* v. *Elliott*, L.R. 9 C.P. 518; 43 L.J. C.P. 255. See *Miller* v. *Law Accident Ins. Soc.*, (1902) 2 K.B. 694; 71 L.J. K.B. 551.

reasonable apprehension of danger; if such a restraint is likely to continue, the shipowner is entitled to discharge the cargo before reaching the port of destination (*u*). Every foreigner is deemed to be a party to the public authoritative acts of his own government; and a detention by order of such government is as much his act as if it proceeded immediately from himself. He cannot, therefore, make a loss resulting from such a detention the foundation of a claim for indemnity against any British subjects in the courts of this country (*x*), unless the insurance is expressly directed against such a contingency, and the insurer has expressly agreed to take upon himself such a risk (*y*). If the detention of goods takes place whilst they are on board the vessel at the port of destination, before the risk in the policy ceases, the underwriters are responsible; but, if the goods have been safely landed and are then seized, they are discharged from liability (*z*). The underwriters are sometimes exempted, by the express terms of the policy, from responsibility in case of confiscation, seizure, and capture in port. In these cases, whether the vessel was or was not at her port of discharge is a question of fact for a jury, to be determined by reference to custom and usage, as defining the limits of the port (*a*).

Loss by pirates, rovers and thieves.—Amongst the perils which the underwriters avowedly take upon themselves in our common printed forms of policy are those of "pirates, rovers and thieves." Pirates (*aa*) are persons who form the crew of a ship which sails without legal commission for the purpose of plundering other vessels indiscriminately. "The term 'pirates' includes passengers who mutiny and rioters who attack this ship from the shore" (*b*). The term "pirate" is also applied to the ship itself. The crew of a ship who mutiny and seize her, and then carry her off, are pirates (*c*), though in such a case the loss might also be ascribed to barratry (*d*). "The term 'thieves' does not cover clandestine theft, or a theft committed by any one of the ship's company, whether crew or passengers" (*e*).

Peril of barratry of master and crew.—"The term 'barratry' includes every wrongful act wilfully committed by the master or

(*u*) *Nobel's Explosives Co.* v. *Jenkins*, (1896) 2 Q.B. 326; 65 L.J. Q.B. 638.
(*x*) *Campbell* v. *Innes*, 4 B. & Ald. 423; but see *Aubert* v. *Gray*, 32 L.J. Q.B. 50; 3 B. & S. 163.
(*y*) *Simeon* v. *Bazett*, 2 M. & S. 98.
(*z*) *Brown* v. *Carstairs*, 3 Campb. 160.
(*a*) *Reyner* v. *Pearson*, 4 Taunt. 662; *Levy* v. *Vaughan*, *ib.* 387; *Levin* v. *Newnham*, *ib.* 722; *Mellish* v. *Staniforth*, 3 Taunt. 499.
(*aa*) As to popular meaning of "pirate," see *Bolivia Republic* v. *Indem. Mut. Mar. Ins. Co.*, (1909) 1 K.B. 785; 78 L.J. K.B. 596.
(*b*) 6 Edw. 7, c. 41, sched. 1, r. 8; see also *Nesbitt* v. *Lushington*, 4 T.R. 783.
(*c*) *Brown* v. *Smith*, 1 Dow. P.C. 349.
(*d*) *Dixon* v. *Reid*, 5 B. & Ald. 597.
(*e*) 6 Edw. 7, c. 41, sched. 1, r. 9.

crew to the prejudice of the owner, or, as the case may be, the charterer " (*f*), such as running away with the ship; or fraudulently carrying her out of her course; or sinking or deserting her; or fraudulently defeating or delaying the voyage; embezzling the cargo; smuggling (*g*); cruising for and taking prizes without the authority of the owner (*h*); sailing out of port without paying port dues, or in breach of an embargo, whereby the vessel or cargo is confiscated or lost; trading with alien enemies; or wilfully and knowingly sailing to a blockaded port, whereby the ship is seized by a British cruiser (*i*); and the act may be barratry, although it was done by the captain with no view of benefiting himself, but of securing some advantage for the shipowners. A deviation caused by the crew taking the ship on a different voyage is barratry (*k*). Where the deviation proceeds from ignorance or want of skill and not from fraud, it is not barratry, although it may be against the interest of the owners (*l*); for unless accompanied with fraud or criminal intent, no case of deviation will fall within the true definition of barratry (*m*). Barratry does not include simple negligence, unaccompanied by culpable misconduct, nor any act done in obedience to the commands of the shipowner, or from ignorance, or a mere error of judgment, or a mistake by the captain of the tenor of his instructions (*n*). A master who is a sole owner cannot commit barratry, because he cannot commit a fraud against himself; but, if a master, being also part owner, makes away with the ship in fraud of the other owners, that is barratry (*o*). Where barratry of the master was insured against, and the ship was warranted " free from capture and seizure," and the ship was seized in consequence of barratry, it was held that the loss was due to the seizure not the barratry (*p*).

Perils, losses, and misfortunes generally.—" The term ' all other perils ' includes only perils similar in kind to the perils

(*f*) 6 Edw. 7, c. 41, sched. 1, r. 11. See *Vallejo* v. *Wheeler*, Cowp. 154; *Earle* v. *Rowcroft*, 8 East, 126.

(*g*) *Dixon* v. *Reid*, 5 B. & Ald. 597; *Hucks* v. *Thornton*, Holt, N.P. 30; *Roscow* v. *Corson*, 8 Taunt. 684; *Ross* v. *Hunter*, 4 T.R. 33; *Havelock* v. *Hancil*, 3 T.R. 277.

(*h*) *Moss* v. *Byrom*, 6 T.R. 379.

(*i*) *Goldschmidt* v. *Whitmore*, 3 Taunt. 508.

(*k*) *Dixon* v. *Reid*, 5 B. & Ald. 597; 6 Edw. 7, c. 41, s. 49 (1) (g), *ante*, p. 1170.

(*l*) *Phyn* v. *Royal Ex. Assur. Co.*, 7 T.R. 505.

(*m*) *Earle* v. *Rowcroft*, 8 East, 139; *Bradford* v. *Levy*, R. & M. 333; *Bottomley* v. *Bovill*, 5 B. & C. 212; 4 L.J (O.S.) K.B. 237.

(*n*) *Todd* v. *Ritchie*, 1 Stark. 240; *Stamma* v. *Brown*, 2 Str. 1173; *Phyn* v. *Royal Exchange*, 7 T.R. 505; *Grill* v. *Gen. Iron Screw Colliery Co.*, L.R. 3 C.P. 476; 37 L.J. C.P. 205.

(*o*) *Jones* v. *Nicholson*, 10 Exch. 28; 23 L.J. Ex. 330. As to negligence of master who is also part owner, see *Trinder, Anderson & Co.* v. *Thames and Mersey Mar. Ins. Co.*, (1898) 2 Q.B. 114; 67 L.J. Q.B. 666; *Westport Coal Co.* v. *McPhail*, (1898) 2 Q.B. 130; 67 L.J. Q.B. 674.

(*p*) *Cory* v. *Burr*, 8 App.Cas. 393; 52 L.J. Q.B. 657, *ante*, p. 1179.

specifically mentioned in the policy " (*q*). The clause generally inserted in policies extending the insurance to " all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c.," does not extend the protection of the policy to all perils that may come to the hurt, detriment, or damage of the thing insured, but the words are confined to perils of the same nature as those previously enumerated; so that in order to come within the general words, now under consideration, the dangers must be *ejusdem generis* with those specifically described (*r*). If, therefore, a vessel is fired into and sunk by mistake the loss is within this " sweeping clause " of the policy. If a vessel is lost or injured in port, whilst the policy continues in force, the loss will be covered by this clause; but the general words thereof are restrained in construction to perils of the same kind as those more particularly enumerated in the policy (*s*). And, where meat becomes putrid by reason of delay caused by tempestuous weather, it is not a loss within this clause (*t*). Nor will these general words include damage by the explosion of a boiler (*u*).

Total and partial losses—Constructive and actual—Distinctions between.—A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss (*x*). A total loss may be either an actual total loss, or a constructive total loss (*y*). Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss (*z*). Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss (*a*). Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total (*b*). Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretriev-

(*q*) 6 Edw. 7, c. 41, sched. 1, r. 12.

(*r*) See *Thames and Mersey Mar. Ins. Co.* v. *Hamilton, Fraser & Co.*, 56 L.J. Q.B. 626; 12 A.C. 484; *The Knight of St. Michael*, 67 L.J. P. 19; (1898) P. 30; *Schloss Brothers* v. *Stevens*, 75 L.J. K.B. 927; (1906) 2 K.B. 665.

(*s*) *Cullen* v. *Butler*, 5 M. & S. 461; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Naylor* v. *Palmer*, 8 Exch. 739; 22 L.J. Ex. 329; *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73.

(*t*) *Taylor* v. *Dunbar*, L.R. 4 C.P. 206; 38 L.J. C.P. 178; *Pink* v. *Fleming*, 25 Q.B.D. 396; 59 L.J. Q.B. 559.

(*u*) *Thames and Mersey Mar. Ins. Co.* v. *Hamilton, Fraser & Co.*, 12 App.Cas. 484; 56 L.J. Q.B. 626, disapproving *West India Teleg. Co.* v. *Home Ins. Co.*, 6 Q.B.D. 51; 50 L.J. Q.B. 41.

(*x*) 6 Edw. 7, c. 41, s. 56 (1).

(*y*) *Ib.*, s. 56 (2).

(*z*) *Ib.*, s. 56 (3).

(*a*) *Ib.*, s. 56 (4).

(*b*) *Ib.*, s. 56 (5).

ably deprived thereof, there is an actual total loss (*c*). In the case of an actual total loss no notice of abandonment need be given (*d*). Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed (*e*).

Constructive total loss.—Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred (*f*). In particular, there is a constructive total loss—(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival (*g*).

Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss (*h*).

If a ship insured for a particular voyage grounds on a sand-bank and cannot be got off, the loss is a total loss, although the ship still exists *in specie*. If she is disabled by stress of weather, and is so strained as not to be worth repairing, the loss is a total loss, although she still exists as a ship in the dockyard. And, when a vessel has been wrecked, the cargo is totally lost if no part of it can be recovered for the benefit of the insured. If a cargo is so much injured as to be unfit for conveyance to the

(*c*) 6 Edw. 7, c. 41, s. 57 (1).
(*d*) *Ib.*, s. 57 (2).
(*e*) *Ib.*, s. 58.
(*f*) *Ib.*, s. 60 (1). See *Beaver Line Associated Steamers* v. *Lond. and Prov. Mar. and Gen. Ins. Co.*, 5 Com. Cas. 269.
(*g*) *Ib.*, s. 60 (2). See *Marten* v. *Steamship Owners Underwriting Assoc.*, 71 L.J. K.B. 718; *Angel* v. *Merchants' Mar. Ins. Co.*, 72 L.J. K.B. 498; (1903) 1 K.B. 811; *North Atlantic S.S. Co.* v. *Burr*, 9 Com. Cas. 164.
(*h*) *Ib.*, s. 61.

port of destination, and has consequently been landed at an intermediate port to prevent its entire destruction, the loss is in contemplation of law, as between the underwriter and insured, a total loss, and the latter is entitled to recover the full amount of the insurance (*i*). But in these cases, when the subject-matter of the insurance is not totally destroyed, the insured must, in order to recover the full amount of the insurance as for a total loss, ABANDON what remains, *i.e.*, he must make a cession of all his proprietary rights thereto to the underwriters, and give them notice of abandonment.

Notice of abandonment.—Sect. 62 of the Marine Insurance Act, 1906 (*k*), enacts that:—"(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss. (2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer. (3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry. (4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment. (5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance. (6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice. (7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him. (8) Notice of abandonment may be waived by the insurer. (9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him."

The notice of abandonment is required in all cases to give the

(*i*) *Ionides* v. *Universal Ins. Co.*, 14 C.B. N.S. 292; 32 L.J. C.P. 176.

(*k*) 6 Edw. 7, c. 41, s. 62. See *Cunningham* v. *Maritime Ins. Co.*, (1899) 2 Ir. R. 257; *The Blairmore*, 67 L.J. P.C. 96; (1898) A.C. 593; *Western Assur. Co. of Toronto* v. *Poole*, 72 L.J. K.B. 195; (1903) 1 K.B. 376; *Duns, Brown, & Co.* v. *Binning*, 11 Com. Cas. 190; *Guthrie* v. *North China Ins. Co.*, 7 Com. Cas. 130.

insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure all the benefit that can be derived from the wreck. It must be given "within a reasonable time after the insured receives intelligence of the accident, that the underwriter may be entitled to the benefit of what may still be of value" (*l*). Notice of abandonment need not, however, be given to the underwriters of a policy of re-insurance (*m*). Where the insured receives information that the subject of insurance is in *imminent* danger of becoming a total loss he must immediately give notice of abandonment, and it is immaterial that the subject of insurance is afterwards justifiably sold (*n*). The abandonment must be an unconditional abandonment of the whole of the subject-matter of the insurance to the insurers or underwriters, unless the latter think proper to accept of a conditional abandonment. When the subject-matter of the insurance totally perishes, no notice of abandonment is necessary; for there is nothing to abandon (*o*). And, when it is so far annihilated that it no longer exists *in specie*, a formal abandonment of the comparatively valueless remnants of what was once a ship or a cargo is not necessary to enable the insured to recover as for a total loss (*p*), although, if these remnants are worth anything at all, or have been sold, the underwriters will be entitled to them, or to the value of them, or to the price they have fetched; for it is contrary to the principle of every contract of indemnity to permit the insured to recover more than the amount of the loss sustained (*q*). If the insurance is on freight, and the voyage is lost by a peril insured against, so that the freight cannot be earned by the insured, the loss is a total loss, and there is no need of an abandonment of freight; "for there is nothing to abandon" (*r*). If the adventure is brought to an end by a peril insured against, and the things are taken out of the power of the insured, as, for instance, if they are totally lost to him by reason of capture or seizure in a foreign port, or by

(*l*) *Mitchell* v. *Edie*, 1 T.R. 613; *Knight* v. *Faith*, 15 Q.B. 649; 19 L.J. Q.B. 509; *Gernon* v. *Royal Exch. Assur. Co.*, 6 Taunt. 383; *King* v. *Walker*, 33 L.J. Ex. 325; 3 H. & C. 209; *Stringer* v. *English Ins. Co.*, L.R. 4 Q.B. 676; 38 L.J. Q.B. 321; aff. 5 Q.B. 599; 39 L.J. Q.B. 214; *Western Assur. Co. of Toronto* v. *Poole*, (1903) 1 K.B. 376; 72 L.J. K.B 193.

(*m*) *Uzielli* v. *Boston Mar. Ins. Co.*, 15 Q.B.D. 11; 54 L.J. Q.B. 142.

(*n*) *Kaltenbach* v. *Mackenzie*, 3 C.P.D. 467; 48 L.J. C.P. 9.

(*o*) *Rankin* v. *Potter*, L.R. 6 H.L. 83; 42 L.J. C.P. 169.

(*p*) *Cambridge* v. *Anderton*, 2 B. & C. 691; 2 L.J. (O.S.) K.B. 141; *Allen* v. *Sugrue*, 8 B. & C. 561; 7 L.J. (O.S.) K.B. 53.

(*q*) *Roux* v. *Salvador*, 4 Sc. 34; 7 L.J. Ex. 328; *Trinder, Anderson & Co.* v. *Thames & Mersey Mar. Ins. Co.*, (1898) 2 Q.B. 114; 67 L.J. Q.B. 666.

(*r*) *Idle* v. *Roy. Ex. Assur. Co.*, 8 Taunt. 755; 3 Moore, 142; *Mount* v. *Harrison*, 4 Bing. 388; 6 L.J. (O.S.) C.P. 6; *Rankin* v. *Potter*, *supra*.

political laws working detention and sale by a court, or by circumstances of distress and danger creating a mercantile necessity for a sale, there is no necessity for any notice of abandonment (*s*). And, where the sale was not under a condemnation of any court, but took place because the insured declined to give security to prevent the sale, it was held that such sale was a total loss occasioned by the seizure, the giving of the security under the circumstances not being the course which a prudent uninsured owner would have adopted (*t*). But it is otherwise where the sale is not a necessary or natural consequence of any of the perils insured against (*u*). A constructive total loss is a total loss within the meaning of a policy against "total loss only" (*x*).

Party to give notice of abandonment.—The party giving notice of abandonment must be the party in whom the property in the ship is at the time vested. Where, therefore, a policy of insurance has been deposited as security for an advance of money, the pledgee of the policy has no implied authority to give notice of abandonment; but it is otherwise with a person who has a mortgage on the ship (*y*).

Form of notice of abandonment.—The word "abandon" need not be used; any words showing an intention to give up the property insured upon the ground of its having been totally lost will be sufficient (*z*).

Effect of notice of abandonment.—"Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto" (*a*). If they do not warrant an abandonment, or the insured neglects to give prompt notice of abandonment, he must proceed against the underwriters for the loss he has actually sustained. The insured then makes the best of what he can save, and resorts to the underwriter for the actual loss, after deducting the value of the remnants. On the other hand, when there is a constructive total loss and an abandonment, the risk of saving what remains to be saved is thrown upon the underwriter. After the abandonment the insurer stands in the place of the insured, and is clothed with the ownership of the property saved, and is entitled to all the

(*s*) *Farnworth* v. *Hyde*, 34 L.J. C.P. 207; 18 C.B. N.S. 835; *Mullett* v. *Shedden*, 13 East, 304; *Mellish* v. *Andrews*, 15 *ib.* 13; *Cossman* v. *West*, 13 App. Cas. 160; 57 L.J. P.C. 17.

(*t*) *Stringer* v. *English Ins. Co.*, L.R. 5 Q.B. 599; 39 L.J. Q.B. 214.

(*u*) *De Mattos* v. *Saunders*, L.R. 7 C.P. 570.

(*x*) *Adams* v. *Mackenzie*, 13 C.B. N.S. 442; 32 L.J. C.P. 92.

(*y*) *Jardine* v. *Leathley*, 3 B. & S. 700; 32 L.J. Q.B. 132.

(*z*) *Currie* v. *Bombay Native Ins. Co.*, L.R. 3 P.C. 72; 39 L.J. P.C. 1.

(*a*) 6 Edw. 7, c. 41, s. 62 (1).

profits and advantages that may accrue therefrom; and, if the insured recovers and retains possession of any portion of the property, the underwriters may maintain an action against him for the recovery of the value of it (*b*). The abandonment is retrospective in its operation, so that the title of the abandonees relates back to the time of the loss (*c*).

Insurance on freight.—"Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss" (*d*). Where a ship and the freight to be earned on the voyage were insured by separate sets of underwriters, and the ship was captured, and the ship and freight were abandoned to the respective underwriters, who each paid as for a total loss, and after that the ship was recaptured, and then performed her voyage and earned freight, it was held that the underwriters on the *ship* were entitled to the freight so earned, to the exclusion of the underwriters on the freight (*e*). The insured ship is by the abandonment vested in the underwriters from the time of the loss; and, as their ship earns the freight, they are entitled to it as purchasers of the ship (*f*); but if, at the time of the casualty, there is no freight pending, as, for instance, if the shipowner is carrying his own goods, the abandonment can give no right to freight (*g*). But freight is not an incident to the ownership of the vessel; and therefore, where a vessel was abandoned to the underwriters of the vessel upon a constructive total loss occurring through the fault of another vessel, it was held that they could not claim any share of the damages recovered from the owners of the wrong-doing vessel on account of the loss of freight (*h*). Where, after an embargo on a ship, the ship and freight were abandoned to the respective underwriters, and the embargo was taken off and the ship completed her voyage and earned freight, it was held that the shipowners had no right to the freight earned after the abandonment of the ship, and that the loss of freight was not demandable from the underwriters on freight, as it was not lost by means of the

(*b*) *Leatham* v. *Terry*, 3 Bos. & P. 479.
(*c*) *Cammell* v. *Sewell*, 3 H. & N. 644; 27 L.J. Ex. 447.
(*d*) 6 Edw. 7, c. 41, s. 63 (2).
(*e*) *Davidson* v. *Case*, 5 Moo. 116. But see *Sea Ins. Co.* v. *Hadden*, 13 Q.B.D. 706; 53 L.J. Q.B. 252.
(*f*) *Hickie* v. *Rodocanachi*, 4 H. & N. 466; 28 L.J. Ex. 273.
(*g*) *Miller* v. *Woodfall*, 8 E. & B. 504; 27 L.J. Q.B. 120.
(*h*) *Sea Ins. Co.* v. *Hadden*, *supra*.

perils insured against, but by reason of the abandonment of the ship, which was the act of the insured themselves (*i*). A total loss of the ship, therefore, does not necessarily involve a total loss of the freight. The ship may get to port a mere wreck, and deliver her cargo and earn freight, and the shipowner may elect to abandon and proceed for a total loss; but, if he does so, the underwriters of the ship will be entitled to the freight, and the insured will have no claim to any indemnity from the underwriters on freight for the loss of freight. Thus, where a ship and freight were separately insured by separate policies, and the ship came into port greatly damaged, and after survey was found not worth repairing, and was finally abandoned, but the cargo was safely landed, and the freight was earned and received by the shipowners, and was then handed over by them to the underwriters, as incident to the ship, which being done, the shipowners proceeded against the underwriters on freight for indemnity for loss of freight, it was held that they had no claim whatever in respect thereof, as the freight had been earned and actually received by the shipowners, and might have been retained by them for their own use, but for their subsequent voluntary election to abandon to the underwriters on the ship, and to constitute such underwriters the owners of the damaged ship and the freight earned by it (*k*).

But in all these cases where the underwriters are entitled to the freight after abandonment, the freight has been earned by the insured ship. If another ship finishes the voyage, the underwriters are not entitled to the freight, unless the substituted vessel is their vessel, or has been hired for their benefit by their agents (*l*). And, if the goods in the ship are the property of the owner of the ship, and he is carrying them on his own account, the abandonees of the ship have no claim to freight (*m*). The shipowner and charterer may agree that a portion of the freight shall be prepaid, in which case, as it cannot be recovered back, that portion is not a risk, and is not insurable; but the remaining portion may be insured, and if the ship is wrecked, and only such an amount of cargo is saved as corresponds with the prepaid freight, the insured may recover as for a total loss (*n*).

When insured may abandon—Total losses.—The general rule is that the insured may abandon in every case and claim for a

(*i*) *M'Carthy* v. *Abel*, 5 East, 388.
(*k*) *Scot. Mar. Ins. Co.* v. *Turner*, 17 Jur. 631; 4 H.L.C. 312, n.; *Benson* v. *Chapman*, 8 C.B. 964; 2 H.L.C. 696.
(*l*) *Hickie* v. *Rodocanachi*, 4 H. & N. 467; 28 L.J. Ex. 273.
(*m*) *Miller* v. *Woodfall*, 8 E. & B. 493; 27 L.J. Q.B. 120.
(*n*) *Allison* v. *Bristol Mar. Ins. Co.*, 1 App. Cas. 209.

total loss, when, by the occurrence of any of the misfortunes or perils insured against, the subject-matter of the insurance is so injured or deteriorated as to render any further dealing with it, in the mode contemplated at the time the policy was effected, worthless. If a vessel insured for a voyage is so much injured by perils of the sea that the cost of the repairs will be more than the vessel is worth when repaired, the insured may abandon and claim for a total loss (*o*). But not if the vessel is worth repairing, and can be repaired and re-fitted for sea at an expense less than her value when repaired (*p*). A vessel valued at 23,000*l.* was insured against risks which included perils of the sea, the insured value to be taken as the "repaired value" in ascertaining whether the vessel was a constructive total loss. The vessel being driven on the rocks, notice of abandonment was given by the assured, but the underwriters declined to accept it. The ship was floated by persons employed with the consent and for the benefit of all concerned, and was temporarily repaired and brought to England. The assured claimed to recover as for a constructive total loss. The vessel was not permanently repaired at the time of the trial, but the judge found that about 22,359*l.* was the proper amount to fix as the total cost of repair, and held that there was not a constructive total loss. It was held by the Court of Appeal, that in determining the question whether he had a right to abandon the vessel as a constructive total loss, the assured was not entitled to add the damaged value of the vessel to the cost of repair (*q*). Where a ship has sunk in deep water, the underwriters cannot escape liability for a total loss by intervening and raising the ship at their own expense (*r*). So, if a stranded vessel can by any means within reach of the captain, which he could reasonably use, be recovered and saved, the vessel cannot be abandoned by the insured; and, if the captain, to avoid the trouble of recovering the vessel, sells her as she lies, the sale will not entitle the insured to treat the loss as a total loss, and to abandon to the underwriters (*s*). When a ship and cargo are so submerged that both must be got up together, the expenditure incurred in raising them is for

(*o*) *Young* v. *Turing*, 2 Man. & G. 593; *Angel* v. *Merchants' Mar. Ins. Co.*, (1903) 1 K.B. 811; 72 L.J. K.B. 498; *Irving* v. *Manning*, 1 H.L.C. 287; *Phillips* v. *Nairne*, 4 C.B. 358; 16 L.J. C.P. 194; *De Cuadra* v. *Swann*, 16 C.B. N.S. 772; *Kemp* v. *Halliday*, L.R. 1 Q.B. 520; 35 L.J. Q.B. 156.

(*p*) *Moss* v. *Smith*, 9 C.B. 103; 19 L.J. C.P. 225.

(*q*) *Angel* v. *Merchants' Mar. Ins. Co.*, (1903) 1 K.B. 881; 72 L.J. K.B. 498; *dictum* in *Young* v. *Turing*, 2 Man. & G. at p. 601, disapproved.

(*r*) *Blairmore Sailing Ship Co.* v. *Macredie*, (1898) A.C. 593; 67 L.J. P.C. 96.

(*s*) *Knight* v. *Faith*, 15 Q.B. 657; 19 L.J. Q.B. 509; *Gardener* v. *Salvador*, 1 M. & Rob. 116; *Doyle* v. *Dallis*, *ib.* 48; *Tanner* v. *Bennett*, R & M. 182.

the common preservation of both, and the cargo must contribute thereto as well as the ship, and the amount to be contributed by the cargo must be taken into account for the purpose of ascertaining whether or not the ship is a total loss (*t*). But there is no principle of law which requires a person to contribute to an outlay merely because he has derived a benefit from it. So where a vessel was put into dry dock for necessary repairs by the insurers under the policy, and the owners took advantage of her being there to have her surveyed for a reclassification at Lloyd's, it was held that they were not called upon to contribute to the expenses of getting her into and out of dock (*u*). The loss of the voyage has nothing to do with the loss of the ship; and the shipowner who has insured his ship cannot abandon the ship merely because the voyage cannot be completed and the freight earned (*x*). If the policy is on freight, and the ship is detained by an embargo, the loss is *primâ facie* total; but, if the embargo be taken off and she then earns freight, the loss is partial only (*y*). If the vessel is driven by stress of weather into port to repair and re-fit, and the master hypothecates the ship, freight, and cargo for the payment of these repairs, and the amount exceeds the value of the ship and freight, the loss is a total loss (*z*). Where goods are, in consequence of the perils insured against, lying at a place different from their destination, damaged, but in such a state that they can at some cost be put in a condition to be carried to their destination, the question to be determined is, whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth; and in determining this there must be taken into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but there must not be taken into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not (*a*). Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods

(*t*) *Kemp* v. *Halliday*, *supra*. See *Marine Ins. Co.* v. *China S.S. Co.*, 11 App. Cas. 573; 56 L.J. Q.B. 100; *Ruabon S.S. Co.* v. *London Assurance*, (1898) 1 Q.B. 722; 67 L.J. Q.B. 548.

(*u*) *Ruabon S.S. Co.* v. *London Assurance*, (1900) A.C. 6; 69 L.J. Q.B. 86; explaining *Marine Ins. Co.* v. *China S.S. Co.*, *supra*.

(*x*) *Pole* v. *Fitzgerald*, Willes, 647.

(*y*) *Everth* v. *Smith*, 2 M. & S. 278.

(*z*) *Benson* v. *Chapman*, 7 Sc. N.R. 625; 2 H.L.C. 720.

(*a*) *Farnworth* v. *Hyde*, L.R. 2 C.P. 204; 36 L.J. C.P. 33.

on, and he does not choose to do so, there must not be taken into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened (*b*).

The mere suspension or retardation of the voyage in the case of an insurance on goods is no ground of abandonment (*c*). If, however, the voyage is not worth pursuing by reason of the delay, or if salvage services have been rendered, and the insured has no means of paying them, he may persist in the abandonment, and claim as for a total loss; but, if it appears that he could probably have raised money to liberate the vessel, and that he made no exertion to do it, he cannot treat the loss as a total loss; for he is bound in every case to exert himself to the uttermost of his power to prevent the loss from being a total loss (*d*). If the cargo can be transhipped and forwarded to the port of destination without any material deterioration or delay, the insured has no right to abandon it and claim for a total loss; but it is his duty to go on with the adventure and turn it to the best advantage, and to proceed against the underwriter for a partial loss, being the amount of the actual damage sustained by the peril insured against (*e*).

Capture and re-capture and abandonment—Embargo—Spes recuperandi.—Capture by an enemy or a pirate, or an arrest of princes, or an embargo, entitles the insured to abandon and claim for a total loss, unless the embargo has been taken off, or the vessel has been re-captured and restored to the owners, or they have the immediate means of recovering the vessel (*f*), and may reasonably be expected to take possession of it (*g*). On re-capture by an English vessel the shipowner has a right to the restitution of his ship on payment of salvage; and, if the insurance is on the ship, and the ship is re-captured and placed within the power of the insured, the loss, which was before a total loss, becomes then only a partial loss (*h*), unless

(*b*) *Rosetti* v. *Gurney*, 11 C.B. 176; 20 L.J. C.P. 257; *Farnworth* v. *Hyde*, *ante*, p. 1192.

(*c*) *Anderson* v. *Wallis*, 2 M. & S. 240.

(*d*) *Thornely* v. *Hebson*, 2 B. & Ald. 518; *Parry* v. *Aberdein*, 9 B. & C. 416; 7 L.J. (O.S.) K.B. 260; *Dixon* v. *Reid*, 5 B. & Ald. 597.

(*e*) *Hunt* v. *Royal Exch. Assur.*, 5 M. & S. 53; *Falkner* v. *Ritchie*, 2 M. & S. 290.

(*f*) *Goss* v. *Withers*, 2 Burr. 692; *Kleinwort* v. *Shepard*, 28 L.J. Q.B. 147; 1 E. & B. 447; *Cologan* v. *Lond. Assur.*, 5 M. & S. 455; *Wilson* v. *Forster*, 6 Taunt. 25.

(*g*) *Lozano* v. *Janson*, 28 L.J. Q.B. 343; 2 E. & E. 160.

(*h*) *Hamilton* v. *Mendez*, 2 Burr. 1198; 1 W. Bl. 276; *Brotherston* v. *Barber*, 5 M. & S. 418; *Bainbridge* v. *Neilson*, 10 East, 329.

the vessel is in a damaged and unseaworthy state, or the salvage and costs and expenses attendant upon the re-capture are likely to be more than the vessel is worth, and the voyage cannot be advantageously prosecuted. If the vessel be captured and re-captured, and the insured neither has the vessel restored to him nor any means of obtaining possession of it, or if the consequences of the capture are such as to occasion a total obstruction of the voyage, or render it not worth pursuing, if the salvage be high, if further expense be necessary, and the insurer will not, at all events, undertake to pay that expense, the loss continues a total loss, and the insured may abandon, notwithstanding the re-capture (*i*). Where a ship insured under a policy covering war risks was captured, and notice of abandonment was given to the underwriters and refused, and an action was commenced on the policy, and subsequently the vessel was released, it was held that the return of the ship after the commencement of the action did not disentitle the owners to recover as for a total loss (*k*).

Unreasonable abandonment.—"The privilege of abandoning," it has been justly observed, "is liable to great abuse. Where, as in the case of capture, the thing insured is completely gone out of the power of the insured, it is proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer. But it seems unreasonable that the owner of a ship which is stranded (the captain and crew, his servants, being on the spot and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters, who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands but to the greatest disadvantage" (*l*). "I am not disposed," observes Lord Ellenborough, "to enlarge the grounds of abandonment against underwriters, a privilege which, every one knows, has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the court to watch every such case, and in no instance to enlarge that which in the nature of the thing is only a partial, into a total, loss" (*m*).

Partial loss—Exception of partial losses.—A partial loss is not paid for, if there is a total loss of the vessel from perils insured against during the period covered by the policy;

(*i*) *Dean* v. *Hornby*, 3 E. & B. 190; 23 L.J. Q.B. 129; *Milles* v. *Fletcher*, 1 Doug. 232; *M'Iver* v. *Henderson*, 4 M. & S. 584; *Pringle* v. *Hartley*, 3 Atk. 195; *Naylor* v. *Taylor*, 9 B. & C. 718; *Hadkinson* v. *Robinson*, 3 Bos. & P. 388; but see *Barker* v. *Blakes*, 9 East, 293.

(*k*) *Rays* v. *Royal Exch. Assur.*, (1897) 2 Q.B. 135; 66 L.J. Q.B. 534.

(*l*) Marshall on Insurance, 444 (ed. 4).

(*m*) *Bainbridge* v. *Neilson*, 10 East, 343.

because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage, except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and, if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the insured against. If a partial loss is sustained, and then the whole subject-matter of the insurance is totally lost from a peril excepted from the policy, the underwriters will not be responsible for the partial loss, unless it has occasioned actual pecuniary loss to the insured (*n*). But if the total loss does not take place until after the expiration of the period covered by the policy, the underwriter will be responsible for the partial loss, and must pay the amount of the diminution in the value of the vessel occasioned by the partial loss, without reference to whether the vessel had been repaired or not before the total loss occurred (*o*). Where a vessel insured against perils of the sea was stranded and sustained such injuries that the cost of repairing her would have been greater than her value, and immediately afterwards was destroyed by fire, it was held that the insurers against fire were liable for the full amount in which they had insured the vessel (*p*). If a vessel loses a mast by a peril insured against, and is re-fitted, the loss is a partial loss; and, if the vessel then puts to sea, and is totally lost, the insured is entitled to be indemnified in respect of the partial loss, as well as the total loss; but, if, before the vessel is re-fitted, she is totally lost, the insured cannot then recover in respect of the partial loss (*q*). In case of a partial loss, and in the absence of other means of arriving at the loss, the insured is entitled to recover the cost of repairs up to the amount insured with the reduction of one-third new for old, even although this amount might be more than the amount payable for a total loss with benefit of salvage (*r*). A memorandum is frequently introduced at the foot of maritime policies, exempting the underwriters from all partial losses upon certain articles and descriptions of merchandise, and from all partial losses not amounting to 5*l.* per cent. upon other classes of merchandise, and from all partial losses upon ship and freight

(*n*) *Livie* v. *Janson*, 12 East, 656; *The Dora Forster*, (1900) P. 241; 69 L.J. P. 85.

(*o*) *Lidgett* v. *Secretan*, L.R. 6 C.P. 616; 40 L.J. C.P. 257.

(*p*) *Woodside* v. *Globe Mar. Ins. Co.*, (1896) 1 Q.B. 105; 65 L.J. Q.B. 117.

(*q*) *Stewart* v. *Steele*, 5 Sc. N.R. 941; 11 L.J. C.P. 155.

(*r*) *Aitchison* v. *Lohre*, 4 App. Cas. 755; 49 L.J. Q.B. 123, where repairs were actually done: *aliter* where not done, see *Pitman* v. *Universal Ins. Co.*, 9 Q.B.D. 192; 51 L.J. Q.B. 561, diss. Brett, L.J.

not amounting to 3*l.* per cent., unless the loss be a general average and contribution loss (*ante*, pp. 1008—1013). In many policies the underwriters exempt themselves from all partial or average losses of every description, excepting general average losses, so that they are not responsible at all upon the policy unless there is a total loss, or unless there has been a general average contribution. When the policy is warranted "free from particular average," no damage short of the absolute destruction of the thing insured will amount to a total loss. An exemption of this kind opens a wide door to fraud, inasmuch as a direct premium is offered to the insured to turn every partial loss into a total loss, in order that it may be covered by the policy (*s*).

General and particular average—Policies warranted free from average.—The term "average" is used, in insurance contracts and trading adventures, to denote every kind of partial loss or damage happening either to the ship or the cargo, from any cause whatever. It has been truly observed, that ambiguities frequently arise from the indiscriminate use, in mercantile matters, of the word AVERAGE, which has no less than four different meanings amongst commercial men. In policies of insurance the terms general average and particular average are constantly met with.

A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss (*t*). Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges (*u*), are called particular charges. Particular charges are not included in particular average (*x*).

Particular charges are recoverable from the insurer under the sue and labour clause; and this is so, even when the policy contains a warranty against particular average, if they were incurred with the object of presenting not merely a partial but a total loss (*y*). Particular average, instead of being contributed for by the general body of those who are interested in the adventure, falls entirely upon the particular owner of the

(*s*) *Dyson* v. *Rowcroft*, 3 Bos. & P. 476.

(*t*) 6 Edw. 7, c. 41, s. 64 (1).

(*u*) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils: 6 Edw. 7, c. 41, s. 65 (1). "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred: *ib.* s. 65 (2).

(*x*) 6 Edw. 7, c. 41, s. 64 (2).

(*y*) *Kidston* v. *Empire Mar. Ins. Co.*, L.R. 2 C.P. 357; 36 L.J. C.P. 156.

property deteriorated by the damage; and such owner, if insured, has a claim against his underwriter in proportion: (1) to the degree by which the damage sustained may have diminished the value to him of the property insured; (2) to the sum which the underwriter by the policy has agreed to insure on such property (*z*). Particular average is thus distinguished from general average, for while in particular average the loss remains where it falls, in general average it is borne proportionately by all the interests concerned.

General average loss.—A general average loss is a loss caused by or directly consequential on a general average act and it includes a general average expenditure as well as a general average sacrifice (*a*). There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure (*b*). Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution (*c*). Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute (*d*). Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer (*e*). In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against (*f*). Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons (*g*).

Measure of indemnity for partial losses.—The measure of

(*z*) Arnould, vol. 2, p. 1215 (ed. 8).
(*a*) 6 Edw. 7, c. 41, s. 66 (1). See *The Leitrim*, 71 L.J. P. 108; (1902) P. 256.
(*b*) *Ib.*, s. 66 (2). See also *ib.*, s. 66 (7) and *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.*, (1901) 1 K.B. at p. 151; (1902) 1 K.B. 734; 71 L.J. K.B. 467.
(*c*) 6 Edw. 7, c. 41, s. 66 (3).
(*d*) *Ib.*, s. 66 (4).
(*e*) *Ib.*, s. 66 (5).
(*f*) *Ib.*, s. 66 (6).
(*g*) *Ib.*, s. 66 (7). See *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.*, *supra*.

indemnity for partial losses may be qualified by express terms in the policy; and the commonest example of this is the memorandum in the Lloyd's policy which is as follows:—"Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded—sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent., unless general, or the ship be stranded." The term "average unless general" means a partial loss, and does not include particular charges (*h*). A general average loss, however small, is recoverable from the underwriters, but a particular average loss is not, unless it exceeds the specified percentage, in which case the underwriter is liable not merely for the balance over that percentage but for the whole loss. If a small portion of corn or flax is damaged from sea-water to the extent of 45*l*., and the entire value of the whole cargo is 1,000*l*., this is an average loss of $4\frac{1}{2}$ per cent. upon the whole, and is called "average" in mercantile phraseology; so that, if the cargo is warranted "free from average under 5*l*. per cent." the underwriters will be exempted from all responsibility in respect of this partial or average loss (*i*). If a cargo of corn insured "free from average" receives damage from sea-water, and the vessel puts into port for the purpose of drying the corn and preventing its total destruction, and the corn is so much damaged that if brought home it could not have been sold for an amount exceeding the expenses of unshipping, drying it, and bringing it home, the loss is total; but, if the value of the corn in England would exceed these expenses, the loss is an average loss within the warranty exempting the underwriters from liability. An insurance on goods warranted free of average, unless general, is equivalent to an insurance against their total loss only. As a general rule, where the whole or any part of the cargo is capable of being sent in a marketable state to the port of destination without laying out more money than it is worth, the master cannot sell, nor can the insured recover for a total loss (*k*). Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice,

(*h*) 6 Edw. 7, c. 41, sched. 1, r. 13.

(*i*) *Wilson* v. *Smith*, 3 Burr. 1550; *M'Andrews* v. *Vaughan*, 1 Park, Ins. 252; *Mason* v. *Skurry*, *ib.* 253; *Oppenheim* v. *Fry*, 33 L.J. Q.B. 267; 5 B. & S. 348.

(*k*) *Reimer* v. *Ringrose*, 6 Exch. 267; 20 L.J. Ex. 175; *Rosetti* v. *Gurney*, 11 C.B. 187; 20 L.J. C.P. 257; *Gt. Ind. Penins. Rail.* v. *Saunders*, 31 L.J. Q.B. 206; 1 B. & S. 41; 2 B. & S. 266; *Booth* v. *Gair*, 15 C.B. N.S. 291; 33 L.J. C.P. 99. See *The Pomeranian*, (1895) P. 349; 65 L.J. P. 39.

unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part (*l*). Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against (*m*). Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage (*n*). For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded (*o*). The effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and labouring clause of extraordinary expense which may be incurred in preserving it (*p*).

Insurance on separate bales or packages—Average and total losses.—If the merchandise insured is packed in separate bales, hogsheads, or packages, and the insurance is effected on each bale, hogshead, &c., separately, and some bales or hogsheads are totally lost, and others saved, the loss of each separate bale, hogshead, &c., is a total loss *pro tanto* (*q*); but, when the insurance is upon the bulk, and the goods are all of the same species, unless the loss exceeds the value specified in the memorandum, there is no average or partial loss, and there cannot, in such a case, be a total loss of a portion of the cargo (*r*). Where an insurance had been effected on goods generally, and several thousand bags of linseed were put on board, and by the memorandum as to average, seed was warranted free from average, the Court of Exchequer Chamber thought it was necessary, in the natural construction of the terms of the policy, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the warranty could

(*l*) 6 Edw. 7, c. 41, s. 76 (1).
(*m*) *Ib.*, s. 76 (2).
(*n*) *Ib.*, s. 76 (3).
(*o*) *Ib.*, s. 76 (4).
(*p*) *Kidston* v. *Empire Ins. Co.*, L.R. 2 C.P. 357; 36 L.J. C.P. 156; *Meyer* v. *Ralli*, 1 C.P.D. 358; 45 L.J. C.P. 741.
(*q*) *Entwisle* v. *Ellis*, 2 H. & N. 555; 27 L.J. Ex. 105; *Davy* v. *Milford*, 15 East, 559.
(*r*) *Hills* v. *Lond. Assur. Corp.*, 5 M. & W. 569; 9 L.J. Ex. 25.

not apply to each bag in which the seed happened to be packed as a distinct object (*s*); but, where the goods insured were described in the policy as "master's effects," and the memorandum was "free from all average," and some of the goods thus insured were totally lost, and others were saved, it was held that, as the articles which constituted "master's effects" were essentially different in their nature, and kind, and value, the insurer was liable in respect of the total loss of particular articles constituting "master's effects." To hold that, if the insured happens to be successful in rescuing any of the articles insured, even the clothes he may be wearing, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost, would lead to a result quite at variance with the object for which the memorandum as to average was introduced into policies (*t*). As soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated (*u*).

If the contents of any particular package, hogshead, &c., separately insured, are not totally destroyed, the loss is then only a partial or average loss, and the underwriters are exempted, by the memorandum, from liability (*x*). It is usual, therefore, to modify the effect of the memorandum by an express stipulation to the effect that the underwriters are to pay "average on each species of produce, or package of manufactured goods, or on each ten, fifteen, or twenty hogshead, &c." so as to give the insured a right to claim for an average or partial loss separately on each species, if the loss amounts to three or five per cent., although there may not have been a three or five per cent. loss upon the whole. This stipulation does not oust the claim of the assured in respect of a general average loss (*y*). If several average or partial losses take place under three or five per cent. *each*, but the aggregate amount of the whole exceeds three or five per cent., the underwriters will be liable (*z*). But a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage, when the subject-matter of the insurance is warranted "free from average under so much per cent. unless general" (*a*).

(*s*) *Ralli* v. *Janson*, 6 E. & B. 422; 25 L.J. Q.B. 300. See also *Lysaght, Ltd.* v. *Coleman*, (1895) 1 Q.B. 49; 64 L.J. Q.B. 175.

(*t*) *Duff* v. *Mackenzie*, 3 C.B. N.S. 16; 26 L.J. C.P. 313.

(*u*) *Wilkinson* v. *Hyde*, 3 C.B. N.S. 30; 27 L.J. C.P. 116.

(*x*) *Hedburg* v. *Pearson*, 7 Taunt. 154; *Navone* v. *Haddon*, 9 C.B. 43; 19 L.J. C.P. 161.

(*y*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

(*z*) *Blackett* v. *Royal Exch. Assur. Co.*, 2 Cr. & J. 244; 1 L.J. Ex. 101; but see, as to excessive losses on the same thing, *Stewart* v. *Merchants' Marine Ins. Co.*, 16 Q.B.D. 619; 55 L.J. Q.B. 81.

(*a*) *Price* v. *A1 Ships Small Damage Ins. Assoc.*, 22 Q.B.D. 580; 58 L.J. Q.B. 269.

Whenever the policy is made free from average under so much per cent., and a loss happens, the proportion which the loss bears to the cargo must be calculated upon the cargo which was on board at the time of the loss (*b*). The petty charges of primage and average, previously mentioned (*ante*, p. 1008) as incident to navigation, form part of the necessary and ordinary expenses of the voyage; and the payment of them is not considered a loss within the meaning of the policy.

Exceptions of general average losses and stranding of vessel.—General average losses arising from general contribution by the owners of property exposed to a common peril of the seas to make good a loss incurred for the preservation of the common property of all (*ante*, p. 1008), must be made good by the underwriter under the general terms of the policy; and, when they are excepted from the average clause, the underwriter, of course, continues responsible in respect of them, although he is exempted from liability in respect of all other partial or average losses. It has been held that where ship and cargo both belong to the same person, as there can be no contribution in fact, the underwriter of a policy of insurance on cargo is not liable in respect of a general average loss (*c*); but this decision has been disapproved of (*d*). "Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board" (*e*). To the clause "warranted free from average" is frequently annexed, as we have already seen, the exception "unless the ship be stranded." By the stranding of the vessel, under such a clause, the exemption from average is destroyed; and the loss falls within the general words of the policy, although it was not in anywise occasioned by the stranding (*f*). It is said to be a rule that, where a vessel takes the ground in the ordinary course of navigation in a tidal river or harbour upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of the tide, such an event is not to be considered a stranding within the sense of the memorandum; but it is otherwise where the ground is taken by reason of some unusual occurrence (*g*). Where a ship ran on some wooden piles four

(*b*) *Rohl* v. *Parr*, 1 Esp. 444.
(*c*) Per Barnes J., *The Brigella*, (1893) P. 189; 62 L.J. P. 81.
(*d*) *Montgomery* v. *Indemnity Mutual Marine Ins. Co.*, (1902) 2 K.B. 734; 71 L.J. K.B. 467.
(*e*) 6 Edw. 7, c. 41, sched. 1, r. 14.
(*f*) *Burnett* v. *Kensington*, 7 T.R. 210; *Roux* v. *Salvador*, 4 Sc. 1; 7 L.J. Ex. 328; *Thames & Mersey Marine Ins. Co.* v. *Pitts*, (1893) 1 Q.B. 476.
(*g*) *Wells* v. *Hopwood*, 3 B. & Ald. 34;

feet under water which had been erected in a river about nine yards from the shore to keep up the banks, and lay on such piles until they were cut away, this was held to be a stranding within the policy (*h*). But, if the vessel merely grounds on a rock and gets off when the tide rises, and pursues her voyage, this is not a stranding, though the vessel may be injured; "if it is touch and go with the ship, there is no stranding" (*i*). But, when the ship accidentally takes the ground and remains there for any time, this constitutes a stranding, without reference to the damage sustained by the vessel (*k*). If the shore tackling, placed to keep the vessel upright when the tide leaves her, breaks, and she rolls over on her side and is stove in, this is a stranding (*l*). Where a ship, having encountered bad weather, and lost both her anchors, and had her masts cut away, was taken in tow by salvors, and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury, it was held that there was a stranding (*m*). The stranding of a lighter, in which goods are being taken from the ship to the shore, is not a stranding of the vessel within the exception in the policy (*n*). The stranding must of course, in all cases, take place during the voyage covered by the policy, and while the insured goods are on board the vessel (*o*).

A clause in a policy "general average as per foreign statement," means that general average in the policy shall include such losses as the law of the port of adjustment regards as intentional sacrifices made for the benefit of the whole adventure although such losses may not be general average according to English law (*p*). The mere temporary suspension of the voyage for repairs at a port of refuge does not warrant an average adjustment at that port as between shipowner and owner of cargo; and the shipowner is not entitled to *pro ratâ* freight, unless it is shown that the owner of the goods had an option of having them sent on or of accepting them at that port (*q*).

Kingsford v. *Marshall*, 8 Bing. 458; 1 L.J. C.P. 135; *Letchford* v. *Oldham*, 5 Q.B.D. 538; 49 L.J. Q.B. 458.

(*h*) *Dobson* v. *Bolton*, 1 Park, Ins. 239; *Raynor* v. *Godmond*, 5 B. & Ald. 225.

(*i*) Lord Ellenborough, *Macdougle* v. *Royal Exch. Assur.*, 4 Campb. 283.

(*k*) *Harman* v. *Vaux*, 3 Campb. 429; *Barrow* v. *Bell*, 4 B. & C. 736; 4 L.J. (O.S.) K.B. 47.

(*l*) *Bishop* v. *Pentland*, 7 B. & C. 219; 6 L.J. (O.S.) K.B. 6.

(*m*) *De Mattos* v. *Saunders*, L.R. 7 C.P. 570.

(*n*) *Hoffman* v. *Marshall*, 2 Sc. 559; 5 L.J. C.P. 70.

(*o*) *The Alsace Lorraine*, (1893) P. 209; 62 L.J. P. 107; as to the meaning to be attached to the word "burnt" in an exception, see *The Glenlivet*, (1894) P. 48; 63 L.J. P. 45.

(*p*) *Marro* v. *Ocean Marine Ins. Co.*, L.R. 10 C.P. 414; 44 L.J. C.P. 229; *The Mary Thomas*, (1894) P. 108; 63 L.J. P. 49; *De Hart* v. *Compania Anonima de Seguros Aurora*, (1903) 2 K.B. 503; 72 L.J. K.B. 818.

(*q*) *Hill* v. *Wilson*, 4 C.P.D. 329; 48 L.J. C.P. 764.

Suing and labouring clause.—"And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns to sue, labour, and travel for, in and about the defence, safeguards and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment"(*qq*). This clause is not limited in construction to a case where the insured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs (*r*).

"Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred (*r*) pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average (*s*), either wholly or under a certain percentage. General average losses and contributions and salvage (*t*) charges, as defined by this Act, are not recoverable under the suing and labouring clause (*u*). Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause. It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss" (*x*).

Measure of indemnity for loss—Extent of liability of insurer.—The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy,

(*qq*) 6 Edw. 7, c. 41, Sched. I.

(*r*) *Kidston* v. *Empire Ins. Co.*, L.R. 2 C.P. 357; 36 L.J. C.P. 156; *Lee* v. *Southern Ins. Co.*, L.R. 5 C.P. 397; 39 L.J. C.P. 218; *Meyer* v. *Ralli*, 1 C.P.D. 358; 45 L.J. C.P. 741.

(*s*) See *ante*, p. 1196.

(*t*) See 6 Edw. 7, c. 41, s. 65, as to meaning of salvage charges. See *Aitchison* v. *Lohre*, 4 App. Cas. 755; 49 L.J. Q.B. 123; *Xenos* v. *Fox*, 38 L.J. C.P. 351; L.R. 4 C.P. 665; *Dixon* v. *Whitworth*, 48 L.J. C.P. 538; 4 C.P. D. 371; *Balmoral S.S. Co.* v. *Marten*, (1902) A.C. 511; 71 L.J. K.B. 819.

(*u*) *Aitchison* v. *Lohre*, 4 App. Cas. 755; 49 L.J. Q.B. 123. See also *Cunard S.S. Co.* v. *Marten*, (1903) 2 K.B. 511; 72 L.J. K.B. 754; *Gt. Indian Peninsular Ry.* v. *Saunders*, 31 L.J. Q.B. 206; 2 B. & S. 266; *Francis* v. *Boulton*, 1 Com. Cas. 217.

(*x*) 6 Edw. 7, c. 41, s. 78. See *Crouan* v. *Stanier*, (1904) 1 K.B. 87; *Western Assur. Co. of Toronto* v. *Poole*, 72 L.J. K.B. 195; (1903) 1 K.B. 376.

is called the measure of indemnity (*y*). Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy (*z*). Subject to the provisions of the Marine Insurance Act, 1906, and to any express provision in the policy, where there is a total loss of the subject-matter insured,—(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy; (2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured (*a*).

The underwriters are liable for total or average losses in proportion to the sums they have underwritten. Thus, if a man underwrite 100*l.* upon property valued at 500*l.* and a total loss happen, he shall pay 100*l.*, that being the amount of his subscription; and, if only an average loss, amounting to 60*l.* or 70*l.* per cent., then he shall pay only 60*l.* or 70*l.*, being his proportion of the loss. The liability of the underwriter is not restricted to the amount of his subscription: for he may be subject to an average and a total loss in the same voyage, or for several average or partial losses amounting together to more than his subscription (*b*). But the insured cannot, of course, in any case, recover anything beyond that which is a strict indemnity for losses actually sustained. If several articles be insured for one sum, with a distinct valuation on each, or so much upon ship, and so much upon cargo, and no part of the cargo be taken on board, so that the risk upon that never attaches, the insured will recover only such a portion of the sum insured as the value of the article lost bore to the value of the whole (*c*). In the case of open policies on freight, the usage is to calculate the loss upon the gross amount, and not upon the net value of the freight (*d*). When part of the goods insured is saved and the salvage exceeds the amount of the freight, the practice is to deduct the freight from the value of the goods saved, and to make up the loss upon the difference (*e*).

If the policy can be proved to have been fraudulently overvalued, it will be void. But if the assured has valued that which he intends should be at risk upon the basis of a value which

(*y*) 6 Edw. 7, c. 41, s. 67 (1).
(*z*) *Ib.*, s. 67 (2).
(*a*) *Ib.*, s. 68.
(*b*) *Le Cheminant* v. *Pearson*, 4 Taunt. 367; *Brooks* v. *M'Donnell*, 1 Y. & C. 515; 4 L.J. Ex.(Eq.) 60; and see s. 77, *post*, p. 1211.
(*c*) *Amery* v. *Rogers*, 1 Esp. 208.
(*d*) *Palmer* v. *Blackburn*, 1 Bing. 61; 1 L.J. (O.S.) C.P. 1.
(*e*) *Boyfield* v. *Brown*, 2 Str. 1065.

turns out to be erroneous because of facts of which he was ignorant when he took out the policy, yet, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive, although the amount actually at risk is very much less (*f*). Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss occurring the insured receives under some of the policies part of the sums insured, in an action upon another policy, he is only entitled to recover the difference between the amount received and the agreed valued in that policy (*g*). If the policy be an open policy on a ship, the value is taken to be the sum the ship is worth to the owner at the port where the voyage commences, including stores, furniture, provisions, wages, advances to sailors, and all expenses of outfit, to which are added the premium and costs of insurance. If it be an open policy on goods, the value is taken to be the prime cost of the goods as proved by the invoices and tradesmen's bills, adding thereto the shipping charges, and premium, and costs of insurance. The presumed value of the goods, if they had reached their place of destination and been sold there, has nothing to do with the calculation of the outset value. The insurer has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset: he has no concern in any subsequent value (*h*). If the policy is a valued policy on a ship at and from A. to B., and the ship while at A. undergoing repairs is burnt so as to become a total loss, the underwriter is not entitled to deduct from the value the estimated expense of the repairs necessary to make the ship seaworthy for the voyage, but must pay the total agreed value (*i*).

"Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty; (2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed

(*f*) *The Main*, (1894) P. 320; 63 L.J. P. 69.

(*g*) *Bruce* v. *Jones*, 1 H. & C. 769; 32 L.J. Ex. 132. See 6 Edw. 7, c. 41, s. 32 (2) (b).

(*h*) *Lewis* v. *Rucker*, 2 Burr. 1170.

(*i*) *Lidgett* v. *Secretan*, L.R. 6 C.P. 616; 40 L.J. C.P. 257. See 6 Edw. 7, c. 41, s. 77.

the cost of repairing the whole damage, computed as above; (3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above" (*k*).

The shipowner is entitled to have the ship repaired with materials and workmanship corresponding to its original character (*l*). The principal difficulty in adjusting a particular average loss on ship consists not in the rule of apportionment, but in ascertaining and fixing the amount of damage. If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one-third from the whole expense both of labour and materials, which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed deducting one-third new for old, and it is done on the principle that, unless where the ship is quite new, the substitution of new for old materials is a benefit to the shipowner, who gets the ship the better for the repairs by the substitution of new work for old, and would consequently be a gainer if the whole expense of labour and repairs were regarded as so much pure loss to him. To avoid discussion in each particular case the amount of deduction is fixed at one-third (*m*).

Signed adjustments.—When an adjustment has been made of the amount of the loss, and indorsed upon the policy and signed by the underwriter, this binds the latter, unless he can show that it was made on wrong information, or under a mistake, or under the influence of misrepresentations (*n*). The adjustment is not an absolute and final settlement which is to be conclusively binding upon the parties (*o*); but, when the underwriter has once settled for the loss, he cannot recover back the money he has paid, unless there has been actual fraud on the part of the insured. If he pays for a total loss, which afterwards turns out to have been only an average loss, he cannot recover back his money, but must do the best he can with the property saved (*p*).

(*k*) 6 Edw. 7, c. 41, s. 69. See also *ib.*, s. 77.

(*l*) *Agenoria S.S. Co.* v. *Merchant's Mar. Ins. Co.*, 8 Com. Cas. 212; *North Atlantic S.S. Co.* v. *Burr*, 9 Com. Cas. 164.

(*m*) *Da Costa* v. *Newnham*, 2 T.R. 407; *Poingdestre* v. *Roy. Exch. Assur. Co.*, Ry. & M. 378; *Fenwick* v. *Robinson*, 3 C. & P. 324; *Lohre* v. *Aitchison*, 2 Q.B.D. 501; 3 Q.B.D. 558; *Lidgett* v. *Secretan*, L.R. 6 C.P. at p. 627.

(*n*) *Herbert* v. *Champion*, 1 Campb. 134; *Shepherd* v. *Chewter*, *ib.* 274; *Gammon* v. *Beverley*, 8 Taunt. 124.

(*o*) *Luckie* v. *Bushby*, 13 C.B. 878; 22 L.J. C.P. 220.

(*p*) *Da Costa* v. *Firth*, 4 Burr. 1966.

Loss of freight.—To recover for loss of freight, a total loss by perils of the sea must be proved. If the master has the means of repairing a vessel which has sustained sea damage, and of shipping and bringing home the cargo, and neglects to avail himself of the opportunities within his reach, the insured cannot recover for loss of freight (*q*). Where the insurance was on freight, and the ship was injured by perils of the sea, and obliged to put into port and land the cargo to re-fit, and part of the cargo was so wetted by sea-water that it could not be re-laden on board without imminent danger of ignition, unless it went through a process which would have detained the vessel six weeks, at an expense equal to the freight, and the master sold the goods, and, finding he could not obtain others, sailed on his voyage, it was held that the underwriters were not liable to make good the loss of the freight on these goods (*r*). Where the plaintiff having entered into a charter-party by which the ship was to proceed to Newport and there load a cargo, insured the chartered freight, and the ship on the way to Newport was delayed by the perils insured against for so long a time that the freighter refused and was justified in refusing to load a cargo, it was held that there was a total loss of the freight (*s*). With respect to the measure of indemnity where there is a partial loss of freight, see Measure of Indemnity, p. 1203.

Partial loss of freight.—A partial loss of chartered freight may arise from the operation of a cesser clause like the following:—"In the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when the detention begins until she be again in an efficient state to resume her service." When a loss of time occasioned by any of the perils insured against results in such a clause coming into operation, and thereby causes a loss of hire, such loss is recoverable under a policy on the chartered freight as a particular average loss (*t*). It seems in this country that a claim in respect of partial loss on freight can only be made good when either (1) only part of the full intended cargo out of which the freight was expected to

(*q*) *Philpot* v. *Swan*, 5 L. T. 183.

(*r*) *Mordy* v. *Jones*, 4 B. & C. 400; 3 L.J. (O.S.) K.B. 250.

(*s*) *Jackson* v. *Union Ins. Co.*, 8 C.P. 572; 10 C.P. N.S. 125; see *Inman Steam Co.* v. *Bischoff*, 7 A.C. 670; 52 L.J. QB.. 169; *Brankelow S.S. Co.* v. *Canton Ins. Office*, (1901) A.C. 462; 70 L.J. K.B. 952; *The Alps*, (1893), P. 109; 62 L.J. P. 59; *The Bedouin*, (1894) P. 1; 63 L.J. P. 30.

(*t*) *The Alps*, (1893) P. 109; 62 L.J. Adm. 59; *The Bedouin*, (1894) P. 1; 63 L.J. Adm. 30; *Hough* v. *Head*, 55 L.J. Q.B. 43.

arise was on board, or contracted for at the time of loss (*u*); (2) when some separable part of the whole cargo (*i.e.*, separately valued or insured by the policy (*v*)) goes in bulk to the bottom of the sea, or is otherwise totally destroyed by a peril insured against (*x*). In both these cases there is a clear total loss of part, or partial loss of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated.

The rule as to the amount recoverable for a partial loss of freight is thus stated:—"Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy" (*y*).

Partial loss of goods, merchandise, &c.—Standard of value and measure of depreciation.—Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy (*z*); (2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss (*a*); (3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross (*b*) sound and damaged values at the place of arrival bears to the gross sound value (*c*).

If a partial loss has been sustained on goods and merchandise, this loss is calculated and adjusted by comparing the selling

(*u*) *Forbes* v. *Aspinall*, 13 East, 323; *Forbes* v. *Cowie*, 1 Campb. 520.

(*v*) *Ralli* v. *Janson* (in error), 6 E. & B. 422; 25 L.J. Q.B. 300.

(*x*) See *The Merchant Shipping Co.* v. *Armitage*, L.R. 9 Q.B. 99; 43 L.J. Q.B. 24; Stevens Av. 174.

(*y*) 6 Edw. 7, c. 41, s. 70. See also *ib.* s. 67 (2).

(*z*) 6 Edw. 7, c. 41, s. 71 (1).

(*a*) *Ib.*, s. 71 (2).

(*b*) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers: 6 Edw. 7, c. 41, s. 71 (4).

(*c*) *Ib.*, s. 71 (3); and see *Francis* v. *Boulton*, 65 L.J. Q.B. 153.

price of the sound commodity with the selling price of the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i.e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against, and for which the insured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated portion of loss to the standard by which the value is calculated (*i.e.*, to the declared value in the case of a valued policy, and to the invoice price, &c., in the case of an open policy), "and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money" (*d*). If part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But, where one hogshead happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but, if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. This is to be found out, not by any price at the outset port, but at the port of delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value; and, as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged. For instance, suppose the value in the policy to be 30*l.*, the goods are damaged, but sell for 40*l.*; if they had been sound, they would have sold for 50*l.* The difference then between the sound and the damaged is a fifth; consequently, the insurer must pay a fifth of the prime cost or value in the policy, that is, 6*l.*: *e converso*, if they come to a losing market and sell for 10*l.*, being damaged, but would have sold for 20*l.* if sound, the difference is one-half, and the insurer must pay half the prime cost or value in the policy, that is, 15*l.* (*e*). To put the matter in another shape, "If goods valued at 100*l.*, and coming to a good market, would, if sound, have been sold for 120*l.*, but are so damaged as not to fetch more than 40*l.*, the loss will be that proportion of the

(*d*) *Usher* v. *Noble*, 12 East, 647. (*e*) *Lewis* v. *Rucker*, 2 Burr. 1170.

prime cost (100*l.*), which the difference between the price of the damaged and the price of the sound goods (80*l.*) bears to the price of the sound, 120*l.* Thus, if 120*l.* : 80*l.* :: 100*l.* :— the answer is 66*l.* 13*s.* 4*d.*, the true loss" (*f*). This mode of calculation furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the fluctuations of a rising or falling market. The merchant in this way makes the market prices of the sound and damaged commodity serve as the scales in which to weigh the depreciation (*g*).

Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy, and the insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole (*h*). Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods (*i*).

General average contributions and salvage charges.—Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute (*k*). Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle (*l*). "The master is not compellable to part with the possession of the goods until the sum contributable in respect of them is either paid or

(*f*) Marshall on Insurance, 504 (ed. 4); *Johnson* v. *Sheddon*, 2 East, 581; *Hurry* v. *R. Ex. Assur. Co.*, 3 Bos. & P. 308; *Tunno* v. *Edwards*, 12 East, 488.
(*g*) Stevens on Average, 84.
(*h*) 6 Edw. 7, c. 41, s. 72 (1).
(*i*) *Ib.*, s. 72 (2).
(*k*) 6 Edw. 7, c. 41, s. 73 (1). *See Balmoral S.S. Co.* v. *Marten*, 71 L.J. K.B. 819; (1902) A.C. 511; *Pirie* v. *Steele*, 2 M. & Rob. 49; *Henderson Bros.* v. *Shankland*, (1896) 1 Q.B. 525; 65 L.J. Q.B. 340.
(*l*) *Ib.*, s. 73 (2).

secured to his satisfaction" (*m*). As agents for all parties concerned he has a lien upon the cargo for the proportion due from each cargo owner in respect of general average (*n*).

Liabilities to third parties.—Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability (*o*).

General provisions as to measure of indemnity.—"Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case (*p*). Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy" (*q*).

Successive losses.—Unless the policy otherwise provides, and subject to the provisions of the Marine Insurance Act, 1906, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured (*r*). "Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss: Provided that nothing in" sect. 77 of the Act of 1906 "shall affect the liability of the insurer under the suing and labouring clause" (*s*). Where a ship insured by a valued time policy was a constructive total loss by sea damage when the policy attached on her a total subsequent loss was held recoverable (*t*).

Rights of insurer on payment.—Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss (*u*).

(*m*) *Simonds* v. *White*, 2 B. & C. 811; 2 L.J. (O.S.) K.B. 159; per Abbott, C.J.

(*n*) See *Cargo ex Galam*, 33 L.J. Ad. 97; *Strang* v. *Scott*, 14 App. Cas. 601; 59 L.J. P.C. 1; *Nobel's Explosives Co.* v. *Rea*, 2 Com. Cas. 293.

(*o*) 6 Edw. 7, c. 41, s. 74.

(*p*) *Ib.*, s. 75 (1).

(*q*) *Ib.*, s. 75 (2).

(*r*) *Ib.*, s. 77 (1); and see *ante*, p. 1204.

(*s*) *Ib.*, s. 77 (2); *Livie* v. *Janson*, 12 East, 648.

(*t*) *Barker* v. *Janson*, L.R. 3 C.P. 303; 37 L.J. C.P. 105; *Woodside* v. *Globe Assur. Co.*, (1896) 1 Q.B. 105; 65 L.J. Q.B. 117.

(*u*) 6 Edw. 7, c. 41, s. 79 (1). See

Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, by such payment for the loss (*x*).

Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract (*y*). If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and he is entitled to the like remedies as a surety who has paid more than his proportion of the debt (*z*).

SECTION III.

OF FIRE INSURANCE.

Insurance against peril by fire (*a*).—When the underwriter, in consideration of a premium, undertakes to indemnify the insured against loss of, or injury to, property from fire, the contract is a contract of fire insurance, and the instrument by which it is effected is called a FIRE POLICY. In a contract of this kind, the insurers, after reciting the receipt of the premium, usually covenant or agree that, from a day named in the policy, unto, and inclusive of, another day named therein, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurers shall accept the same, they, the insurers, will make good any loss or damage by fire to the property insured, except loss or damage from fire caused by foreign enemies, &c. When the policy refers to printed proposals, as embodying the terms upon which the insurance is effected, these proposals form part of the contract, and the policy and proposals must be read and construed together. Where, however, a slip containing particulars of the risk had been initialled by underwriters, but no policy had been signed, it was held that there was

Dickenson v. *Jardine*, L.R. 3 C.P. 639; 37 L.J. C.P. 321; *King* v. *Victoria Ins. Co.*, (1896) A.C. 250; 65 L.J. P.C. 38.

(*x*) 6 Edw. 7, c. 41, s. 79 (2). See *Assicurazioni Generali de Trieste* v. *Empress Assur. Corp.*, (1907) 2 K.B. 814; 76 L.J. K.B. 980; *North of England Ins. Assoc.* v. *Armstrong*, L.R. 5 Q.B. 244; 39 L.J. Q.B. 81.

(*y*) *Ib.*, s. 80 (1).

(*z*) *Ib.*, s. 80 (2).

(*a*) See 9 Edw. 7, c. 49, as to insurance companies and the class of business to which that Act applies.

a complete and binding contract of insurance (*b*). The insured must have a pecuniary interest in the property exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property (*c*). If he has no such interest or accountability, the contract will be void at common law, independently of the 14 Geo. 3, c. 48, as being contrary to public policy, and holding out the strongest possible temptation to arson; but it is not necessary, to give the insured an insurable interest, that he should have the absolute property in the things insured. If he has a lien on them for money due to him, or if he holds them as a bailee, or depositary, or warehouseman, or as a commission-agent for sale, or as an artificer, or a common carrier, or is employing his work and labour upon them, he may lawfully insure them to their full value as goods held in trust or on commission, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers (*d*). Where, however, the insurers had specially limited their liability to "goods on trust or on commission for which the insured are responsible," it was held that they were not liable for loss to goods sold, and in which the property had passed to the purchaser, although the insured held the delivery warrants for the convenience of paying the charges on the goods which were in bond (*e*). If the insured is a bankrupt in possession of after-acquired property by permission of his trustee, he has an insurable interest (*f*). An insurer cannot ratify a contract after becoming aware of the loss of the subject-matter (*ff*).

Parties entitled to benefit of insurance.—By sect. 7 of 22 & 23 Vict. c. 35, the person entitled to the benefit of a covenant to insure against loss or damage by fire shall have the same advantage from any insurance not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant; but this section has been repealed by sect. 14 of 44 & 45 Vict. c. 41, and Schedule II., Part I., and its place is practically supplied by the relief against forfeiture contained in sect. 14 of the above Act (*g*). A purchaser of property insured against fire does not, by the purchase, acquire a right to the benefit of the policy (*h*). Where machinery was

(*b*) *Thompson* v. *Adams*, 23 Q.B.D. 361.

(*c*) *Marks* v. *Hamilton*, 7 Exch. 323; 21 L.J. Ex. 109.

(*d*) *Tasker* v. *Scott*, 6 Taunt. 234; 1 Marsh. 556; *L. & N. W. Ry.* v. *Glyn*, 28 L.J. Q.B. 193; 1 E. & E. 652; *Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870; 25 L.J. Q.B. 102.

(*e*) *North British Ins. Co.* v. *Moffatt*, L.R. 7 C.P. 25; 41 L.J. C.P. 1; and see *Martineau* v. *Kitching*, L.R. 7 Q.B. 436, 457; 41 L.J. Q.B. 227.

(*f*) *Marks* v. *Hamilton*, 7 Exch. 323; 21 L.J. Ex. 109.

(*ff*) *Grover* v. *Mathews*, (1910) 2 K.B. 401; 79 L.J. K.B. 1025.

(*g*) See *ante*, p. 714.

(*h*) *Poole* v. *Adams*, 33 L.J. Ch. 639; *Phœnix Assur. Co.* v. *Spooner*, (1905) 2 K.B. 753; 74 L.J. K.B. 792.

mortgaged by a bill of sale, which contained a covenant to insure, but no provision for the application of the policy moneys in case of fire in liquidation of the mortgage debt, and the machinery was burnt, it was held that the mortgagee had no claim to the benefit of the policy as against the mortgagor (*i*). So also a lessee with an option of purchase has no right after a fire to exercise his option and claim the insurance money (*k*).

Things covered by policy.—An insurance on "household furniture, linen, and wearing apparel," will not include linen-drapery bought on speculation (*l*); nor will an insurance on the "interest in an inn" include the profits of the publican's trade (*m*); nor an insurance on "an oil mill and millwright's gear therein" include machinery in a separate detached building, although it is worked by the same motive power, and considered to be part of the mill (*n*). If a building be described as of one class instead of another requiring a larger premium, the policy will be nugatory (*o*).

Warranties.—Every statement, condition, and representation, material to the risk, will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk (*p*). While the nature of the contract requires that strict good faith be kept with the insurers in the representations made to them to induce them to accept the insurance, the parties may frame their contracts in their own terms, and subject to such conditions as they may think fit; and such conditions, when imposed upon or undertaken by the assured, are termed "warranties" and form the primary terms of the contract. When a formal proposal is executed, any statements therein made unconditionally, and expressly or by reference referred to in the policy, are warranties, and must be strictly and literally true, and their correctness is a condition precedent to the responsibility of the insurer. "It is simply sufficient, and ought to be sufficient," observed Lord St. Leonards (*q*), "to avoid the policy, that any one thing warranted is not true." Whenever the assured and the assurers are at issue, whether a statement or condition in the policy has been complied with or not, it will be important to

(*i*) *Lees* v. *Whiteley*, L.R. 2 Eq. 143; 35 L.J. Ch. 412.

(*k*) *Edwards* v. *West*, 7 Ch. D. 858; 47 L.J. Ch. 463; recognised in *Isaacs* v. *Reginall*, (1894) 3 Ch. 506; 63 L.J. Ch. 815; *Raffety* v. *Schofield*, (1897) 1 Ch. 937; 66 L.J. Ch. 448.

(*l*) *Watchorn* v. *Langford*, 3 Campb. 422.

(*m*) *Wright* v. *Pole*, 1 Ad. & E. 621.

(*n*) *Hare* v. *Barstow*, 8 Jur. 928.

(*o*) *Newcastle Fire Ins. Co.* v. *Macmorran*, 3 Dow, 255.

(*p*) *Benham* v. *United Guar. Assur. Co.*, 7 Exch. 744; 21 L.J. Ex. 317; *Baxendale* v. *Harvey*, 4 H. & N. 450; S.C. nom. *Baxendale* v. *Harding*, 28 L.J. Ex. 236.

(*q*) *Anderson* v. *Fitzgerald*, 4 H.L.C. 484; *Thomson* v. *Weems*, 9 A.C. 687.

decide whether we have to deal with a warranty or a representation, since the first must be literally true, while it will be sufficient if the latter is so substantially (*r*).

Alteration of premises increasing risk.—In every policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter the premises so as to increase the risk. If he converts a house of two stories into a house of three stories, the liability of the insurer is increased; the premium, if previously fair, has then become inadequate, and the underwriter is discharged (*s*). It has been held that, if it is stated or asserted in the description of the premises in the policy, "that no fire is kept on the premises, and no hazardous goods deposited thereon," this refers merely to the ordinary state and condition of the property; and if on some particular occasion, for some temporary purpose, fire is brought upon the premises, or hazardous goods are temporarily or casually placed thereon, and a loss by fire consequently occurs, the policy is not forfeited, and the underwriters are not discharged (*t*). When no express warranty is infringed, the Court will look to the substance of the contract, and uphold it when the description is substantially correct; and the rule has been thus expressed. "If the description of the property is substantially correct, and a more accurate description would not have varied the premium, the error is not material" (*u*).

Notice of alterations.—If by the terms of the policy the insured is to give notice of the erection or use of new stoves or furnaces, or of the making of any alterations increasing the risk, and pay an increased premium, this, it has been held, refers to some permanent alteration or user, and not to a mere temporary or casual matter (*x*). But the authority of these cases is somewhat doubtful; and it has been held that, where, by the terms of the policy, steam-engines, stoves, or any description of fire-heat other than common fire-places, are not to be used unless notice has been given and the use allowed, the policy will be avoided if a steam-engine, with furnace attached, is brought on the premises, and used only on one or two occasions for experimental purposes, and not in the business of

(*r*) Park. on Ins. 661—663.

(*s*) *Sillem* v. *Thornton*, 3 E. & B. 882; 23 L.J. Q.B. 368.

(*t*) *Dobson.* v. *Sotheby*, M. & M. 90; *Shaw* v. *Robberds*, 6 Ad. & E. 83; 6 L.J. K.B. 106; *Thompson* v. *Equity Fire Assur. Co.*, (1910) A.C. 592; 80 L.J. K.B. 13. See, however, *infra*, Notice of Alterations.

(*u*) Smith's Merc. Law, 10th ed. 505, cited from an earlier edition with approval by Malins, V.-C.: *The Universal Non-Tariff F.O., Forbes & Co.'s Claim, In re*, L.R. 19 Eq. 485; 44 L.J. Ch. 761; *Biggar* v. *Rock L. Assur. Co.*, (1902) 1 K.B. 516; 71 L.J. K.B. 79.

(*x*) *Tim* v. *Reid*, 6 Sc. N.R. 982; 12

the insured (*y*); but it must be proved that the risk of fire was increased by the thing done (*z*).

Misdescription of insured premises.—Where by the terms of a policy, the houses, buildings, or other places where insured goods were deposited, were to be accurately described, and a lodger who had only one room in a house effected an insurance upon goods therein, describing them as being in his "dwelling-house," it was held that the description was sufficiently accurate (*a*). A coffee-house keeper who does not furnish beds and lodgings for the night does not carry on the trade of an innkeeper within the meaning of a policy enumerating the trade of an innkeeper as doubly hazardous, and requiring an increased premium for the insurance of buildings where it is carried on (*b*). When mills are warranted to be worked by day only, and they are put in motion by means of shafts worked by steam power in an adjoining building, the warranty is not broken by the steam-engine and shafts being kept going all night to turn other mills, if it appears that the machinery of the insured mill was disconnected at night from the moveable shafts, and that the mill itself had ceased to work (*c*).

Fraudulent concealment of facts materially affecting risk.—If any extraordinary risk is known by the insured to exist at the time the policy is effected, and is not disclosed to the underwriter, this is a fraudulent concealment, which deprives the insured of all right of action upon the policy. Where a warehouse adjoining a boat-builder's shop took fire, and the fire was apparently extinguished, and the boat-builder sent immediate instructions for the insurance of his shop and premises, without communicating the fact of the neighbouring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the following morning, and extended to the boat-builder's shop and premises and consumed them, it was held that the concealment of the increased risk from the recent existence of the adjoining fire avoided the policy (*d*).

Risks covered by policy.—As the insurers in most cases take upon themselves only the risk of fire, they will not be responsible unless there has been actual ignition of the property insured. If it has been damaged merely from atmospheric con-

L.J. C.P. 299; *Barrett* v. *Jermy*, 3 Exch. 545; 18 L.J. Ex. 215.

(*y*) *Glen* v. *Lewis*, 8 Exch. 617; 22 L.J. Ex. 228.

(*z*) *Stokes* v. *Cox*, 1 H. & N. 533; 26 L.J. Ex. 113.

(*a*) *Friedlander* v. *London Assur. Co.*, 1 M. & Rob. 171.

(*b*) *Doe* v. *Laming*, 4 Campb. 73.

(*c*) *Whitehead* v. *Price*, 2 Cr. M. & R. 447; *Mayall* v. *Mitford*, 6 Ad. & E. 670.

(*d*) *Bufe* v. *Turner*, 6 Taunt. 338; *Uzielli* v. *The Commercial Union Ins. Co.*, 12 L.T. 399; *Wedderburn* v. *Bell*, 1 Campb. 1; *Seaton* v. *Heath*, (1899) 1 Q.B. 782; 68 L.J. Q.B. 782.

cussion caused by an explosion of gunpowder at a distance (*e*), or from the heat or smoke of ordinary flues and chimneys which have been overheated and mismanaged, and there has been no outbreak of fire, they will not be responsible upon the policy; but if a chimney should have caught fire, and the firemen in extinguishing it injured and displaced the slates upon the roof, or accidentally poured water in the room below, and so defaced the ceilings or walls, such damage would be a consequential loss which the insurers would have to make good (*f*). Where it was provided that the insurers should not be liable if the property should be burnt "by foreign enemies, or any military or usurped power," and it was set on fire by a mob excited by the high price of provisions, it was held that this was not a burning by an usurped power within the meaning of the proviso (*g*). But, if the insurers exempt themselves from liability for losses by fire "happening from civil commotion," they will not be responsible for damage resulting from the incendiarism of a rebellious mob, or from the insurrection of the people (*h*). The insurer who paid a loss of this kind could formerly sue the hundred upon the Riot Act in the name of the insured (*i*). A policy contained an exception of "loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas;" an explosive vapour escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire, besides doing damage by the explosion; it was held that the word "gas" meant ordinary coal gas, and did not include the explosive vapour, and that the exemption applied to the damage caused by the subsequent explosion and its consequences just as much as to a fire originated by explosion (*k*). Where a ship was insured for three months against fire, and was described as lying in the Victoria wet docks, with liberty to go into a dry dock for repairs, it was held that she was covered by the policy whilst passing along the Thames, on her way from the wet dock to the dry dock, but not whilst she was lying in the river for the purpose of re-fixing her paddle-wheels, or for purposes of repair (*l*). And where the risk was stated to be on four pumps "at and from Ardrossan to the steamer ashore at Drogheda, and while there engaged at the wreck and until

(*e*) *Everett* v. *Lond. Assur. Co.*, 19 C.B. N.S. 126; 34 L.J. C.P. 299.

(*f*) *Austin* v. *Drewe*, 6 Taunt. 436.

(*g*) *Drinkwater* v. *Lond. Assur. Co.*, 2 Wils. 363.

(*h*) *Langdale* v. *Mason*, 2 Park. Ins. 965.

(*i*) *Clark* v. *Hundred of Blything*, 2 B. & C. 254; *Yates* v. *Whyte*, 5 Sc. 640; 7 L.J. C.P. 116. As to the procedure now, see 49 & 50 Vict. c. 38, ss. 2 (2), 4, and sched. 1.

(*k*) *Stanley* v. *Western Ins. Co.*, L.R. 3 Ex. 71; 37 L.J. Ex. 73.

(*l*) *Pearson* v. *Commercial Un. Assur. Co.*, 1 App. Cas. 498; 45 L.J. Ex. 761; *ante*, p. 1178.

again returned to Ardrossan, &c.," it was held that this did not include the risk while the pumps were on board the wreck on a voyage to Belfast, a port of safety (*m*). Under the words "from the 14th of February until the 14th of August," the whole of the 14th of August was held to be included (*n*).

Fires caused by negligence—Extraordinary risks.—One of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence against the claim of the insured; and there is no distinction between the negligence of servants and agents and of the insured himself (*o*). But the underwriters do not take upon themselves extraordinary risks, unless those risks are expressly brought to their notice, and are accepted and insured against by them at the time the policy is effected.

Notice of loss—Partial losses.—By the terms of most contracts for insurance against fire, the insured is required to give, within a certain number of days, notice of the loss to the insurers, and to deliver full particulars of the damage sustained, and prove the amount of it; and the strict performance of these things in point of time, and the substantial performance of them in other respects, constitute a condition precedent to the right of the insured to be indemnified for his loss (*p*). By the term "full particulars" is meant the best particulars the insured can reasonably give (*q*). When a partial loss only has been sustained of the property insured, the insured is, of course, entitled only to be indemnified to the extent of such partial loss; to permit him to recover more, and put himself in a better situation than he was in before the loss occurred, would be totally opposed to the nature of a contract of insurance as a mere contract of indemnity. If a reasonable suspicion exists that buildings situate within the bills of mortality have been insured for more than their value and fired, but proof is wanting, the insurers may rebuild or repair at their own expense, and resist the claim of the insured for the money secured by the policy (*r*).

Forfeiture of policy—Non-payment of premium—Days of grace.—Where the insurance is for a year, and so on from year to year, or for a quarter of a year, and so on from quarter

(*m*) *Waugate* v. *Foster*, 3 Q.B.D. 582; 47 L.J. Q. B. 525.

(*n*) *Isaacs* v. *Royal Ins. Co.*, L.R. 5 Ex. 296; 39 L.J. Ex. 189.

(*o*) *Bush* v. *Roy. Ex. Assur. Co.*, 2 B. & Ald. 73.

(*p*) *Roper* v. *Lendon*, 28 L.J. Q.B. 260; 1 E. & E. 825; *Worsley* v. *Wood* 6 T.R. 710.

(*q*) *Mason* v. *Harvey*, 8 Exch. 819; 22 L.J. Ex. 336.

(*r*) *Vernon* v. *Smith*, 5 B. & Ald. 1; and see *post*, p. 1221.

to quarter, it is not kept alive after the expiration of the year or quarter by a mere proviso or condition giving a certain number of days of grace for the payment of the premium; but there should be an express stipulation that the insurance shall be continued and the property covered by the policy, until the expiration of the days of grace (*s*). Where a policy of insurance against loss by fire from year to year provided that the insured should, "as long as the managers agreed to accept the same, make all future payments annually at the office within fifteen days after the day limited by the policy, upon pain of forfeiture of the benefit thereof, and no insurance is to take place until the premium be actually paid," and a loss happened within fifteen days after the end of one year, but before the premium for the next was paid, it was held that the insurers were not liable, although the insured tendered the premium within the fifteen days, but after the loss; that the insurance was for a year, and not a year and fifteen days, and the policy at an end by non-payment at the very day; and that, the receipt of the premium being in the discretion of the insurers, they had clearly a right to refuse to continue the policy (*t*). Where there was a condition in a policy that the insured "should forfeit all benefit under his policy," if there was any false swearing in support of the claim he made, and the insured made an affidavit of damage to the amount of 1,081*l.*, and the claim was contested, and a jury gave a verdict for 500*l.* only, the Court granted a new trial (*u*).

Divers insurances on same property.—If the insured has effected two or more insurances upon the same property, he can, as we have before seen, recover no more than his actual loss; and, when he has obtained a full indemnity from the one he cannot resort to the other; but, as he is allowed to fix on which insurer he pleases, the law permits the one who has been compelled to make good the loss to resort to the others for contribution, and to recover from them a rateable proportion of the loss against which they have all insured (*x*). If the insurer pays the money, and subsequently the insured receives compensation from any other sources for his loss, the insurer is entitled to recover from the insured any sum in excess of the loss (*y*). A

(*s*) *Salvin* v. *James*, 6 East, 571.

(*t*) *Tarleton* v. *Staniforth*, 5 T.R. 700, 1 B. & P. 471; *Simpson* v. *Accid. Death Ins. Co.*, 2 C.B. N.S. 257; 26 L.J. C.P. 289; *Roberts* v. *Security Co.*, (1897) 1 Q.B. 111; 66 L.J. Q.B. 119.

(*u*) *Levy* v. *Baillie*, 7 Bing. 349; 9 L.J. (O.S.) C.P. 108.

(*x*) *Davis* v. *Gildart*, 2 Park. Ins. 601 (ed. 8); *Godin* v. *London Assur. Co.*, 1 W. Bl. 103. See also *Equitable Fire and Accident Office* v. *The Ching Wo Hong*, (1907) A.C. 96; 76 L.J. P.C. 31.

(*y*) *Darrell* v. *Tibbitts*, 5 Q.B.D. 560; 50 L.J. Q.B. 33. See also *Castellain* v. *Preston*, 11 Q.B.D. 380; 52 L.J. Q.B. 366.

policy of fire insurance being a contract of indemnity merely, the insurer on making good the loss insured against is entitled, even though payment be made with knowledge of a then subsisting contract relating to the subject-matter between the assured and third parties, to stand in the place of the assured, and to recover from him the full value of any rights or remedies which he had renounced, and to which, but for renunciation, the insurer would have a right to be subrogated (*z*). There is no reason why the principles in respect of contribution should not be the same in respect of fire policies as they are in respect of marine policies; and if the *same person in respect of the same right* insures in two offices, there is no reason why they should not contribute in equal proportion in respect of a fire policy as they would in respect of a marine policy (*a*). Several mortgages were given upon the same premises, and the mortgagees severally insured in different offices; the premises were partly destroyed by fire; the plaintiffs were the last mortgagees; the prior mortgagees were paid an amount sufficient to reinstate the premises, and to pay the rent during the period of reinstatement, but the premises were not reinstated; the value of the premises before the fire was sufficient to cover all the mortgages, but, after the fire, was not sufficient to pay the prior mortgagees the balance due to them; it was held that, notwithstanding the payments to the prior mortgagees, the plaintiffs were entitled to recover to the full extent of their loss by the fire, except the loss of rent (*b*).

Insurances by warehousemen and bailees of customers' goods.—A warehouseman, wharfinger, common carrier, or bailee of goods, may insure the goods which come to his hands from time to time, in the ordinary course of trade, and may keep up a floating policy for the protection of the goods of his customers (*c*). It is not necessary that the bailee should have had any previous authority from the owners to insure in order to give him an insurable interest (*d*), nor that he should have made any charge for insurance, nor that he should be in anywise liable to make good to his customers the loss that has been sustained in order to entitle him to recover the full amount of the insurance from the insurers (*e*); but he is not entitled,

(*z*) *West of England Fire Ins. Co.* v. *Isaacs*, (1897) 1 Q.B. 226; 66 L.J. Q.B. 6.

(*a*) *North British Ins. Co.* v. *London Ins. Co.*, 5 Ch.D. 569; 46 L.J. Ch. 537.

(*b*) *Westminster Fire Office* v. *Glasgow Provident Soc.*, 13 App. Cas. 699.

(*c*) *L. & N. W. Ry.* v. *Glyn*, 1 E. & E. 652; 28 L.J. Q.B. 188; *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L.J. K.B. 158.

(*d*) *Hagedorn* v. *Oliverson*, 2 M. & S. 485.

(*e*) *Waters* v. *Mon. Life Co.*, 5 E. & B. 880; 25 L.J. Q.B. 102; *L. & N. W. Ry.* v. *Glyn*, *supra*.

when he has received the money, to appropriate it to his own use. The money is the money of the owners of the goods, and may be recovered by them from the insured who has received it (*f*).

Inability of insured to sue when no damage sustained.—Policies against fire being contracts of indemnity, whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. If, therefore, the loss or damage insured against has been caused by the act or default of some wrongdoer, and the insured has brought an action and recovered full compensation from such wrongdoer, he has then no ground to sue for an indemnity upon the contract of insurance; but, if the compensation he receives falls short of the real injury, an action would be maintainable for so much as would suffice to constitute a complete indemnity.

Rights of insurer and insured as against wrongdoers causing the loss.—Every insurer has a right to be put in the place of the insured, and to use the name of the latter in order to recover compensation from a wrongdoer who has caused the loss (*g*). If, therefore, the insurer has paid the amount of a loss caused by the wrongful act of a third party, he has a right to sue the latter in the name of the insured to recover compensation for the injury; and, if the insured receives from the insurer the amount insured, or full indemnity for his loss, and, after that, brings an action against, and obtains compensation from, a wrongdoer, he is not entitled to double satisfaction, and cannot put the money into his own pocket, but is a trustee thereof for the benefit of the insurer, and is bound to hand it over to the latter.

Laying out insurance money in rebuilding.—By 14 Geo. 3, c. 78, s. 83, the governors and directors of insurance offices are authorised, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers, or other parties effecting the insurance, have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in rebuilding (*h*). Trade fixtures put up by a tenant, being removable by him, are not comprised in the

(*f*) *Randal* v. *Cockran*, 1 Ves. sen. 97; *Yates* v. *Whyte*, 5 Sc. 640; 7 L.J. C.P. 116; *Sidaways* v. *Todd*, 2 Stark. 400; *L. & N. W. Ry.* v. *Glyn*, *supra*.

(*g*) *Mason* v. *Sainsbury*, 3 Doug. 64; *Clark* v. *Hundred of Blything*, 2 B. & C. 254; see *Simpson* v. *Thomson*, 3 App. Cas. 279; *King* v. *Victoria Ins. Co.* (1896) A.C. 250; 65 L.J. P.C. 38.

(*h*) The operation of this section is not limited to the metropolis, but is of universal application: *Filliter* v. *Phippard*, 11 Q.B. 347; 17 L.J. Q.B. 89; *Gorely, Ex parte*, 34 L.J. Bank. 1.

expression "house or other buildings" in the statute. Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the Act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect (*i*). In order to entitle an owner to have the money laid out in rebuilding, he must make a distinct request to that effect to the insurance office before they have settled with the tenant insuring; and in no case is the owner entitled himself to rebuild and claim the policy money (*k*).

SECTION IV.

OF LIFE INSURANCE.

Contracts of life assurance (*l*).—"The contract commonly called life assurance is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable" (*m*). This species of insurance is not, strictly speaking, a contract of indemnity: but it has so many features in common with those contracts, that it is convenient to consider it along with them. The acceptance of a proposal for an insurance on the life of the proposer would appear not to be binding upon the insurers until the premium is paid; and therefore, where, after acceptance of such a proposal, but before tender of the premium, there was a material alteration in the health of the proposer, it was held that there was no contract binding the company to issue a policy (*n*). Where an accident happened, after a proposal had been accepted and a cover note issued but before delivery of the policy which contained a clause that "immediate notice of accident" was to

(*i*) *Gorley, Ex parte, supra.*

(*k*) *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L.J. Ch. 329.

(*l*) See 9 Edw. 7, c. 49. As to the insurance companies and the class of business to which that Act applies. As to insuring lives of children, see 59 & 60 Vict. 25, ss. 62—67, 84, and 59 & 60 Vict. c. 26, s. 13. As to avoidance of policies of life insurance of infants kept for reward, see 8 Edw. 7, c. 67, s. 7.

(*m*) Parke, B., *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 15 C.B. 387; 24 L.J. C. P. 6.

(*n*) *Canning* v. *Farquhar*, 16 Q.B.D. 727; 55 L.J. Q.B. 225.

be given, it was held that the immediate giving of notice was not a condition precedent to the right to recover in the absence of evidence that the assured knew or had an opportunity of knowing the conditions of the policy (*o*).

Contracts with de facto *directors.*—A person who effects a policy with a life insurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company; it is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the Acts of Parliament under which it is incorporated (*p*).

Interest of insured.—By 14 Geo. 3, c. 48, s. 1, no insurance shall be made on the life of any person wherein the person for whose use and benefit, or on whose account, the policy shall be made, shall have no interest, by way of gaming or wagering (*ante*, p. 1213); it shall not be lawful to make any policy on life or lives without inserting therein the name of the person interested therein, or for whose use and benefit, and on whose account, the policy was made (*q*); and (sect. 3) in all cases where the insured has an interest in such life or lives, no greater sum shall be recovered and received from the insurer than the amount or value of the interest of the insured in such life or lives; but nothing therein contained is (sect. 4) to extend to insurances on ships, goods, or merchandises. If an insurance company lends money at interest upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or wagering policy within the meaning of the statute (*r*). The interest in the insurer must be a pecuniary interest in the duration of the life insured (*s*); such as the interest which a creditor has in the life of his debtor (*t*), or a trustee in his trust moneys and revenues (*u*), or a wife in the life of her husband who is bound by law to support and maintain her (*x*), or the interest which a husband has in an annuity payable to his wife for life (*y*). A policy of insurance effected by a husband on the life of his wife may be enforced by him without giving affirma-

(*o*) *Coleman's Depositories, Ltd., In re*, (1907) 2 K.B. 798; 76 L.J. K.B. 865.

(*p*) *County Life Assur. Co., In re*, L.R. 5 Ch. 288; 39 L.J. Ch. 471.

(*q*) *Hodson* v. *Observ. Life Assur. Co.*, 8 E. & B. 40; 26 L.J. Q.B. 303; *Shilling* v. *Accid. Death Ins. Co.*, 2 H. & N. 42; 27 L.J. Ex. 16.

(*r*) *Downes* v. *Green*, 12 M. & W. 490; 13 L.J. Ex. 159.

(*s*) *Halford* v. *Kymer*, 10 B. & C. 724; 8 L.J. (O.S.) K.B. 311.

(*t*) *Anderson* v. *Edie*, 2 Park. Ins. 914.

(*u*) *Tidswell* v. *Ankerstein*, Peake, 151.

(*x*) *Reed* v. *R. Ex. Assur. Co.*, 2 Peake, 70.

(*y*) *Henson* v. *Blackwell*, 4 Hare, 434; 14 L.J. Ch. 329.

tive evidence of any insurable interest therein (*z*). By the Married Women's Property Act, 1882 (*a*), a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a policy effected by her on her own life for the benefit of her husband and children, or by the husband on his own life for the benefit of his wife or children (*b*), will create a trust for the benefit of the objects named, and does not form part of the estate of the insured (*c*), unless the policy has been effected with intent to defraud creditors. A creditor has an insurable interest in the life of his debtor (*d*); and the circumstance that the creditor has other security does not vary the rule. But a debtor does not possess any insurable interest in the life of his creditor, where the latter has without consideration, or other circumstances to make the promise binding, promised not to enforce the debt in his own lifetime(*e*). But a contract for employment at a fixed salary for a certain term gives the employed an insurable interest in the life of the employer (*f*). A surety has an insurable interest in the life of his principal (*g*). The insurable interest is not, however, always rigidly limited to the amount actually due(*h*). A trustee has an insurable interest in respect of the legal right or interest vested in him (*i*), in like manner as the *cestui que trust* has in respect of the equitable interest (*k*).

In an action to recover the amount of a policy of insurance upon the life of a child, the plaintiff's step-sister, evidence was given of a promise made by the plaintiff to the mother of the child to take care of the child and help to maintain it; no objection was taken on behalf of the defendants that the plaintiff had not in fact incurred any expenditure in respect of the child: it was held that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the

(*z*) *Griffiths* v. *Fleming*, (1909) 1 K.B. 805; 78 L.J. K.B. 567.

(*a*) 45 & 46 Vict. c. 75, s. 11.

(*b*) See as to policies for the benefit of widow and children in the case of a second marriage, *Griffiths' Policy, In re*, (1903) 1 Ch. 739; 72 L.J. Ch. 330; *Browne's Policy, In re*, (1903) 1 Ch. 388; 72 L.J. Ch. 85.

(*c*) *Mellor's Policy Trusts, In re*, 7 Ch. D. 200; 47 L.J. Ch. 246; *Seyton, In re*, 34 Ch. D. 511; 56 L.J. Ch. 775; *Davies' Policy Trusts, In re*, (1892) 1 Ch. 90; 61 L.J. Ch. 650; *Parker's Policies, In re*; *Parker* v. *Parker*, (1906) 1 Ch. 526; 75 L.J. Ch. 297. But see *Cleaver* v. *Mutual Reserve Fund*, 61 L.J. Q.B. 128; (1892), 1 Q.B. 147, where the legal representatives were held entitled to recover the insurance money as part of the deceased's estate, where the deceased was murdered by his wife.

(*d*) *Anderson* v. *Edie*, 2 Park. on Ins. 914.

(*e*) *Hebden* v. *West*, 3 B. & S. 579; 32 L.J. Q.B. 85.

(*f*) *Hebden* v. *West*, *supra*.

(*g*) *Lea* v. *Hinton*, 5 De G. M. & G. 823; *Branford* v. *Saunders*, 25 W.R. 650.

(*h*) *Downes* v. *Green*, 12 M. & W. 481; 13 L.J. Ex. 159.

(*i*) *Tidswell* v. *Ankerstein*, Peake, 151.

(*k*) *Yollop, Ex parte*, 15 Ves. 60.

amount of the policy (*l*). A parent cannot make a valid insurance on the life of his child, unless he has a pecuniary interest in it (*m*). The expense of education does not of itself confer such an interest (*n*). The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be a valid insurance, and the plaintiff relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums, it was held by the Court of Appeal, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were in *pari delicto*, and the premiums could not be recovered back (*o*). If one person has a present interest in the policy, though, after that present purpose is satisfied, another person may be the party interested, the name of both persons must be inserted in the policy (*p*). If the insured has an insurable interest in the duration of the life at the time he effects the policy, and his interest afterwards ceases, he is not thereby prevented from suing upon the policy to recover so much of the sum insured as his interest in the life extended to at the time of the making of the policy. If, therefore, a creditor insures the life of his debtor for a certain sum, and the debt is paid, the creditor is not thereby deprived of his right of action upon the policy (*q*). But, though upon a life policy the insurable interest at the time of the making of the policy, and not the interest at the time of the death, is to be considered, the insured cannot recover from the insurers, whether upon one policy or many, more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons, and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so; but he can only recover or receive upon the whole the amount of his insurable interest; and if, therefore, he has received the whole amount from one insurer, he is precluded from recovering any more from the others (*r*). If the underwriter becomes bankrupt before the death has taken place and

(*l*) *Barnes* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 1 Q.B. 864.

(*m*) *Halford* v. *Kymer*, 10 B. & C. 724; 8 L.J. (O.S.) K.B. 311.

(*n*) *Worthington* v. *Curtis*, 1 Ch. D. 419; 45 L.J. Ch. 259.

(*o*) *Harse* v. *Pearl Assur. Co.*, (1904) 1 K.B. 558; 73 L.J. K.B. 373.

(*p*) *Evans* v. *Bignold*, L.R. 4 Q.B. 622; 38 L.J. Q.B. 293.

(*q*) *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 24 L.J. C.P. 3; 15 C.B. 365; *Law* v. *Lond. Indisp. Policy Co.*, 24 L.J. Ch. 196; 1 Kay & J. 223.

(*r*) *Hebden* v. *West*, *ante*, p. 1224.

the amount insured has become payable, the interest of the insured in the policy may be valued and proved under the bankruptcy against such bankrupt underwriter (*s*).

Warranties—Conditions.—A statement respecting the life insured does not amount to a warranty unless it is made the basis of the contract, and was intended by the parties to have that effect (*t*); but policies are generally granted subject to the condition that, if any untrue statement is contained in any of the documents addressed to the insurers in relation to the life insured, the policy shall be void (*u*). By untrue statement is sometimes meant a statement that is wilfully and designedly untrue (*x*). In other cases the policy will be void if the statement is unintentionally untrue (*y*), and is material (*z*). When there is a warranty that the person whose life is to be insured is in good health, it means that he is in a reasonably good state of health, not that he is perfectly free from illness. If there is a warranty that the party is "free from any disorder tending to shorten life," it does not mean that he has no disease at all; and it is not to be concluded that a disorder with which a person is afflicted at the time the insurance is effected is a disorder tending to shorten life, merely because he afterwards dies of it (*a*). A warranty that the party whose life is insured "has not been afflicted with, nor is subject to, vertigo, fits, &c.," does not mean that the party has never had a fit in his life, but that he is not at the time the insurance is made a person habitually or constitutionally afflicted with fits (*b*). If the insured, or his broker, or the agent effecting the policy, merely says that he believes, but will not warrant, the life to be a good one, the underwriter will be liable, unless he can show that the party so stating his belief knew that the life was not good (*c*). Unless it is so specifically stated, a condition that, in cases of fatal accident, notice must be given to the insurers within seven days, is not a condition precedent to recovery upon the policy (*d*).

Fraudulent misrepresentation and fraudulent concealment of circumstances material to be known to the underwriter naturally

(*s*) *Cox* v. *Liotard*, 1 Doug. 166, n.

(*t*) *Wheelton* v. *Hardisty*, 8 E. & B. 232; 26 L.J. Q.B. 265; 27 *ib.* 241.

(*u*) *Cazenove* v. *Brit. Eq. Assur. Co.*, 28 L.J. C.P. 259; 6 C.B. N.S. 437; aff. 29 L.J. C.P. 160.

(*x*) *Fowkes* v. *Manch. &c. Ins. A.*, 3 B. & S. 917; 32 L.J. Q.B. 153; *Perrins* v. *Marine & Gen. Ins. Co.*, 2 E. & E. 317; 27 L.J. Q. B. 242; *Sweeney* v. *Promoter Life Assur. Co.*, 14 Ir. C.L.R. 487.

(*y*) *Macdonald* v. *Law Union Ins. Co.*, L.R. 9 Q.B. 328; 43 L.J. Q.B. 131.

(*z*) *London Assur. Co.* v. *Mansel*, 11 Ch.D. 363; 48 L.J. Ch. 331.

(*a*) *Willis* v. *Poole*, 2 Park. Ins. 935; *Watson* v. *Mainwaring*, 4 Taunt. 763; *Areson* v. *Kinnaird* (*Lord*), 6 East. 188.

(*b*) *Chattock* v. *Shawe*, 1 Mood. & Rob. 498.

(*c*) *Stackpole* v. *Simon*, 2 Park, Ins. 932.

(*d*) *Stoneham* v. *Ocean Ins. Co.*, 19 Q.B.D. 237.

avoid life policies in common with all other contracts, the materiality of the misstatement or concealment being a question for the jury (*e*). Some policies, however, make the insurance company itself sole judge of the materiality of the falsehood, and adopt the most stringent provisions against misstatement, whether material or immaterial, known or not known to be untrue by the party making them, so that, observed Lord St. Leonards, "I am bound to say, unless they are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families by an insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written" (*f*). False answers given to verbal inquiries as to whether the life sought to be insured had been previously insured at other offices have been held to be fraudulent misrepresentations avoiding the policy (*g*); and so have false answers respecting spitting of blood, consumptive symptoms, &c., or concerning the general health and state and condition of the life insured (*h*). If the insurer is referred for information to a former medical attendant of the life insured, and not to the immediate and usual medical attendant, such an omission to refer to the proper person will vacate the policy.

Principal and agent.—If an untrue statement, or a concealment of a fact, or non-communication of a material circumstance, takes place through the instrumentality of an agent, the insured, who is to benefit by the policy, is bound by it, though he himself is not privy to the falsehood of the representation, or the non-communication of the material fact. But the knowledge of a person who is an agent only for the purpose of obtaining proposals has been held, under certain circumstances, to be the knowledge of his principal (*i*). Where the agent of an insurance company induced the plaintiff to continue paying the premiums on a policy already effected by an untrue statement that after a certain date she would get a free policy which would give her all that she put in, it was held that she was entitled to repayment of all the premiums paid since the misrepresentations were made upon the grounds that those mis-

(*e*) *Lindenau* v. *Desborough*, 8 B. & C. 586; *Jones* v. *Provinc. Ins. Co.*, 3 C.B. N.S. 65; 26 L.J. C.P. 272; *Mutual Reserve L. Ins. Co.* v. *Foster*, 20 T.L.R. 715; *Joel* v. *Law Union and Crown Ins. Co.*, (1908), 2 K.B. 863; 77 L.J. K.B. 1108.

(*f*) *Anderson* v. *Fitzgerald*, 4 H.L.C. 507; *Towle* v. *National Guardian Assur. Soc.*, 2 Giff. 42; 30 L.J. Ch. 900.

(*g*) *Wainwright* v. *Bland*, 1 M. & W. 32; 5 L.J. Ex. 147.

(*h*) *Geach* v. *Ingall*, 14 M. & W. 95; 15 L.J. Ex. 37; *Thomson* v. *Weems*, 9 App. Cas. 671. With respect to misstatement of age and receipt of premium after knowledge of, see *Hemmings* v. *Sceptre Life Assoc.*, (1905) 1 Ch. 365; 74 L.J. Ch. 231.

(*i*) *Bawden* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 2 Q.B. 534; 61 L.J. Q.B. 792. See also *Fitzherbert* v. *Mather*, 1 T.R. 12; *Gladstone* v. *King*, 1 M. & S. 35.

representations made the contract of insurance void and that the company could not retain the benefit of a contract entered into by the plaintiff by a misrepresentation, even though the agent had no authority to make it (*k*). Where a party effects a policy on the life of another, the person whose life is insured is not the general agent of the person procuring the insurance, so as to make his false representations those of the party procuring the insurance; and the same may be said of false representations of medical attendants and referees, unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements of the "life," or of the referees in the negotiation of a life insurance, and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy (*l*). But policies may be framed making the insured responsible for any material misrepresentation or concealment by the "life" or by the referees. Where the canvasser filled up the answers to the questions which formed the basis of the policy without any authority from the proposed insurer, who was ignorant that the canvasser had answered the questions falsely, it was held that the insurance company was not liable on the policy, since the canvasser must be regarded, in the circumstances, as having been the agent of the proposer and not of the company (*m*).

Indisputable policies.—Many insurance companies issue prospectuses and transact their business on the terms that all policies effected by them shall be unquestionable or indisputable, unless obtained by fraud (*n*).

Risks covered by life policies.—"When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risks, unless there was some fraud in the person insuring, either by his suppressing circumstances which he knew, or alleging what was false" (*o*). Where, therefore, there is no express provision in the policy that in the event of the insured dying by

(*k*) *Refuge Assur. Co.* v. *Kettlewell*, (1909) A.C. 243; 78 L.J. K.B. 519; *Levy* v. *Scottish Employers' Ins. Co.*, 17 T.L.R. 229; *Life & Health Assur. Assoc.* v. *Yule*, (1904) 6 F. 437.

(*l*) *Wheelton* v. *Hardisty*, 8 E. & B. 232, 285; 27 L.J. Q.B. 241.

(*m*) *Biggar* v. *Rock Life Assur. Co.*, (1902) 1 K.B. 516; 71 L.J. K.B. 79. As to the knowledge of insurer's agent being the knowledge of insurer, see *Bawden* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 2 Q.B. 534; 61 L.J. Q.B. 792; *Holdsworth* v. *Lancs. & Yorks. Ry.*, 23 T.L.R. 521; *Pearl Life Assur. Co.* v. *Johnson*; *Same* v. *Greenhalgh*, (1909) 2 K.B. 288; 78 L.J. K.B. 777.

(*n*) *Wood* v. *Dwarris*, 11 Exch. 493; 25 L.J. Ex. 129; *Wheelton* v. *Hardisty*, *supra*; *Anctil* v. *Manufacturers' L. Ins. Co.*, (1899) A.C. 604; 68 L.J. P.C. 123.

(*o*) *Ross* v. *Bradshaw*, 2 Park, Ins. 649 (ed. 7); 1 W. Bl. 312.

his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity (*p*). But, if a man insures his own life for a certain sum to be paid to his executors after his decease, in consideration of annual premiums to be paid by him to an insurance company, the policy will be void, and the amount irrevocable, if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the common hangman or public executioner (*q*). In some policies, where parties insure their own lives, a condition is inserted making void the policy in case the party shall die by his own hands, or by the hands of justice, or in consequence of a duel; and it has been held that such a condition is not limited to felonious self-destruction, but extends to all cases of voluntary self-destruction, so that, if a man destroys himself in a fit of phrenzy or delirium, the insurers will be discharged from liability (*r*). Such policies sometimes contain an exception to the effect that the policy in such a case shall not be void to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person for a sufficient pecuniary or other consideration; and, where the insurance company with whom the policy was effected had advanced money to the insured upon mortgage and upon the deposit of the policy as a collateral security, it was held that they had such a *bonâ fide* interest, and that the policy was not void upon the suicide of the insured (*s*).

If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable; for "from the day of the date excludes the day" (*t*). But the word "from" may mean either inclusive or exclusive, according to the apparent intention of the parties, to be gathered from the general context of the written instrument (*u*). An insurance to cover death "within the United Kingdom" is satisfied by a death in Jersey (*x*).

Forfeiture of policies—Non-payment of premium—Days of grace.—To keep the policy in force the renewal premium

(*p*) *Horn* v. *Anglo-Austral. Assur. Co.*, 30 L.J. Ch. 511. But see *Ellinger & Co.* v. *Mutual L. Ins. Co. of New York*, (1905) 1 K.B. 31; 74 L.J. K.B. 39.

(*q*) *Amicable Society* v. *Bolland*, 4 Bligh, N.S. 194.

(*r*) *Clift* v. *Schwabe*, 17 L.J. C.P. 2; 3 C.B. 437; *Dormay* v. *Borradaile*, 16 L.J. C.P. 337; 5 C.B. 380; *Moore* v. *Woolsey*, 24 L.J. Q.B. 40; 4 E. & B. 243; *Dufaur* v. *Profess. Life Assur. Co.*, 27 L.J. Ch. 817; 25 Beav. 599.

(*s*) *White* v. *British Empire Mutual Life Assur. Co.*, L.R. 7 Eq. 394; 38 L.J. Ch. 53; *Wigan* v. *English & Scottish Law Life Assur. Assoc.*, (1909) 1 Ch. 201; 78 L.J. Ch. 120.

(*t*) *Howard's case*, 2 Salk. 625.

(*u*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714.

(*x*) *Stoneham* v. *Ocean Ins. Co.*, 19 Q.B.D. 237.

must be actually paid: it is not sufficient that there was no intention to discontinue the policy, and that the office is not damnified by the delay (*y*). A policy of life insurance contained a condition that the assured had the option of paying the premium half-yearly or quarterly instead of annually. The dates on which such half-yearly or quarterly payments would fall due were named in the policy, and the assured had thirty days of grace from each such date within which he might make the half-yearly or quarterly payments. The premium was in fact, paid quarterly. The assured died within the thirty days of grace, which occurred after the falling due of the payment for the last quarter of the year. This payment had not been then made. Afterwards within the days of grace, the assignee of the policy paid the amount due, the death of the assured being not known either to the assignee or to the company. It was held by the Court of Appeal that the assignee was entitled to recover upon the policy the amount for which the assured's life was insured (*z*). "Payment of a premium at any time within the stipulated days of grace is equivalent to payment on the day when the premium became due" (*a*). Many policies, however, expressly provide that in case any person on whose life any insurance shall have been effected shall happen to die after the premium has become due, but before payment, the insurance shall nevertheless be valid, provided the premium is paid within the days of grace (*b*). A policy upon the life of W. lapsed by reason of a premium being unpaid for thirty days. The premium was subsequently sent to the company, who returned a receipt therefor. W. knew that there was some printing on the back of such receipt, but did not trouble to read it; it, in fact, stated that the policy had lapsed, and that the present payment was only accepted on the condition that the assured had been in good health for twelve months. It was held that the company could rely upon the condition; and that, as W. was admittedly in bad health at the time, the policy was of no effect (*c*). A claim under a winding-up in respect of

(*y*) *Acey* v. *Fernie*, 7 M. & W. 151; 10 L.J. Ex. 9; *London & Lanc. Life Assur. Co.* v. *Fleming*, (1897) A.C. 499; 66 L.J. P.C. 116. If an agent without authority gives credit for the premiums, that is no receipt by the company so as to prevent the policy lapsing: *Busteed* v. *West of England Co.*, L.R. 5 Ir. Ch. 553.

(*z*) *Stuart* v. *Freeman*, (1903) 1 K.B. 47; 72 L.J. K.B. 1; distinguishing *Pritchard* v. *Merchant, &c., Life Assur. Soc.*, 27 L.J. C.P. 169; 3 C.B. N.S. 622. But see *Simpson* v. *Accid. Death Ins. Co.*, 2 C.B. N.S. 295; 26 L.J. C.P. 289; *Want* v. *Blunt*, 12 East, 183; *Tarleton* v. *Staniforth*, 5 T.R. 695.

(*a*) Per Mathews, L.J., in *Stuart* v. *Freeman*, *supra*.

(*b*) *Prince of Wales Life Assur. Co.* v. *Harding*, 27 L.J Q.B. 301; E. B. & E. 183.

(*c*) *Handler* v. *Mutual Reserve Fund Assoc.*, 90 L.T. 192.

a policy of life insurance is not affected by non payment of the premium where the days of grace have not expired until after the commencement of the winding-up (*d*).

Non-inception of risk—Return of premium.—When the policy is rendered null and void by reason of a misstatement made by the insured by mistake, and without fraud, and the risk has never attached, the premium is, in the case of marine insurance (see *ante*, p. 1159), recoverable; but if the policy is avoided by reason of the fraud or deceit of the insured or his agent, the premiums cannot then be recovered back (*e*). The policies of most insurance companies now provide, not only that the contract shall be void if there is any false statement or misrepresentation on the part of the insured of any material circumstance, but that all the premiums that may have been paid upon the policy shall be forfeited to the insurer, so that the policy may be avoided, and the premiums forfeited, by an innocent and unintentional misstatement (*f*). But Lord St. Leonards drew a distinction between that portion of the proviso which is framed as a protection to the insurer by making his liability for the payment of the amount insured dependent upon a true and accurate statement of every material circumstance, and the penal part of the proviso working a forfeiture of the premiums, and intimated that such a construction should be adopted as will afford a fair security to the insurer from misrepresentation and misstatement, on the one hand, and a just protection to the insured against the forfeiture, on the other, where there has been no wilful misstatement, or misconduct, on his part (*g*). When the policy has been void *ab initio*, or in any case "where a premium has been paid but the risk has not been run, whether this has been owing to the fault, pleasure or will of the assured, or to any other cause, the premium shall be returned by the insurers"; but if the risk has once commenced, there shall be no apportionment or return of the premium afterwards (*h*).

Waiver of forfeiture.—If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers or their agent continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to

(*d*) *Albert Assur. Co., In re, Cook's Policy*, L.R. 9 Eq. 703; 39 L.J. Ch. 257.

(*e*) *Duffell* v. *Wilson*, 1 Campb. 401.

(*f*) *Duckett* v. *Williams*, 2 Cr. & M. 348; 3 L.J. Ex. 141.

(*g*) *Anderson* v. *Fitzgerald*, 4 H.L.C. 484; *Jones* v. *Provinc. Ins. Co.*, 3 C.B. N.S. 65; 26 L.J. C.P. 272; *Cazenove* v. *Brit. Eq. Assur. Co.*, 29 L.J. C.P. 160.

(*h*) *Tyrie* v. *Fletcher*, Cowp. 666; *Stevenson* v. *Snow*, 3 Burr. 1237; *Anderson* v. *Thornton*, 8 Ex. 425; *Fowler* v. *The Scottish Equitable*, 28 L.J. Ch. 225; *Foster* v. *Mutual Reserve Fund*, 20 T.L.R. 715.

have waived the forfeiture, and will not afterwards be permitted to avoid the policy (*i*).

Assignment.—By the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), any person or corporation becoming entitled, by assignment (*k*), or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and give an effectual discharge for the moneys thereby assured, may sue at law in the name of such person or corporation to recover such moneys. By sect. 3, no assignment is to confer on the assignee any right to sue, until a written notice of the date and purport of the assignment has been given to the assurance company at their principal place of business, which is to be specified in the policy (sect. 4); and the date on which the notice is received is to regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which the notice is received is to be as valid as if the Act had not been passed. By sect. 5, the assignment may be made either by indorsement on the policy or by a separate instrument in the form given in the Act. By sect. 6, every assurance company to whom notice of assignment shall have been given are, at the request in writing of the person giving the notice, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and such acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company, will be conclusive evidence as against the company of their having duly received the notice to which the acknowledgment relates. By sect. 7, the expression "policy of life assurance" or "policy" is to mean an instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" is to mean and include every corporation, association, society, or company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object. By sect. 8, the

(*i*) *Wing* v. *Harvey*, 23 L.J. Ch. 511; 5 De G. M. & G. 265; *Armstrong* v. *Turquand*, 9 Ir. Com. Law R. 32.

(*k*) See now, as to assignment of a *chose in action*, Jud. Act, 1873, s. 25 (6), *ante*, p. 222. Policies effected under the Friendly Societies Act, 1875, and, *semble*, under the Friendly Societies Act, 1896, are assignable in the ordinary way as well as by nomination under the Acts. *Griffin, In re*, (1902) 1 Ch. 135; 71 L.J. Ch. 112.

Act is not to apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, in pursuance of the provisions of 16 & 17 Vict. c. 45, or 27 & 28 Vict. c. 43 (*l*), or to any engagement for payment on death by any friendly society (*m*).

Notice of the assignment should be given to the insurance company, for the purpose of securing a right to sue in the name of the assignee (*n*). An assignment of a life policy to secure a debt, with proviso for redemption, is an assignment by way of mortgage (*o*), and must be duly stamped before payment out of the money assured (*p*).

Where a policy is to be void in case of suicide, unless it has been legally assigned, any circumstances constituting a valid, equitable assignment of the policy will satisfy the proviso (*q*); but an assignment by operation of law, such as an assignment by force of the Bankruptcy Acts, is not within the proviso, and will not keep the policy on foot for the benefit of creditors (*r*).

A contract for the sale of a life policy will be set aside by the Court where it was entered into on the basis of a common belief by the vendor and purchaser that the assured was alive, though he was in fact dead. Such a contract may be rescinded even after it has been completed by assignment of the policy to the purchasers (*s*).

Right of party interested in policy to recover insurance money.—The liability upon a life policy is not affected by the question whether the party claiming the benefit of the policy has, or has not, been damnified by the happening of the contingency upon which the money becomes payable. Thus, if a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the latter may nevertheless recover upon the policy the amount insured by him upon the life of such debtor (*t*). Amongst the purposes for which collecting societies and industrial assurance companies (*u*) may issue policies of

(*l*) These two statutes are partially repealed by 45 & 46 Vict. c. 51.

(*m*) See 59 & 60 Vict. c. 25.

(*n*) *Ante*, p. 226; *Williams* v. *Thorp*, 2 Sim. 257; *Colvill, Ex parte*, 1 Mont. 110; 9 L.J. (O.S.) Ch. 55; *Tennyson, Ex parte*, 1 Mont. & Bl. 67; *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; 31 L.J. Ch. 633; *Webb, In re*, 36 L.J. Ch. 341.

(*o*) *Caldwell* v. *Dawson*, 5 Exch. 1; 14 Jur. 316; decided on sched. Pt. I. of 55 Geo. 3, c. 184, repealed by 33 & 34 Vict. c. 99, but re-enacted 54 & 55 Vict. c. 39, s. 86.

(*p*) 54 & 55 Vict. c. 39, s. 118.

(*q*) *Jones* v. *Consol. Ins. Co.*, 28 L.J. Ch. 66; 26 Beav. 256; *White* v. *British Assur. Co.*, L.R. 7 Eq. 394; 38 L.J. Ch. 53; *ante*, p. 1229.

(*r*) *Jackson* v. *Forster*, 1 E. & E. 463; 29 L.J. Q.B. 8; *Moore* v. *Woolsey*, 4 E. & B. 243; 24 L.J. Q.B. 40.

(*s*) *Scott* v. *Coulson*, (1903) 2 Ch. 249; 72 L.J. Ch. 600.

(*t*) *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 15 C.B. 390; 24 L.J. C.P. 8; *Law* v. *Lond. Indisp. Assur. Co.*, 24 L.J. Ch. 196; 1 Kay & J. 223; *ante*, p. 1225.

(*u*) As to these societies and companies see 59 & 60 Vict. c. 25, and 59 & 60 Vict. c. 26.

assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister (*x*); and no policy effected before the passing of the Assurance Companies Act, 1909, with a collecting society or industrial assurance company is to be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a *bonâ fide* expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses, and any such policy is to enure for the benefit of the person for whose benefit it was effected or his assigns (*y*).

Industrial assurance companies—Disputes.—By sect. 1 (b) of the Collecting Societies and Industrial Assurance Companies Act, 1896 (*z*), that Act applies to industrial assurance companies granting policies of life assurance for a less sum than 20*l.*, and receiving premiums by means of collectors at a greater distance than ten miles from the registered offices or principal place of business of the company at less periodical intervals than two months. By sect. 7 disputes between an industrial insurance company and a member or person insured or a person claiming through him may be settled by the County Court or by a Court of Summary Jurisdiction. It was held that the jurisdiction of a County Court or a Court of Summary Jurisdiction was limited to disputes arising with regard to policies originally granted for a less sum than 20*l.* (*a*).

Separation of funds of assurance company.—By sect. 3, subsect. 1 of the Assurance Companies Act, 1909 (*b*): "In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance

(*x*) 9 Edw. 7, c. 49, s. 36 (1).

(*y*) *Ib.*, s. 36 (2).

(*z*) 59 & 60 Vict. c. 26, s. 1 (b).

(*a*) *Cowling* v. *Topping*, (1906) 1 K.B. 466; 75 L.J. K.B. 176. *Quære* whether an industrial assurance company issuing policies for 20*l.* and upwards, as well as policies for sums less than 20*l.* comes in the provisions of sect. 7, so as to give any jurisdiction over disputes to a county court or court of summary jurisdiction. *Ib.*

(*b*) 9 Edw. 7, c. 49, s. 3. As to the application of the Act to fire insurance companies, see sect. 31; to accident insurance companies, see sect. 32; to employers liability insurance companies, see sect. 33; and to bond investment companies, see sect. 34 of the same Act.

business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund." And by sub-sect. 2: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable." And by sect. 30 it is provided in the case of life assurance companies that: "(e) Nothing in this Act providing that the life assurance fund shall not be liable for any contracts for which it would not have been liable had the business of the company been only that of life assurance shall affect the liability of that fund, in the case of a company established before the ninth day of August eighteen hundred and seventy, for contracts entered into by the company before that date; (f) In the case of a company carrying on life assurance business and established before the ninth day of August eighteen hundred and seventy, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears, such of the provisions of this Act as require the separation of funds, and exempt the life assurance fund from liability for contracts to which it would not have been liable had the business of the company been only that of life assurance, shall not apply" (*c*).

Winding-up of insurance companies.—By sect. 15 of the Assurance Companies Act, 1909 (*d*), "the court may order the winding-up of an assurance company, in accordance with the Companies (Consolidation) Act, 1908 (*e*), and the provisions of that Act shall apply accordingly, subject, however, to the following modification:—The company may be ordered to be wound up on the petition of ten or more policy holders owning

(*c*) 9 Edw. 7, c. 49, s. 30.
(*d*) 9 Edw. 7, c. 49, s. 15.
(*e*) 8 Edw. 7, c. 69.

policies of an aggregate value of not less than ten thousand pounds: Provided that such a petition shall not be presented except by leave of the Court, and leave shall not be granted until a *primâ facie* case has been established to the satisfaction of the Court and until security for costs for such amount as the Court may think reasonable has been given" (*f*); and by sect. 18, "the court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the court thinks just, in place of making a winding-up order" (*g*).

Under the articles of association of an insurance company it was held that the policy-holders, who participated in the profits to some degree, were members, and liable to be put on the list of contributories upon the winding-up of the company (*h*), but that they were not to be called on to contribute until the shareholders were exhausted (*i*). The Court has jurisdiction to wind up an unregistered mutual insurance society; but it seems that the holders of policies in such a society are not liable to contribute to the payment of debts, and the funds of the society are distributable among them in proportion to their claims (*k*).

Insurance against injury by accident.—Insurances against accidents are in principle strictly life insurances, with a condition that the claim shall only arise in the event of death or injury occurring in a particular way (*kk*). They are subject to the provisions of the Gambling Act, in like manner as other life insurances (*l*). Where an insurance company granted policies of insurance against loss of life and personal injuries arising from "accidents at sea," it was held that death by sunstroke was not an "accident" within the meaning of the policy, and that death engendered by exposure to heat, cold, damp, and atmospheric influences, could not properly be said to be accidental (*m*); but death by drowning is a case of death by

(*f*) And see 9 Edw. 7, c. 49, s. 16, as to the winding-up of subsidiary companies: *British Widow's Assur. Co., In re*, (1905) 2 Ch. 40; 74 L.J. Ch. 525; *Nelson & Co., In re*, (1905) 1 Ch, 551; 74 L.J. Ch. 290. The mode of valuing the policies in the case of a winding-up is provided for by sect. 17 and scheds. 6 and 7 of the same Act. See *Popular Life Assur. Co., In re*, (1909) 1 Ch. 80; 78 L.J. Ch. 37.

(*g*) See *Gt. Britain Assur. Soc., In re*, 20 Ch. D. 351; 51 L.J. Ch. 506.

(*h*) *Winstone's case*, 12 Ch.D. 239; 48 L.J. Ch. 607; but not a policy holder who has assigned his policy: *Brown's case*, 18 Ch.D. 639; 50 L.J. Ch. 714. As to the liability of the assignee, see *Sanders' case*, 20 Ch.D. 403; 51 L.J. Ch. 579.

(*i*) *Albion Life Assur. Soc., In re*, 16 Ch.D. 83.

(*k*) *Great Britain Assur. Soc., In re*, 16 Ch.D. 246; 51 L.J. Ch. 7, 506.

(*kk*) As to claim under a coupon policy, see *General Accident, &c. Corp.* v. *Robertson*, (1909) A.C. 404; 79 L.J. P.C. 1.

(*l*) *Hodson* v. *The Observer Life Assur. Soc.*, 8 E. & B. 40; 26 L.J. Q.B. 303.

(*m*) *Sinclair* v. *Maritime Passengers Assur. Co.*, 30 L.J. Q.B. 77; 3 E. & E. 478; *Scarr* v. *General Accident Assur. Corp.*, (1905) 1 K.B. 387; 74 L.J. K.B. 237

"accident" within the meaning of such a policy (*n*). Cockburn, C.J., said:—"It is difficult to define the term accident, as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident and injury or death from natural causes. . . . At the same time, we think we may safely assume that, in the term accident, as so used, some violence, casualty or *vis major* is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus, disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate or atmospheric influences, cannot, we think, properly be said to be accidental, unless at all events the exposure is itself brought about by circumstances which may give it the character of an accident" (*o*). Where a person, insured against death from the effects of injury caused by accident, fell and dislocated his shoulder, and died shortly afterwards from pneumonia, caused by cold but accelerated by the accident, it was held that the death was caused by accident within the terms of the policy (*p*). A shock to the nerves from fright has been held to be an accident (*q*). Where a policy for insuring the payment of money in case the insured should be injured by accidental violence, and die from the direct effect of such accidental injury, expressly excepts death or disability from any disease or cause arising within the system of the insured before, or at the time of, or following such accidental injury, death from disease within the system, which disease has been caused by accidental violence, is not within the exception (*r*). In consequence of the above case, the clause contained in the policies of the company was varied, and the policy does not now insure against "death from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." Where erysipelas supervened upon, and in consequence of, an accidental cut, and the assured died of the erysipelas seven days after the accident, it was held that the insurers were protected by the

(*n*) *Trew* v. *Rail. Pass. Assur. Co.*, 6 H. & N. 839; 30 L.J. Ex. 317; *Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42; 50 L.J. Q.B. 232; *Lawrence* v. *Accident Ins. Co.*, 7 Q.B.D. 216; 50 L.J. Q.B. 522.

(*o*) *Sinclair* v. *Maritime Pass. Ins. Co.*, 3 E. & B. 478; 30 L.J. Q.B. 77.

(*p*) *Isitt* v. *Rail. Pass. Assur. Co.*, 22 Q.B.D. 504; 58 L.J. Q.B. 191; but see *Scarr* v. *Gen. Acc. Assur. Corp.*, (1905) 1 K.B. 387; 74 L.J. K.B. 237.

(*q*) *Pugh* v. *L. B. & S. C. Ry.*, (1896) 2 Q.B. 248; 65 L.J. Q.B. 521; see also *Mardorf* v. *Accident Ins. Co.*, (1903) 1 K.B. 514; 72 L.J. K.B. 362

(*r*) *Fitton* v. *Accidental Death Ins. Co.*, 17 C.B. N.S. 122; 34 L.J. C.P. 29.

above condition, and were not liable (*s*). Where a policy of insurance against accidental death or injury excepted accidents incurred through exposure to obvious risk, and the insured in broad daylight was killed in crossing a railway in front of an approaching train, it was held that this came within the exception (*t*). Where a tramcar company insured against claims in respect of accidents to the amount of 250*l.* in respect of any one accident, it was held that the word "accident" meant an injury for which a person claimed compensation, and was not limited to one accident out of which many such injuries arose (*u*). Where the accident policy was renewable each year, it was held that an entirely new contract arose for each year, and that the amount payable under it in one year was not affected by an assignment of the policy in a previous year (*x*). Where an accident happens after the proposal is signed but before delivery of the policy, and the policy contains a provision *inter alia* that immediate notice of an accident must be given, and that the terms of the policy, so far as they contain anything to be done by the employer, are the essence of the contract, and the company do not prove that the plaintiffs knew of the condition as to giving immediate notice of any accident, the condition never becomes applicable to that risk, and the plaintiffs are entitled to recover (*y*).

Railway accidents—Damages.—Where a passenger by railway effected an insurance for 1,000*l.* with a company, to be paid to his personal representatives in the event of his death by a railway accident, and a proportionate part of the 1,000*l.* to be paid to the insured himself in case of any personal injury by reason of such accident, it was held that the damages recoverable in respect of personal injury to the insured, not attended with loss of life, were confined to compensation for bodily pain and suffering and the expenses of medical and surgical attendance, &c., and that loss of time or loss of profits resulting from the accident could not be taken into consideration by the jury: "otherwise one passenger, whose time is more valuable than another's, would, for precisely the same personal injury, receive a larger

(*s*) *Smith* v. *Accident Ins. Co.*, L.R. 5 Ex. 302; 39 L.J. Ex. 211.

(*t*) *Cornish* v. *Accident Ins. Co.*, 23 Q.B.D. 453; 58 L.J. Q.B. 591.

(*u*) *South Staffordshire Tram. Co.* v. *Accident Assur. Assoc.*, (1891) 1 Q.B. 402; 60 L.J. Q.B. 260. As to "injury caused by external means," see *Hamlyn* v. *Crown Accidental Ins. Co.*, (1893) 1 Q.B. 750; 62 L.J. Q.B. 409. As to injury caused by "accidental means," see *Scarr* v. *Gen. Acc. Assur. Corp.*, (1905) 1 K.B. 387; 74 L.J. K.B. 237.

(*x*) *Stokell* v. *Heywood*, (1897) 1 Ch. 459; 65 L.J. Ch. 721.

(*y*) *Coleman's Depositories, Ld., and Life and Health Assur. Assoc., In re*, (1907) 2 K.B. 798; 76 L.J. K.B. 865; *In re Williams and Thomas and the Lancashire and Yorkshire Accident Ins. Co.*, 19 T.L.R. 82.

remuneration than another whose time would be of less value" (*z*).

Breach of covenants to insure.—Where a covenant was entered into with an insurance company to keep up a policy in their office as security for money lent by them, and the policy was dropped, and the company recovered judgment for the amount of the loan, with interest thereon, it was held that the measure of damages was not the amount of the premiums which would have been payable to the company if the policy had been kept up, but the amount of injury sustained, either through loss of the security, or through the expenses incurred in effecting another insurance (*a*). Where a deed by which a debtor assigned a policy of insurance on his life for 1,000*l.* to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited, and the policy was subject to a condition that, if the insured should go beyond the limits of Europe without licence from the directors, the policy should be void, and the debtor went beyond the limits of Europe without licence from the directors, it was held that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the debtor had covenanted to pay, and would have to pay, the premiums on the policy (*b*).

Loss of life policy—Payment into Court.—Where an action was brought against a life insurance company upon a life policy which had been lost, and the directors of the company were of opinion that no sufficient discharge could otherwise be obtained, it was held that the provisions of the Life Assurance Companies (Payment into Court) Act, 1896, were applicable, and therefore leave should be given to the defendants to pay the amount of the policy into the High Court under Order LIV. (c.), r. 3(*c*).

SECTION V.

INSURANCE AGAINST BURGLARY.

Burglary.—Goods in a shop were insured against "theft following upon actual forcible and violent entry upon the premises;" early in the morning, during the temporary absence

(*z*) *Theobald* v. *Railw. Pass. Assur. Co.*, 23 L.J. Ex. 249; 10 Exch. 45.

(*a*) *National Assur. Co.* v. *Best*, 27 L.J. Ex. 19; 2 H. & N. 605; *Brown* v. *Price*, 4 C.B. N.S. 598; 27 L.J. C.P. 290.

(*b*) *Hawkins* v. *Coulthurst*, 5 B. & S. 343; 33 L.J. Q.B. 192.

(*c*) *Harrison* v. *Alliance Assur. Co.*, (1903) 1 K.B. 184; 72 L.J. K.B. 115.

of the shopman, a thief gained access to the shop by turning the door-handle and walking in, and stole the goods: it was held that under the special circumstances of the case the loss was covered by the policy (*d*). Where a policy provided that there should be no claim on the policy for "loss by theft, robbery or misappropriation by members of the assured's business staff," and a theft was committed by a gang of men who gained admittance to the premises through the agency of an employee of the assured, it was held that there had been a loss within the meaning of the proviso which exempted the insurer from liability (*e*).

(*d*) *George* v. *Goldsmiths', &c. Ins. Assoc.*, (1898) 2 Q.B. 136; 67 L.J. Q.B. 807. As to waiver of payment of premium, see *Roberts* v. *Security Co.*, (1897) 1 Q.B. 111; 66 L.J. Q.B. 119.

(*e*) *Saqui* v. *Stearns*, (1911) 1 K.B. 427.

CHAPTER VI.

MERCANTILE INSTRUMENTS.

BILLS, NOTES, AND CHEQUES.

Negotiable instruments.—Bills of exchange, with cheques and promissory notes, constitute a paper currency to which special characteristics, unknown to the common law, were attached by the law merchant. The most important of these are negotiability, presumption of consideration, certain other presumptions, and estoppels directed to enable a "holder in due course" to take and hold the paper without being prejudiced by any defect, irregularity, or special arrangement between earlier parties of which he is not aware at the time, and the concession of days of grace. When an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt, and though the transferor had no title to it (*a*). But if either of the above requisites is wanting, that is, if it is either not accustomably transferable, or, though it be accustomably transferable, yet if its nature is such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property in it to a vendee, however *bonâ fide*, if the transferor himself has not a good title to it, and the transfer is made out of market overt (*b*). Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. But a Paymaster-General's warrant for payment of pension signed by the payee is a mere receipt and not negotiable (*c*).

Bills of exchange—Definition.—It should be borne in mind

(*a*) *London Jt. Stk. Bk.* v. *Simmons*, (1892) A.C. 201 ; 61 L.J. Ch. 723 ; *Thomson* v. *Clydesdale Bk.*, (1893) A.C. 282 ; 62 L.J. P.C. 91.

(*b*) *Miller* v. *Race*, 1 Smith, L.C. 463 (ed. 11).

(*c*) *Jones* v. *Coventry*, (1909) 2 K.B. 1029 ; 79 L.J. K.B. 41.

that the Bills of Exchange Act, 1882 (*d*), is, generally speaking, declaratory of the law, and may be regarded as a consolidation and re-enactment of it (*e*).

A bill of exchange is an unconditional order in writing (*f*), addressed by one person to another, signed (*g*) by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person (*h*), or to bearer (*i*). An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange (*k*). A bill is sometimes called a draft, and an accepted bill is often referred to as "an acceptance." The person who gives the order is called the drawer. The person thereby ordered to pay is called the drawee, and if he signifies his assent to the order in due form (*l*), he is then called the acceptor. The person to whom the money is payable is called the payee or bearer (*i*), as the case may be. Comparing the definition given by the Bills of Exchange Act, 1882, s. 3, with the wider definition of "bills of exchange" in sect. 32 of the Stamp Act, 1891(*m*), it appears that instruments may require to be stamped as bills which do not possess the mercantile incidents of bills as defined by the Act of 1882. An instrument invalid as a bill under the Act may be valid as an agreement if it is in conformity with the requirements of the general law as to agreements (*n*). Where an instrument is so ambiguously worded that it is doubtful whether it was intended for a bill or for a note, the holder may treat it at his option as either (*o*). An order to pay out of a particular fund is not unconditional within the meaning of sect. 3 of the Bills of Exchange Act, 1882 (*p*); but an unqualified order to pay, coupled with (a) an indication of a par-

(*d*) 45 & 46 Vict. c. 61.

(*e*) *M'Lean* v. *Clydesdale Banking Co.*, 9 App.Cas. 105; *Boyse, In re*, 33 Ch.D. 612; 56 L.J. Ch. 135.

(*f*) "Writing" includes print: sect. 2.

(*g*) Sect. 91. "(1) Where by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. (2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal." This section affects an alteration in the law.

(*h*) *Camberlain* v. *Young*, (1893) 2 Q.B. 206; 63 L.J. Q.B. 28.

(*i*) "Bearer" means the person in possession of a bill or note which is payable to bearer. See sect. 2.

(*k*) 45 & 46 Vict. c. 61, s. 3 (1), (2).

(*l*) *Ib.*, s. 17.

(*m*) 54 & 55 Vict. c. 39.

(*n*) See *Brice* v. *Bannister*, 3 Q.B.D. 569; 47 L.J. Q.B. 472; *Hamilton* v. *Spottiswoode*, 4 Ex. 200; 18 L.J. Ex. 393.

(*o*) *Edis* v. *Bury*, 6 B. & C. 433; 5 L.J. (O.S.) K.B. 179; *Fielder* v. *Marshall*, 9 C.B. N.S. 606; 30 L.J. C.P. 158; cp. *Allen* v. *Mawson*, 4 Campb. 115.

(*p*) 54 & 55 Vict. c 39.

ticular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill (*q*), is unconditional (*r*). A bill is not invalid by reason—(a) That it is not dated; (b) that it does not specify the value given, or that any value has been given therefor; (c) that it does not specify the place where it is drawn or the place where it is payable (*s*).

Drawing of a bill.—A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee (*t*). Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person (*u*) or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note (*x*).

The drawee must be named or otherwise indicated in a bill with reasonable certainty (*y*). A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange (*z*).

Where a bill is not payable to bearer (*a*), the payee must be

(*q*) "Bill" means "Bill of Exchange" by sect. 2. By sect. 4, (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

"For the purposes of this Act 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

The definition of a bill of exchange in sect. 3 embraces a cheque: see *M'Lean* v. *Clydesdale*, *ante*, p. 1242.

(*r*) *Ib.*, s. 3 (3). See *Boyse, In re*, 33 Ch.D. 612; 56 L.J. Ch. 135.

(*s*) *Ib.*, s 3, (4). Though an undated bill may be valid, it is irregular to issue it undated. As to filling in the date in the case of an undated bill or acceptance, see *ib.*, ss. 12 and 20. The alteration of the date is a material alteration: s. 64 (2). Under most of the Continental codes it is essential that a bill should be dated.

By sect. 53, "(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

"(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee."

(*t*) 45 & 46 Vict. c. 61, s. 5 (1).

(*u*) As to the meaning of fictitious person, see *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145; *Ashpitel* v. *Bryan*, 32 L.J. Q.B. 91; affirmed by Ex. Ch. 33 L.J. Q.B. 328; *Clutton* v. *Attenborough*, (1897) A.C. 90; 66 L.J. Q.B. 221; *Vinden* v. *Hughes*, (1905) 11 Q.B. 795; 74 L.J. K.B. 410; *North and South Wales Bank* v. *Macbeth*, (1908) A.C. 137; 77 L.J. K.B. 464.

(*x*) 45 & 46 Vict. c. 61, s. 5 (2); *Miller* v. *Thomson*, 3 M. & G. 576; *Capital and Counties Bank* v. *Gordon*, (1903) A.C. p. 250; *Smith* v. *Bellamy*, 2 Stark. 223.

(*y*) *Ib.*, s. 6 (1), *Peto* v. *Reynolds*, 9 Ex. 410, and 11 Ex. 418; *Fielder* v. *Marshall*, 9 C.B. N.S. 606; 30 L.J. C.P. 158; *Gray* v. *Milner*, 8 Taunt. 739; *Shuttleworth* v. *Stephens*, 1 Campb. 407.

(*z*) *Ib.*, s. 6 (2). See Acceptances, *ib.*, s. 19 (2).

(*a*) "Bearer" means the person in

named or otherwise indicated therein with reasonable certainty (*b*). A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees, and it may also be made payable to the holder of an office for the time being (*c*). Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer (*d*).

V., a foreign correspondent of the plaintiffs, was in the habit of drawing upon him to the order of C.P. & Co.; a clerk in the plaintiff's service forged V.'s signature, and also letters of advice with respect to the bills in question, and thus procured the genuine acceptance of the plaintiff; the clerk next forged indorsements of C.P. & Co., and presented the bills to the defendants, the Bank of England, who paid them, the plaintiff having advised them in the ordinary course that the bills were coming forward for payment; it was held by the House of Lords that C.P. & Co. were "fictitious or non-existing" payees within the meaning of sect. 7, sub-sect. (3), and that the Bank of England were not liable (*e*). A cheque drawn to the order of a fictitious or non-existing person is to be treated as a cheque payable to bearer although the drawer believes and intends the cheque to be payable to the order of a real person (*f*). Where a cheque is drawn by a real drawer who designates an existing person as the payee and intends him to receive the proceeds, the payee is not "a fictitious person" within sect. 7, sub-sect. 3 of the Bills of Exchange Act, 1882. The drawer of a cheque induced by the fraud of W. drew the cheque to the order of K., an existing person, and intended him to be the payee, W. forged K.'s indorsement, and paid the cheque into his own account at his bankers, who received the amount of the cheque from the drawer's bank. It was held by the House of Lords that the drawer could recover the amount of the cheque from W.'s bankers (*g*).

Bills, when payable.—A bill is payable on demand—(a) Which is expressed to be payable on demand, or at sight, or on presen-

possession of a bill or note which is payable to bearer. See sect. 1.

(*b*) 45 & 46 Vict. c. 61, s. 7 (1); *Soares* v. *Glyn*, 8 Q.B. 24; *Willis* v. *Barrett*, 2 Stark. 29; *Chamberlain* v. *Young*, *ante*, p. 1242.

(*c*) *Ib.*, s. 7 (2); *Cowrie* v. *Sterling*, 6 E. & B. 333; *Yates* v. *Nash*, 29 L.J. C.P. 306; *Blanckenhagen* v. *Blundell*, 2 B. & Ald. 417; cp. *Holmes* v. *Jacques*, L.R. 1 Q.B. 376; and *Watson* v. *Evans*, 32 L.J. Ex. 137.

(*d*) *Ib.*, s. 7 (3); sub-sections (2) and (3) were not the law before the Act. See *Yates* v. *Nash*, 29 L.J. C.P. 306; 8 C.B. N.S. 581; *M'Call* v. *Taylor*, 34 L.J. C.P. 365; 19 C.B. N.S. 301.

(*e*) *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145. The Court also held that the plaintiff had been guilty of negligence.

(*f*) *Clutton* v. *Attenborough*, (1897) A.C. 90; 65 L.J. Q.B. 122.

(*g*) *North and South Wales Bank* v. *Macbeth*, 77 L.J. K.B. 464; (1908) A.C. 137.

tation; or (b) in which no time for payment is expressed (*h*). Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand" (*i*).

A bill is payable at a determinable future time within the meaning of the Bills of Exchange Act, 1882, which is expressed to be payable—(1.) At a fixed period after date or sight; (2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain; but an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (*k*).

Dating of bills.—"Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance (*l*) of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith (*m*) and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date" (*n*).

Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement (*o*), as the case may be (*p*). A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday (*q*). A post-dated cheque bearing a penny stamp, though taken by a holder before its date, is a valid cheque and can be sued on by the holder after its date (*r*).

Sum payable.—The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—(a) With interest; (b) by stated instalments; (c) by

(*h*) 45 & 46 Vict. c. 61, s. 10 (1).

(*i*) *Ib.*, s. 10 (2).

(*k*) *Ib.*, s. 11. See *Coleham* v. *Cooke*, Willes 393; *Goss* v. *Nelson*, 1 Burr. 226; *Price* v. *Taylor*, 5 H. & N. 540; 29 L.J. Ex. 331; *Baring* v. *London and South-Western Bank*, (1900) 1 Q.B. 270; 69 L.J. Q.B. 164.

(*l*) "Acceptance" means an acceptance completed by delivery or notification. See sect. 1.

(*m*) By sect. 90, "A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

(*n*) Sect. 12 effects an alteration in the law.

(*o*) "Indorsement" means an indorsement completed by delivery; sect. 1.

(*p*) 45 & 46 Vict. c. 61, s. 13 (1); *Armfield* v. *Allport*, 27 L.J. Ex. 42.

(*q*) *Ib.*, s. 13 (2).

(*r*) *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715; 64 L.J. Q.B. 99.

stated instalments, with a proviso that upon default in payment of any instalment the whole shall become due; (d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill (*s*). Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable (*t*). Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue (*u*) thereof (*x*).

Negotiability and transfer of bills.—Where a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable (*y*). A negotiable bill may be payable either to order or to bearer (*z*). A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (*a*). A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*b*). Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option (*c*).

If the acceptor of a bill of exchange desires to qualify his acceptance he must do so on the face of the bill, in clear and unequivocal terms and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an express qualification (*d*). It would seem doubtful whether a cheque made payable to order, can be made not transferable under sect. 8 (*e*); and whether a cheque, payable to order or bearer, can be made "not negotiable" except by crossing it in manner provided by sect. 76 (*f*).

(*s*) 45 & 46 Vict. c. 61, s. 9 (1). See *Carlon* v. *Kenealy*, 12 M. & W. 139; 13 L.J. Ex. 64; *Gaskin* v. *Davis*, 2 F. & F. 294; *Oridge* v. *Sherborne*, 11 M. & W. 374; 12 L.J. Ex. 313; *Moffatt* v. *Edwards*, Car. & M. 16; *Worley* v. *Harrison*, 3 A. & E. 669; 4 L.J. K.B. 268.

(*t*) *Ib.*, s. 9 (2); *Saunderson* v. *Piper*, 5 Bing. N.C. 425; 8 L.J. C.P. 227; *Phipps* v. *Tanner*, 5 C. & P. 488.

(*u*) "Issue" means the first delivery of a bill or note complete in form to a person who takes it as a holder; sect. 2.

(*x*) 45 & 46 Vict. c. 61, s. 9 (3); *Doman* v. *Dibdin*, R. & M. 381.

(*y*) 45 & 46 Vict. c. 61, s. 8 (1). This was not so before the Act.

(*z*) *Ib.*, s. 8 (2). See "bearer" defined by s. 2, *supra*.

(*a*) *Ib.*, s. 8 (3).

(*b*) *Ib.*, s. 8 (4).

(*c*) *Ib.*, s. (8) 5.

(*d*) *Meyer* v. *Decroix*, (1891) A.C. 520; 61 L.J. Q.B. 205; *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199.

(*e*) Per Fry, L.J., *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199.

(*f*) *Post*, p. 1291. See *per* Lindley, L.J., *National Bank* v. *Silke*, *supra*.

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder (*g*) of the bill (*h*). A bill payable to bearer is negotiated by delivery (*i*). A bill payable to order is negotiated by the indorsement of the holder completed by delivery (*k*). Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor (*l*). Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability (*m*).

"An indorsement (*n*), in order to operate as a negotiation, must comply with the following conditions, namely:—(1.) It must be written on the bill itself, and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient (*o*). An indorsement written on an allonge, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognized, is deemed to be written on the bill itself. (2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill (*p*). (3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others. (4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature. (5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have

(*g*) "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof; sect. 2.

(*h*) 45 & 46 Vict. c. 61, s. 31 (1).

(*i*) *Ib.*, s. 31 (2). See "bearer" and "delivery" defined by s. 2, *supra*.

(*k*) *Ib.*, s. 31 (3). As to the nature of negotiation, see the remarks of Lord Blackburn in *Crouch* v. *Crédit Foncier*, L.R. 8 Q.B. at p. 381; 42 L.J. Q.B. 183.

(*l*) *Ib.*, s. 31 (4). Per Byles, J., *Harrop* v. *Fisher*, 10 C.B. N.S. 196, at p. 203; 30 L.J. C.P. 283; *Cunliffe* v. *Whitehead*, 3 Bing. N.C. 828, at p. 830; 6 L.J. C.P. 255; *Mowbray, Ex parte*, 1 Jac. & W. 428; *Edge* v. *Bumford*, 31 Beav. 247; 31 L.J. Ch. 805; *Day* v. *Longhurst*, 62 L.J. Ch. 334.

(*m*) *Ib.*, s. 31 (5). See *ib.*, s. 16 (1), as to indorsements limiting or negativing liability, and sect. 26 as to indorsements in a representative capacity; *Good* v. *Walker*, 61 L.J. Q.B. 736.

(*n*) "Indorsement" means an indorsement completed by delivery; sect. 2.

(*o*) *Richards* v. *Frankum*, 9 C. & P. at p. 225; *Mitchell* v. *Smith*, 33 L.J. Ch. 596; *Bishop, Ex parte*, 15 Ch. D. 400; 50 L.J. Ch. 18; *Young* v. *Glover*, 3 Jur. N.S. 637.

(*p*) See *Heilbut* v. *Nevill*, L.R. 4 C.P. at p. 358; 38 L.J. C.P. 373.

been made in the order in which it appears on the bill, until the contrary is proved. (6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive."(*q*).

If the written order duly stamped is made payable to "bearer," it is transferable by mere delivery (*r*); so that any *bonâ fide* holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn "payable to order," it can only be assigned by indorsement from the payee (*s*). The indorsement may be written either on the back or the face of the bill (*t*), and is sometimes an indorsement in full, so called, because the indorser not only writes his own name on the bill, but expresses therein in whose favour the indorsement is made, as "pay the contents to Mr. A. B." and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing; but, in the second, he can transfer it by delivery only, so that any subsequent *bonâ fide* holder may treat the first indorsement in blank as a direct indorsement to himself, and bring an action in his own name upon the instrument; and this he might formerly do notwithstanding subsequent indorsements in full had been made thereon (*u*); but this appears to have been altered, for by sect. 8 (3) (*x*) of the Bills of Exchange Act, 1882, a bill is payable to "bearer" which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. Any number of persons, too, whether partners or not, may, it seems, join in suing upon a bill indorsed in blank (*y*).

The bill may be indorsed before the day that it bears date (*z*) and before acceptance, and whilst the date and the amount for which it is drawn are left in blank (*a*); and the acceptance and indorsement may be made before the bill is drawn; and a bill drawn and issued in blank for the name of the payee may, under certain circumstances, be filled up by a *bonâ fide* holder with his own name, and will bind the drawer(*b*).

(*q*) 45 & 46 Vict. c. 61, s. 32.

(*r*) *Gibson* v. *Minet*, 1 H. Bl. 606. As to completion by delivery, see sect. 21, *post*, p. 1252.

(*s*) See Bills of Exchange Act, 1882, s. 31, *post*; *Edge* v. *Bumford*, 31 Beav. 247; 31 L.J. Ch. 805.

(*t*) *Young* v. *Glover*, 3 Jur. N.S. 637.

(*u*) *Fairclough* v. *Pavia*, 9 Exch. 695; 23 L.J. Ex. 215; *Wookey* v. *Pole*, 4 B. & Ald. 1, 9.

(*x*) *Ante*, p. 1246.

(*y*) *Attwood* v. *Rattenbury*, 6 Moore, 579; *Ord* v. *Portal*, 3 Campb. 239; *Lowe* v. *Copestake*, 3 C. & P. 300.

(*z*) *Passmore* v. *North*, 13 East, 517.

(*a*) *Snaith* v. *Mingay*, 1 M. & S. 87.

(*b*) *Schultz* v. *Astley*, 2 Bing. N.C.

So it has been held that where a bill is accepted in blank, and is afterwards filled in with the name of a drawer and indorser the acceptor cannot, as against a *bonâ fide* indorsee for value without notice of irregularity adduce evidence to show that either the drawing or indorsement is a forgery (*c*). If the indorsement is made before the bill has been filled up for any specific sum, the indorser may become liable to subsequent indorsees or holders to any amount warranted by the stamp. The indorsement is a letter of credit for an indefinite sum (*d*). If the payee of a bill or money order, not negotiable, indorses it, he is liable on his indorsement to his indorsee (*e*). The indorsee may treat the indorser as the drawer of a new bill, or as the indorser of the old bill; but he cannot treat him as both (*f*).

Inchoate bills.—Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit (*g*). In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given (*h*). Reasonable time for this purpose is a question of fact (*h*). Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (*h*). Where a defendant in an action brought by the payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, and had entrusted the paper to another person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs, and deliver it to the

544; 5 L.J. C.P. 130; *Cruchley* v. *Clarance*, 2 M. & S. 90; *Crutchley* v. *Mann*, 5 Taunt. 529.

(*c*) *London and S.W. Bank* v. *Wentworth*, 5 Ex.D. 96; 49 L.J. Ex. 657; and see *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339; *contra*, where notice of irregularity.

(*d*) *Russell* v. *Langstaffe*, 2 Doug. 515, *a.*; *Hatch* v. *Searles*, 2 Sm. & Giff. 147; 24 L.J. Ch. 22. See sect. 20, *infra*.

(*e*) *Hill* v. *Lewis*, 1 Salk. 132.

(*f*) *Burmester* v. *Hogarth*, 11 M. & W. 101; 12 L.J. Ex. 178.

(*g*) 45 & 46 Vict. c. 61, s. 20 (1). *Glenie* v. *Tucker*, 77 L.J. K.B. 193; (1908) 1 K.B. 263.

(*h*) *Ib.*, s. 20 (2). See also sect. 36, *post*, p. 1260. *Crutchley* v. *Mann*, 5 Taunt. 529; *Carter* v. *White*, 25 Ch.D. 666; 54 L.J. Ch. 138.

plaintiffs as security for an advance to be made by them, and that person had fraudulently filled the paper up as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud, it was held by the Court of Appeal that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs, and therefore the action was maintainable against him for the full amount of the note (*i*). A bill of exchange accepted for valuable consideration with the drawer's name left blank may be completed by the drawer's name being added after the death of the acceptor (*k*).

Negotiation of bill to party already liable thereon.—Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of the Bills of Exchange Act, 1882 (*l*), re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable (*m*).

Payment in due course.—A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. "Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (*n*). Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but (a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill. (b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill (*o*). Where an accommodation bill is paid in due course by the party accommodated the bill is discharged (*p*).

(*i*) *Lloyd's Bank, Ltd.* v. *Cooke*, (1907) 1 K.B. 794; 76 L.J. K.B. 666, doubting and distinguishing; *Herdman* v. *Wheeler*, (1902) 1 K.B. 361; 71 L.J. K.B. 270. But see *Smith* v. *Prosser*, 77 L.J. K.B. 71; (1907) 2 K.B. 735.

(*k*) *Carter* v. *White*, 25 Ch.D. 666; 54 L.J. Ch. 138.

(*l*) 45 & 46 Vict. c. 61.

(*m*) *Attenborough* v. *Mackenzie*, 25 L.J. Ex. 244; *Wilkinson* v. *Unwin*, 7 Q.B.D. 636; 50 L.J. Q.B. 338; *Glenie* v. *Tucker*, 77 L.J. K.B. 193; (1908) 1 K.B. 263.

(*n*) 45 & Vict. c. 61, s. 59 (1). See *Harmer* v. *Steele*, 4 Ex. at p. 14; 19 L.J. Ex. 34; *Deacon* v. *Stodhart*, 2 M. & G. 317; *Glasscock* v. *Balls*, 24 Q.B.D. 13; 59 L.J. Q.B. 51; *Imperial Bank of Canada* v. *Bank of Hamilton*, (1903) A.C. 49; 72 L.J. P.C. 1.

(*o*) 45 & 46 Vict. c. 61, s. 59 (2).

(*p*) *Ib.*, s. 59 (3). See *Lazarus* v. *Cowie*, 3 Q.B. 465; 11 L.J. Q.B. 310; *Burbridge* v. *Manners*, 3 Campb. 193; *Attenborough* v. *Mackenzie*, 25 L.J. Ex.

Restrictive indorsements.—The negotiability of the bill may be limited and restrained by the express terms of the indorsement.

"The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit" (*q*). The drawer of a bill, and any indorser, may insert therein an express stipulation—(1.) Negativing or limiting his own liability to the holder: (2.) Waiving as regards himself some or all of the holder's duties (*r*). Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (*s*).

An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer (*t*). A special indorsement specifies the person to whom, or to whose order, the bill is to be payable (*u*). The provisions of the Bills of Exchange Act, 1882 (*x*), relating to a payee (*y*) apply with the necessary modifications to an indorsee under a special indorsement (*z*). When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person (*a*). An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "pay D. only," or "pay D. for the account of X.," or "pay D. or order for collection" (*b*). A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party

244; *Morley* v. *Culverwell*, 7 M. & W. 182; 10 L.J. Ex. 35.

(*q*) 45 & 46 Vict. c. 61, s. 15. This provision is new. The referee in case of need is sometimes called the drawee in case of need, or simply the "case of need." A bill must be protested or noted for protest before it can be presented to the case of need; see *ib.*, ss. 65, 67, 68.

(*r*) *Ib.*, s. 16.

(*s*) This effects an alteration in the law.

(*t*) *Ib.*, s. 34 (1). By sect. 31 (2), a bill payable to bearer is negotiated by delivery.

(*u*) *Ib.*, s. 34 (2). *Soares* v. *Glyn*, 8 Q.B. 24. See *ib.*, s. 8 (5). A bill specially indorsed is payable to the indorsee therein designated, and can only be negotiated by his indorsement. Under sect. 8 (3), a special indorsement following an indorsement in blank controls the effect of the indorsement in blank.

(*x*) 45 & 46 Vict. c. 61.

(*y*) See sects. 7, 8 as to payee.

(*z*) *Ib.*, s. 34 (3).

(*a*) *Ib.*, s. 34 (4). See *Vincent* v. *Horlock*, 1 Campb. 442; *Wilkinson* v. *Johnston*, 3 L.J. (O.S.) K.B. 58; 3 B. & C. 428.

(*b*) *Ib.*, s. 35 (1).

thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so (*c*). Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement (*d*).

If the indorsement is accompanied by a notification that "the within must be credited to A.," or a direction "to pay A. for my use," every indorsee and subsequent holder has notice of the direction, and holds the bill, or the money he receives upon it, as the trustee of the restraining party (*e*). But an indorsement, "Pay J. S., or order, value in account with H. C. D.," was held not restrictive (*f*).

A bill on which the only or *last* indorsement is an indorsement in blank is a bill payable to bearer, so that if a bill had two indorsements on it, the first being in blank, but the second to a named indorsee, it would not be payable to bearer (*g*).

A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill (*h*). And, if the bill be indorsed for part only of the amount, and the limitation do not appear upon the face of the indorsement, the indorsee may sue for the whole sum due upon the bill, and will be a trustee of the surplus for the indorser (*i*).

Completion of contract by delivery.—By the Bills of Exchange Act, 1882, sect. 21, "(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery (*k*) of the instrument in order to give effect thereto (*l*). Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable (*l*). As between immediate parties, and as regards

(*c*) 45 & 46 Vict. c. 61, s. 35 (2). See *Lloyd* v. *Sigourney*, 5 Bing. at p. 532; *Williams, Deacon & Co.* v. *Shadbolt*, 1 C. & B. 529, *per* Case, J.

(*d*) *Ib.*, s. 35 (3).

(*e*) *Lloyd* v. *Sigourney*, 5 Bing. 525; 3 M. & P. 239; *Sigourney* v. *Lloyd*, 8 B. & C. 622; 7 L.J. (O.S.) K.B. 73.

(*f*) *Buckley* v. *Jackson*, L.R. 3 Ex. 135.

(*g*) See 45 & 46 Vict. c. 61, s. 8 (3).

(*h*) 45 & 46 Vict. c. 61, s. 32 (2). *Hawkins* v. *Cardy*, 1 Ld. Raym. 360.

(*i*) *Reid* v. *Furnival*, 1 Cr. & M. 538; 2 L.J. (O.S.) Ex. 199; *Newton, Ex parte*, 16 Ch.D. 330; 50 L.J. Ch. 484.

(*k*) "Delivery" means transfer of possession, actual or constructive, from one person to another. See sect. 2, and *Clutton* v. *Attenborough*, (1897) A.C. 90; 66 L.J. Q.B. 221.

(*l*) 45 & 46 Vict. c. 61, s. 21 (1). *Cox* v. *Troy*, 5 B. & Ald. 474; *Richards, In re*, 36 Ch.D. 541; 56 L.J. Ch. 923; criticised, *Whitaker, In re*, 42 Ch. D. 119, at p. 125; 58 L.J. Ch. 487.

a remote party other than a holder in due course (*m*), the delivery—(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be: (b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill (*n*). But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed (*n*). Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved" (*o*).

In order to constitute a valid indorsement of a bill of exchange as against the indorser, there must be a writing of the name of the holder, and a manual delivery to him of the bill with the intention, not only to pass the property in it, but to guarantee the payment if the acceptor makes default; and evidence of facts showing the absence of this intention is admissible under a traverse of the indorsement (*p*). There is no indorsement if the holder merely writes on the bill a direction to pay it to another person, and the other person gets possession of the bill without the holder's consent. Nor is there any indorsement, as between the indorser and his immediate indorsee, though the holder gives that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him the transferee of the property in the bill (*q*), or with the intention only of making him indorsee and owner of the bill on the performance of certain terms and conditions (*r*). Where a testator wrote his name on the back of a bill payable to his order, and kept the bill in his possession, and his executrix after his death delivered the instrument to the plaintiffs without indorsing it, it was held that the writing of his name by the deceased, and the delivery by the executrix, would not together constitute an indorsement of the note, and that the party to whom it was delivered had consequently no right to sue upon it (*s*). If the indorsement is intended to constitute a testamentary gift, it must be authenticated as such (*t*).

(*m*) See "holder in due course," defined by sect. 29.

(*n*) 45 & 46 Vict. c. 61, s. 21 (2). *Bromage* v. *Lloyd*, 1 Ex. 132; 15 L.J Ex. 257; *Whitaker, In re, supra*; *Bell* v. *Ingestre (Lord)*, 12 Q.B. 317, at p. 319; 19 L.J. Q.B. 71.

(*o*) *Ib.*, s. 21 (3).

(*p*) *Denton* v. *Peters*, L.R., 5 Q. B 475.

(*q*) *Lloyd* v. *Howard*, 15 Q.B.. 997; 20 L.J. Q.B. 1; *Attenborough* v. *Clarke*, 27 L.J. Ex. 138.

(*r*) *Bell* v. *Ingestre (Lord)*, 12 Q. B. 317; 19 L.J. Q.B. 71; *Castrique* v. *Buttigieg*, 10 Moore, P.C. 109.

(*s*) *Bromage* v. *Lloyd*, 1 Exch. 32; 16 L.J. Ex. 257.

(*t*) *Mitchell* v. *Smith*, 33 L.J. Ch. 596

But if the party to whose order the bill is payable writes his name on the back of the bill, and hands it over to another, who delivers it to a third person for value, that is an indorsement from the holder to such third person, and constitutes the latter the absolute owner of the bill. Where the drawer of a bill wrote his name on the back of it, and delivered it to a party to get it discounted, and the latter pledged the bill with a pawnbroker, and appropriated the money he received on the deposit of the bill to his own use, it was held that there was a valid indorsement of the bill from the drawer to the pawnbroker(*u*). One who receives a bill of exchange (payable to order) unindorsed, acquires no better title under it than that which the person from whom he receives it had. Therefore, where A. had fraudulently obtained a bill from B. and handed it to C., in satisfaction of a *bonâ fide* debt, but without indorsing it, it was held that C. could not acquire a legal title to sue by obtaining A.'s indorsement after he had received notice of the fraud (*x*). But a transferee of an indorsed bill of exchange has all the rights of a holder for value, if it has been handed to him on account of a pre-existing debt, and is not affected by any infirmity of title in the transferor (*y*). When the drawer or party to whose order the bill is payable has written his name on the back of the bill, and handed the bill over in the ordinary course of transfer, it is afterwards transferable, as previously mentioned, from hand to hand, by mere delivery; and the consideration for each successive transfer cannot be inquired into, unless the bill has been stolen or obtained by misrepresentation or fraud. Any holder, therefore, who does not wish to sue in his own name on the bill may hand the bill over to another party, in order that the latter may sue upon it for him as his trustee (*z*). But the bill must be handed over prior to the commencement of the action; for, where the holder of a bill indorsed in blank, being unwilling to sue upon it himself, procured the plaintiff, who had no interest in the bill, to sue upon it, and handed the bill to the plaintiff after the commencement of the action, that the latter might produce it in court, it was held that the plaintiff was not entitled to recover upon it, as he was not the holder of the bill at the time he brought his action (*a*). If, however, the bill has been indorsed and

(*u*) *Barber* v. *Richards*, 6 Exch. 63; 20 L.J. Ex. 135.

(*x*) *Whistler* v. *Forster*, 14 C.B. N.S. 248; 32 L.J. Ch. 161. See sect. 31 (4) of the Act, *ante*, p. 1247.

(*y*) *Belshaw* v. *Bush*, 11 C.B. 191; 24 L.J. C.P. 81; *Misa* v. *Currie*, 1 App. Cas. 554; 45 L.J. Ex. 852. See sect. 27 of the Act, *post*, p. 1257.

(*z*) *Oulds* v. *Harrison*, 10 Exch. 579; 24 L.J. Ex. 69; *Law* v. *Parnell*, 7 C.B. N.S. 282; 29 L.J. C.P. 17.

(*a*) *Emmett* v. *Tottenham*, 8 Exch. 884; 22 L.J. Ex. 281. By sect. 2 of the

delivered to some person professing to act as the plaintiff's agent, although without his knowledge, and the plaintiff adopts the acts of the assumed agent, that is sufficient to entitle him to recover, although the action has been commenced in the plaintiff's name without his knowledge, and before the adoption (*b*).

Holder in due course.—A holder in due course is a holder (*c*) who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (b) That he took the bill in good faith (*d*) and for value (*e*), and that at the time the bill was negotiated to him (*f*) he had no notice of any defect in the title of the person who negotiated it (*g*).

In particular the title of a person who negotiates a bill is defective within the meaning of the Bills of Exchange Act, 1882, when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (*h*).

A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (*i*).

Intermediate infirmities of title.—A *bonâ fide* holder for value is not affected by an intermediate fraud or infirmity of title of which he had no knowledge or notice at the time he advanced his money on the credit and security of the bill of which he is the holder. Therefore, if a bill of exchange, indorsed generally, and handed over by a person competent to indorse it, is afterwards stolen, and the thief delivers it for value to a party who

Act, the word "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

(*b*) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L.J. Ex. 163.

(*c*) For definition of "holder," see sect. 2.

(*d*) See *ante*, note (*m*), p. 1245.

(*e*) See *post*, sect. 27, p. 1257.

(*f*) *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*g*) 45 & 46 Vict. c. 61, s. 29 (1); *Whistler* v. *Forster*, 14 C.B. N.S. 248, at p. 258; 32 L.J. C.P. 161, at p. 163; *M'Lean* v. *Clydesdale Bank*, 9 App.Cas. at p. 114; *London and County Bank* v. *London and River Plate Bank*, 21 Q.B.D. 535; 57 L.J. Q.B. 601; cp. *London Joint Stock Bank* v. *Simmons*, (1892) A.C. 201; 61 L.J. Ch. 723; *Lloyd's Bank* v. *Cooke*, (1907) 1 K.B. 794; 76 L.J. K.B. 666.

(*h*) *Ib.*, s. 29 (2).

(*i*) *Ib.*, s. 29 (3); *May* v. *Chapman*, 16 M. & W. at p. 361; *Masters* v. *Ibberson*, 8 C.B. 100; 18 L.J. C.P. 348. By sect. 30, every signing party is presumed to have given value, and every holder a holder in due course until the contrary is shown, when the burden of proof is shifted, unless the holder proves that subsequently to the alleged defect value has in good faith been given for the bill.

receives it without notice of the theft, the latter has full authority to negotiate the bill or sue upon it(*k*). Every person having possession of a bill of exchange has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill, but with this limitation, that to make such transfer valid there must be a delivery, either by him or some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it or a person through whom the holder claims (*l*).

Rights of holder.—The rights and powers of the holder of a bill are as follows:—(1.) He may sue on the bill in his own name (*m*); (2.) Where he is a holder in due course (*n*), he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill (*o*); (3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill (*p*).

When holder bound to prove he gave value for bill.—When a bill of exchange is made payable to order, and is indorsed generally by the drawer, the indorsement is, as we have seen, tantamount to an order to pay the bill to the bearer or holder, so that the mere production of such a bill by a party in possession of it is *primâ facie* evidence that he is a *bonâ fide* indorsee and holder of the bill; but this presumption of ownership and title arising from possession may be rebutted by proof that the bill had been lost by, or improperly obtained from, the owner (*q*), or that the acceptance is a forgery (*r*); and such evidence, if given, throws upon the holder the *onus* of proving that he gave value for the bill.

(*k*) *Peacock* v. *Rhodes*, 2 Doug. 634; *Raphael* v. *Bank of England*, 17 C.B. 173; 25 L.J. C.P. 33.

(*l*) Alderson, B., *Marston* v. *Allen*, 8 M. & W. 494; 11 L.J. Ex. 126; *Watson* v. *Russell*, 3 B. & S. 34; 31 L.J. Q.B. 304. See sect. 29 of the Act, *ante*, p. 1255.

(*m*) See R. S. C., Ord. XVI., r. 5; and as to inferior Courts, 18 & 19 Vict. c. 67, s. 6; *Jones* v. *Broadhurst*, 9 C.B. 173; *Agra Bank* v. *Leighton*, L.R. 2 Ex. 56, at pp. 63—66; 36 L.J. Ex. 33; *Law* v. *Parnell*, 7 C.B. N.S. 282; 29 L.J. C.P. 17; *Thornton* v. *Maynard*, L.R. 10 C.P. 695; 44 L.J. C.P. 382; *Davis* v. *Reilly*, (1898) 1 Q.B. 1; 66 L.J. Q.B. 844; followed in *Debtor, In re*, (1908) 1 K.B. 344, 349; 77 L.J. K.B. 409.

(*n*) This section must be read in connection with sect. 29, *ante*, p. 1255.

(*o*) See *Crouch* v. *Crédit Foncier of England*, L.R. 8 Q.B. at pp. 380—382; 42 L.J. Q.B. 183.

(*p*) 45 & 46 Vict. c. 61, s. 38; *Marston* v. *Allen*, 8 M. & W. at p. 504; 11 L.J. Ex. 126. See this section in Addison on Torts, 540 (ed. 7).

(*q*) *Bulkeley* v. *Butler*, 2 B. & C. 446.

(*r*) *Mather* v. *Maidstone* (*Ld.*), 26 L.J. C.P. 58; 1 C.B. N.S. 273.

Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value (*s*). Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved (*t*) that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (*u*).

Wherever the bill is proved to have been illegal or fraudulent in its inception, or where the immediate indorser to the plaintiff is shown to have obtained possession of it by fraud, the plaintiff may be called upon for proof that he gave value for the bill, and took it without notice of the illegality or fraud; and, if such proof is not forthcoming, the plaintiff may be prevented from recovering upon the instrument (*x*).

What is valuable consideration.—By the Bills of Exchange Act, 1882, sect. 27, "(1.) Valuable consideration for a bill may be constituted by,—(a) Any consideration sufficient to support a simple contract (*y*); (b) An antecedent debt or liability, and such a debt or liability is deemed valuable (*z*) consideration whether the bill is payable on demand or at a future time (*a*). Where value (*b*) has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and

(*s*) 45 & 46 Vict. c. 61, s. 30 (1). See this section in Addison on Torts, 540 (ed. 7).

(*t*) The words "if it is admitted or proved" in sub-sect. 2 mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury; the onus then lies upon the plaintiff to prove that he acted in good faith, which by sect. 90 is interpreted to mean that the thing done was in fact done honestly, whether negligently or not: *Tatham* v. *Haslar*, 23 Q.B.D. 345; 58 L.J. Q.B. 432; *London and County Bank* v. *London and River Plate Bank*, 21 Q.B.D. 535; 57 L.J. Q.B. 601.

(*u*) 45 & 46 Vict. c. 61, s. 30 (2). As to forgery of signature, see sect. 24, *infra*, p. 1259.

(*x*) *Hall* v. *Featherstone*, 3 H. & N. 284; 27 L.J. Ex. 308; *Mather* v. *Maidstone* (*Ld.*), 1 C.B. N.S. 273; 26 L.J. C.P. 58; *Smith* v. *Braine*, 16 Q.B. 244; 20 L.J. Q.B. 201; *Berry* v. *Alderman*, 14 C.B. 95; 23 L.J. C.P. 34; *Harvey* v. *Towers*, 6 Exch. 656; 20 L.J. Ex. 318; *Paterson* v. *Hardacre*, 4 Taunt. 114; *Hogg* v. *Skeen*, 18 C.B. N.S. 426; 34 L.J. C.P. 153; *Fitch* v. *Jones*, 5 E. & B. 245; 24 L.J. Q.B. 293.

(*y*) *Richdale*, *Ex parte*, 19 Ch.D. 409; 51 L.J. Ch. 462; *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715; 64 L.J. Q.B. 99; *Rose* v. *Sims*, 1 B. & Ad. 521, at p. 526; 9 L.J. (O.S.) K.B. 85; *Balfour* v. *Sea Assur. Co.*, 3 C.B. N.S. 300; 27 L.J. C.P. 17; *Crears* v. *Hunter*, 19 Q.B.D. 341; 56 L.J. Q.B. 518; *Martingell*, *Ex parte*, *Browne*, *In re*, (1904) 2 K.B. 133; 73 L.J. K.B. 446; cp. *Hyams* v. *Stuart King*, (1908) 2 K.B. 696; 77 L.J. K.B. 794.

(*z*) Valuable consideration has been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other": *per* Lush, J., *Currie* v. *Misa*, L.R. 10 Ex. at p. 162; 44 L.J. Ex. 94; and cp. *per* Bowen, L.J., *Carlill* v. *Carbolic Co.*, (1893) 1 Q.B. at pp. 271, 272; 62 L.J. Q.B. at p. 264.

(*a*) 45 & 46 Vict. c. 61, s. 27 (1); *Poirier* v. *Morris*, 2 E. & B. 89; 22 L.J. Q.B. 313; *Currie* v. *Misa*, L.R. 10 Ex. 153; 44 L.J. Ex. 94; approved in *Fleming* v. *Bank of New Zealand*, (1900) A.C. 577, at p. 586; 69 L.J. P.C. 120.

(*b*) "Value" means "valuable consideration": sect. 2.

all parties to the bill who became parties prior to such time (*c*). Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien" (*d*). A banker's lien on negotiable securities is "an implied pledge" (*e*). a banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer (*f*). If the banker knows that the bills do not belong to his customer no lien can attach (*g*).

Proof of want of consideration.—A bill or note, given in consideration of what is supposed to be a debt, is without consideration, if it appears that there was either a mistake in law (*h*) or in fact (*i*) as to the existence of the debt, and there has been no indorsement or transfer of the instrument for value.

Fraudulent transfers and indorsements.—If the acceptance or indorsement has been fraudulently made, and the plaintiff is a party to the fraud, or takes the bill with full knowledge of the fraud and of the infirmity of the title of his assignor, he cannot, as we have seen (*k*), sue upon the bill, although he has given full value for it; but an innocent indorsee, who has received the bill, and given value for it, without notice of the fraud, may, it seems, transfer his title and right of action to a person who has knowledge of the original fraud, but is no party thereto. The latter may purchase the title and interest of the innocent indorsee, and so obtain a right of action upon the instrument (*l*). If a person holds the bill for a specific purpose, as for the benefit of the drawer or acceptor, and indorses the bill over in breach of the trust reposed in him, the indorsee cannot, if he has notice of the trust at the time of the indorsement, acquire any better right or title to the bill than the indorser had; for by taking the bill under such circumstances he makes himself a party to a fraud (*m*). If the holder is a mere agent, he will be affected with the infirmity of the title of his principal, and cannot have a better right upon the bill than his principal

(*c*) 45 & 46 Vict. c. 61, s. 27 (2); *Hunter* v. *Wilson*, 4 Exch. 489; 19 L.J. Ex. 8; *Watson* v. *Russell*, 3 B. & S. 34; 31 L.J. Q.B. 304; cp. *Comber* v. *Leyland*, (1898) A.C. 524, at pp. 530, 531; 67 L.J. Q.B. 884.

(*d*) *Ib.*, s. 27 (3); *Newton*, *Ex parte*, 16 Ch.D. 330; 50 L.J. Ch. 484.

(*e*) *Brandao* v. *Barnett*, 3 C.B. at p. 531.

(*f*) *Ib.*, *London Chartered Bank of Australasia* v. *White*, 4 App.Cas. 413; 48 L.J. P.C. 75.

(*g*) *Kingston*, *Ex parte*, L.R. 6 Ch. 632; 40 L.J. Bankr. 91.

(*h*) *Southall* v. *Rigg*, 11 C.B. 481; 20 L.J. C.P. 145.

(*i*) *Bell* v. *Gardiner*, 4 M. & Gr. 11; 11 L.J. C.P. 195. But see *Cook* v. *Wright*, 30 L.J. Q.B. 321; 1 B. & S. 559, *ante*, p. 11.

(*k*) Sects. 29, 30, *ante*, pp. 1255, 1257.

(*l*) *May* v. *Chapman*, 16 M. & W. 355, 360.

(*m*) *Evans* v. *Kymer*, 1 B. & Ad. 528 9 L.J. (O.S.) K.B. 92.

has (*n*). If a bill obtained by fraud is handed over, without indorsement, to an innocent holder for value, and the indorsement is not made until after the holder becomes cognizant of the fraud, he cannot sue upon the bill (*o*). If the party at the time of signing the bill is, without negligence on his part, misled as to the nature and contents of the document which he is signing, his signature will be of no force; for his mind does not go with the signature, and it is in the view of the law no signature at all, and a *bonâ fide* holder for value cannot recover against a person who has signed under such circumstances (*p*).

Forged indorsement.—When a bill payable to order on demand is drawn on a banker (*q*), and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course (*r*), although such indorsement has been forged or made without authority (*s*). This section constitutes an exception to sect. 24 of the Bills of Exchange Act, 1882 (*t*), which provides that:—"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority; provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery." Sect. 60 does not protect the banker when the drawer's signature has been forged (*u*).

(*n*) *Solomons* v. *Bank of England*, 13 East, 136.

(*o*) *Whistler* v. *Forster*, 14 C.B. N.S. 255; 32 L.J. C.P. 161.

(*p*) *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*q*) "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking: sect. 2.

(*r*) As to payment in due course, see sect. 59 (1), *ante*, p. 1250.

(*s*) 45 & 46 Vict. c. 61, s. 60; *Charles* v. *Blackwell*, 2 C.P.D. 151; 46 L.J. C.P. 368; cp. *Bissell* v. *Fox*, 53 L.T. 193; *Smith* v. *Union Bank of London*, L.R. 10 Q.B. 291, at p. 296; 44 L.J. Q.B. 117; 1 Q.B.D. 31; 45 L.J. Q.B. 149. A banker's draft by one branch of a bank on another is not within this section: *Gordon* v. *London, City and Midland Bank*, (1902) 1 K.B. 243; 71 L.J. K.B. 215.

(*t*) 45 & 46 Vict. c. 61, s. 24. See *Embiricos* v. *Anglo-Austrian Bank*, (1905) 1 K.B. 677; 74 L.J. K.B. 326. This section does not apply to indorsements abroad.

(*u*) See *Orr* v. *Union Bank*, 1 Macq. H.L. Cas. 513.

Accommodation bills.—An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person (*x*). An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not (*y*).

Where the bill has been accepted for the accommodation of the drawer without any consideration or value for the acceptance, and that was known to the indorsee at the time he took the bill, and the indorsee paid only part of the amount for which the bill was drawn, he can only recover the sum he actually paid for the bill (*z*). So, if part of the money due on the bill has been paid by the drawer, the holder can only recover the balance from the acceptor (*a*).

Indorsement of bills overdue.—Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed (*b*) or (b) discharged by payment or otherwise (*c*). Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*d*). A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact (*e*). Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue (*f*). Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course (*g*).

Whenever the bill is due at the time of the indorsement, it

(*x*) 45 & 46 Vict. c. 61, s. 28 (1).

(*y*) *Ib.*, s. 28 (2). As to accommodation bills, see further, sect. 46, *post*, p. 1269, sect. 50 (d).

(*z*) *Wiffen* v. *Roberts*, 1 Esp. 259. See sect. 38 of the Act, *ante*, p. 1256.

(*a*) *Cook* v. *Lister*, 13 C.B. N.S. 543; 32 L.J. C.P. 121.

(*b*) See sect. 35, *ante*, p. 1251.

(*c*) *Ib.*, s. 36 (1). See sects. 59–64 as to discharges, and sect. 35 (2) as to restrictive indorsements.

(*d*) *Ib.*, s. 36 (2). *Lloyd* v. *Howard*, 15 Q.B. 995; 20 L.J. Q.B. 1; *Holmes* v. *Kidd*, 3 H. & N. 801; 28 L.J. Ex. 112; see *Alcock* v. *Smith*, (1892) 1 Ch. 238; 61 L.J. Ch. 161.

(*e*) *Ib.*, s. 36 (3); sub-sect. (3) effects an alteration in the law. See *Serrel* v. *Derbyshire Ry. Co.*, 9 C.B. 811; 19 L.J. C.P. 371; *Hughes, Ex parte*, 43 L.T. 577.

(*f*) *Ib.*, s. 36 (4).

(*g*) *Ib.*, s. 36 (5). See sect. 29, *ante* p. 1255.

comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the infirmities with which it may be incumbered in his hands (*h*). But the indorsee does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties (*i*). Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand (*k*).

Presentment for acceptance.—The acceptance (*l*) of a bill is the signification by the drawee of his assent to the order of the drawer (*m*). An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money (*n*). "A bill may be accepted—(1.) Before it has been signed by the drawer, or while otherwise incomplete: (2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment: (3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance" (*o*). A document which is a complete bill of exchange in all respects except that of the signature of the drawer, is, when in the hands of the intended drawer, a bill of exchange (*p*).

General and qualified acceptances.—An acceptance is either (a) general or (b) qualified (*q*). A general acceptance assents

(*h*) *Crossley* v. *Ham*, 13 East, 503; *Burrough* v. *Moss*, 10 B. & C. 558; *Lloyd* v. *Howard*, 15 Q.B. 995; 20 L.J. Q.B. 1; *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L.J. Ex. 112; *Goggerley* v. *Cuthbert*, 2 B. & P. N.R. 170.

(*i*) *Oulds* v. *Harrison*, 10 Exch. 579; 24 L.J. Ex. 69; *Overend, Gurney & Co., In re, Swan, Ex parte*, L.R. 6 Eq. 358. See also *Charles* v. *Marsden*, 1 Taunt. 224; *Sturtevant* v. *Ford*, 4 M. & Gr. 101; 11 L.J. C.P. 245; *Lazarus* v. *Cowie*, 3 Q.B. 459; 11 L.J. Q.B. 310; *Parr* v. *Jewell*, 16 C.B. 684; *Carruthers* v. *West*, 17 L.J. Q.B. 4; 11 Q.B. 143. But see *Parr* v. *Jewell*, 16 C.B. 684, and sects. 29 (2) and 36 of the Act, pp. 1255, 1260, *ante*; *Deuters* v. *Townsend*, 5 B. & S. 613; 33 L.J. Q.B. 301.

(*k*) 45 & 46 Vict. c. 61, s. 10 (2).

(*l*) "Acceptance" means an acceptance completed by delivery or notification: sect. 2.

(*m*) *Ib.*, s. 17 (1); *Okell* v. *Charles*, 34 L.T. 822.

(*n*) *Ib.*, s. 17 (2); *Young* v. *Glover*, 3 Jur. N.S. 637; *Jeune* v. *Ward*, 1 B. & Ald. at p. 660.

(*o*) *Ib.*, s. 18; sub-sect. (3) effects an alteration in the law.

(*p*) *Reg.* v. *Bowerman*, (1891), 1 Q.B. 112; 60 L.J. M C. 13.

(*q*) 45 & 46 Vict. c. 61, s. 19 (1).

without qualification to the order of the drawer (*r*). A qualified acceptance in express terms varies the effect of the bill as drawn (*r*). In particular an acceptance is qualified which is—(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated: (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn: (c) local, that is to say, an acceptance to pay only at a particular specified place: An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere: (d) qualified as to time: (e) the acceptance of some one or more of the drawees, but not of all (*r*).

When presentment for acceptance is necessary.—Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument (*s*). Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment (*t*). In no other case is presentment for acceptance necessary in order to render liable any party to the bill (*u*). Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (*x*). Subject to the provisions of the Bills of Exchange Act, 1882 (*y*), when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time (*z*). If he do not do so, the drawer and all indorsers prior to that holder are discharged (*a*). In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usages of trade with respect to similar bills, and the facts of the particular case (*b*).

Rules as to presentment for acceptance.—A bill is duly presented for acceptance which is presented in accordance with the following rules:—(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized

(*r*) 45 & 46 Vict. c. 61, s. 19 (2).
(*s*) *Ib.*, s. 39 (1).
(*t*) *Ib.*, s. 39 (2).
(*u*) *Ib.*, s. 39 (3).
(*x*) *Ib.*, s. 39 (4).
(*y*) 45 & 46 Vict. c. 61.
(*z*) *Ib.*, s. 40 (1).
(*a*) *Ib.*, s. 40 (2).
(*b*) *Ib.*, s. 40 (3).

to accept or refuse acceptance on his behalf at a reasonable hour (*c*) on a business day and before the bill is overdue: (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only (*d*): (c) Where the drawee is dead presentment may be made to his personal representative: (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee: (e) Where authorized by agreement or usage, a presentment through the post office is sufficient (*e*).

Excuses for non-presentment for acceptance.—Presentment in accordance with the preceding rules is excused, and a bill may be treated as dishonoured by non-acceptance—(a) Where the drawee is dead or bankrupt, or is a fictitious (*f*) person, or a person not having capacity to contract by bill: (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected: (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground (*g*). The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (*h*).

Non-acceptance after customary time for consideration.—When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance (*i*). If he do not, the holder shall lose his right of recourse against the drawer and indorsers (*i*). A bill is dishonoured by non-acceptance—(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by the Bills of Exchange Act, 1882, is refused or cannot be obtained; or (b) when presentment for acceptance is excused and the bill is not accepted (*k*). Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (*l*).

Qualified acceptances.—By sect. 44 (1) of the Bills of

(*c*) "Reasonable hour" in the case of a trader means business hours, and in the case of a banker banking hours. See *Parker* v. *Gordon*, 7 East, 385.

(*d*) By s. 19 (2) an acceptance which is not the acceptance of all the drawees is a qualified acceptance. As to the consequences of a qualified acceptance see sect. 44.

(*e*) *Ib.*, s. 41 (1).

(*f*) As to the meaning of fictitious person see *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145; *Vinden* v. *Hughes*, (1905) 1 K.B. 795; 74 L.J. K.B. 710; *North & South Wales Bank* v. *Macbeth* (1908) A.C. 137; 77 L.J. K.B. 464.

(*g*) *Ib.*, s. 41 (2); sub-sect. (2) effects an alteration in the law.

(*h*) *Ib.*, s. 41 (3).

(*i*) *Ib.*, s. 42.

(*k*) *Ib.*, s. 43 (1).

(*l*) *Ib.*, s. 43 (2).

Exchange Act, 1882, (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance. (2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill. The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance (*m*). (3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto."

If the holder accepts the qualified acceptance, he must give notice of the nature of the acceptance to the prior parties (*n*). When the bill is payable a certain number of days after sight, it is to be accounted so many days after the bill shall be accepted or protested for non-acceptance (*o*). If no time at all is stated upon the face of the bill (*p*), or if it is payable at sight or on presentation, the instrument will be payable on demand (*q*).

The acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto (*r*). If the drawee, after he has put his name to the bill, and before he has parted with the possession of it or notified his acceptance, changes his mind, and runs his pen through the signature, the acceptance is cancelled, and he cannot be made liable upon the bill (*s*).

Liability of the acceptor—Failure of consideration.—"The acceptor of a bill, by accepting it—(1.) Engages that he will pay it according to the tenor of his acceptance: (2.) Is precluded from denying to a holder in due course: (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity

(*m*) 45 & 46 Vict. c. 61, sect. 44; subsect. (2) effects an alteration in the law.

(*n*) *Rowe* v. *Young*, 2 B. & B. 165, 210. See now sect. 44, *ante*, p. 1263, "Dishonour."

(*o*) *Campbell* v. *French*, 6 T.R. 212. See sect. 14, *post*, p. 1271.

(*p*) *Abbott* v. *Douglas*, 1 C.B. 491; 14 L.J. C.P. 202.

(*q*) Sect. 10, *ante*, p. 1244.

(*r*) See *ib.*, s. 17 (2), *ante*, p. 1261.

(*s*) *Cox* v. *Troy*, 5 B. & Ald. 474. Sect. 21, *ante*, p. 1252.

to indorse, but not the genuineness or validity of his indorsement (*t*).

As between the acceptor and the drawer of a bill, failure of consideration is an answer to an action for the amount of the bill, so that, if a person purchases a bill payable at the end of three months for goods or money to be delivered to the acceptor at the end of one month, and the goods or the money are not delivered, the acceptor is not liable upon the bill, unless it was indorsed before it became due to a *bonâ fide* holder for value (*u*). When the bill has been negotiated the acceptor, except in case of a qualified acceptance (*x*), is bound to pay the bill at maturity, and to find out the holder for that purpose. He is not entitled to any presentment or formal demand of payment; and a request in the shape of the issue of a writ is the only request that need be made to him by the indorsee, although the bill be made payable on demand (*y*). A person who has accepted a bill of exchange cannot escape from liability to a *bonâ fide* indorsee by setting up a forgery of the name of the drawer (*z*). "The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge, *pro tanto*, in his account with the drawer, and to one who should refuse or be unable to deliver up the bill, the acceptor is not bound," without an indemnity, "to pay the sum therein specified" (*a*).

An acceptance of a bill of exchange can only be made by the party to whom the bill is addressed, or for his honour. An acceptance by any other person is not an acceptance within the usage and custom of merchants (*b*). Persons may, as we have before seen, draw, accept, or indorse bills in assumed or adopted names, and render themselves responsible upon the instrument by so doing (*c*); but, if the name of a party appearing on the face of a bill as drawer or indorser has been placed there without his authority, he cannot, of course, be made responsible upon the instrument, but the indorsee or holder must proceed against his own immediate indorsee, or the party from whom he got the bill. If the name of a party is mis-

(*t*) 45 & 46 Vict. c. 61, s. 54.

(*u*) *Astley* v. *Johnson*, 5 H. & N. 137; 29 L.J. Ex. 161; *Puget de Bras* v. *Forbes*, 1 Esp. 117.

(*x*) Sect. 52 (2), *post*, p. 1270.

(*y*) *Rumball* v. *Ball*, 10 Mod. 38. Sect. 52 (1), *post*, p. 1270.

(*z*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 295; 25 L.J. C.P. 311. Sect. 54 (2) (a), *supra*.

(*a*) *Ramuz* v. *Crowe*, 1 Exch. 173; 16 L.J. Ex. 280. See sect. 52 (4), *post*, p. 1270.

(*b*) *Davis* v. *Clarke*, 6 Q.B. 19; 13 L.J. Q.B. 305; *Fielder* v. *Marshall*, 30 L.J. C.P. 158; 9 C.B. N.S. 606; but see *Lindus* v. *Bradwell*, 5 C.B. 583; 17 L.J. C.P. 123. See sect. 23 (1), *post*, p. 1301.

(*c*) *Jenkins* v. *Morris*, 16 M. & W. 881.

spelled, oral evidence is admissible to show who was intended (*d*). The acceptor cannot set up, as a defence to an action by an indorsee, that the drawer and first indorser was an uncertificated bankrupt at the time the acceptance was given. If he accepts the bill of a bankrupt, he is responsible to every *bonâ fide* holder (*e*). The acceptor is liable to indemnify any indorser who may pay the bill (*f*).

Liability of drawer and indorser.—By the Bills of Exchange Act, 1882, sect. 55, "(1.) The drawer of a bill by drawing it—(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (2.) The indorser of a bill by indorsing it—(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (*g*); (b) is precluded from denying to a holder in due course (*h*) the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

Every person who draws or indorses a bill of exchange impliedly enters into a conditional contract to pay the amount of the bill to the payee or his assignee, if the acceptor does not pay the amount, unless he indorsed as agent for the plaintiff for the accommodation of the latter, and without value (*i*). When a bill is dishonoured, it is generally thrown back upon the first indorser, each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser. They may arrange the matter amongst themselves; and any one indorser may sue the acceptor or drawer

(*d*) *Willis* v. *Barrett*, 2 Stark. 29. Sect. 32 (4), *ante*, p. 1247.

(*e*) *Braithwaite* v. *Gardiner*, 8 Q.B. 473; 15 L.J. Q.B. 187; *Halifax* v. *Lyle*, 8 Exch. 453; 18 L.J. Ex. 197. Sect. 54 (2), *ante*, p. 1264.

(*f*) *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355. Sect. 57 (1), *post*, p. 1298.

(*g*) *Jenkins* v. *Comber*, (1898) 2 Q.B. 168; 67 L.J. Q.B. 780.

(*h*) See sect. 29, *ante*, p. 1255.

(*i*) *Castrique* v. *Buttigieg*, 10 Moore, P.C. 109.

instead of any one of the preceding indorsers, striking out all the names upon the bill below his own (*k*). But, as the liability of the drawer and indorsers is a secondary and conditional liability, accruing only in default of payment by the acceptor, there must be proof of a regular presentment of the bill to the latter after it became due, and non-payment of the amount, termed a dishonour of the bill, and notice of such presentment and dishonour to the drawer or indorser, before the absolute liability of the latter upon the instrument can attach. Where the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was guilty of no negligence in so signing it, it was held that he was not liable to a *bonâ fide* holder for value (*l*). The indorser is in a position of secondary liability or *quasi* suretyship for the payment of a bill; and when the indorser has paid the bill he is entitled to any securities which may have been deposited by the acceptor with the holder (*m*).

Giving time for payment.—The parties whose names appear upon the face of the bill are liable as principals and sureties, in the order in which they stand; and the rule that a release or discharge, or time given for payment to the principal, operates as a release or discharge to the surety, is applicable to such instruments. By giving time, therefore, to the acceptor, the drawer and indorsers will be discharged (*n*). But a binding agreement with a person who is no party to the bill, to give time to the acceptor, without the consent of the drawer, does not discharge the drawer (*o*). As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties; but, as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties; and, as between the holder and second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties,

(*k*) *Walwyn* v. *St. Quintin*, 1 Bos. & P. 658.

(*l*) *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*m*) *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355.

(*n*) *English* v. *Darley*, 2 Bos. & P. 61; *Moss* v. *Hall*, 5 Exch. 49; 19 L.J. Ex. 205; *Davies* v. *Stainbank*, 6 De G. M. & G. 679; *Greenough* v. *McClelland*, 2 E. & E. 429; 30 L.J. Q.B. 15; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 799; 31 L.J. C.P. 143; *ante*, p. 1093.

(*o*) *Frazer* v. *Jordan*, 8 E. & B. 308; 26 L.J. Q.B. 288.

the sureties, is not a discharge to the prior parties, the principals (*p*).

Presentment for payment.—Section 45 of the Bills of Exchange Act, 1882, enacts that, "Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged. A bill is duly presented for payment which is presented in accordance with the following rules:—(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due. (2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case. (3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found. (4.) A bill is presented at the proper place:—(a) Where a place of payment is specified in the bill and the bill is there presented; (b) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented; (c) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known; (d) in any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence. (5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required. (6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all. (7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found. (8.) When authorized by

(*p*) Byles, 325 (ed. 16); *ante*, pp. 1093, 1094.

agreement or usage, a presentment through the post office is sufficient."

The holder is to present promptly, and to communicate without delay notice of non-payment or of the insolvency of the acceptor; for a party is not only entitled to knowledge of insolvency, but to notice that, in consequence of such insolvency, he will be called upon to pay the amount of the bill (*q*). If the acceptor accepts, payable at a banker's, he undertakes (*r*) to pay the bill at maturity, when presented for payment either to himself or at the banker's; if he accepts payable at a banker's, and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise (*s*). If the banker at whose bank the bill is payable is the holder of the bill at the time of its maturity, there is a sufficient presentment. If the bill is made payable at a particular town, and the holder goes there with the bill, and makes inquiry for the party to whom it is to be presented, and the latter is not to be found, this is a sufficient presentment at the place indicated (*t*). If the bill is made payable at a particular house, presentment to an inmate may suffice (*u*); or, if the house be shut up, at the house door (*x*); and, if two places be named, the holder has the option to present it at either (*y*). "A presentment according to the directions of a forged acceptance cannot be a good presentment as against the drawer" (*z*). The mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque does not make the cheque payable at the place so indicated; and non-payment there on presentment is not necessarily a dishonour (*a*).

Non-presentment for payment when excused.—Section 46 of the Bills of Exchange Act, 1882, enacts that "(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (2.) Presentment for payment is dispensed with,—(a) Where, after the exercise of reasonable diligence presentment, as required (*b*) by this Act, cannot be

(*q*) *Camidge* v. *Allenby*, 6 B. & C. 383; 5 L.J. (O.S.) K.B. 95.

(*r*) Sect. 19 (2), *ante*, p. 1262.

(*s*) *Halstead* v. *Skelton*, 5 Q.B. 93; 13 L.J. Q B. 117.

(*t*) *Hardy* v. *Woodroffe*, 2 Stark. 319. Sect. 46 (2), *post*.

(*u*) *Buxton* v. *Jones*, 1 M. & Gr. 83.

(*x*) *Hine* v. *Allely*, 4 B. & Ad. 624; 2 L.J. K.B. 105.

(*y*) *Beeching* v. *Gower*, Holt, N.P. 314.

(*z*) *Wetton* v. *Hodd*, 18 Jur. 630.

(*a*) *Bailey* v. *Bodenham*, 16 C.B. N.S. 288; 33 L.J. C.P. 252.

(*b*) See 45 & 46 Vict. c. 61, s. 45.

effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment (*c*); (b) where the drawee is a fictitious (*d*) person (*e*); (c) as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented; (d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented; (e) by waiver of presentment, express or implied."

By sect. 52, "(1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. (2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (*f*). (3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour shall be given to him (*g*). (4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it."

If the acceptor absconds, or shuts up his house and cannot be found, presentment is excused, because it cannot be made, and the bill may be treated as a dishonoured bill; but, if the acceptor has merely removed to a different residence, and can be discovered, the bill must be presented in the regular way (*h*). If the bill is a mere accommodation bill, and the acceptor had no effects of the drawer's in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honoured by the acceptor, presentment to the latter is excused as against the drawer, as the latter cannot have been prejudiced by the want of presentment; for, "if the bill was presented and paid by the drawee, the drawer would become indebted to him in the

(*c*) *Boyse, In re*, 33 Ch.D. 612, 623; 56 L.J. Ch. 135; *Sands* v. *Clarke*, 8 C.B. 759; 19 L.J. C.P. 87. But see *Turner* v. *Stones*, 12 L.J. Q.B. 303; 1 D. & L. 122; *Robson* v. *Oliver*, 16 L.J. Q.B. 437; 10 Q.B. 734; *East of England Banking Co., In re*, L.R. 4 Ch. 18; 38 L.J. Ch. 121.

(*d*) As to the meaning of fictitious person, see *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145; *Vinden* v. *Hughes*, (1905), 1 K.B. 795; 74 L.J. K.B. 710: *North and South Wales Bank* v. *Macbeth*, (1908) A.C. 137; 77 L.J. K.B. 464.

(*e*) As to a "fictitious person," see *Vagliano* v. *Bank of England*, *ante*, p. 1244.

(*f*) *Smith* v. *Vertue*, 30 L.J. C.P. 56; 9 C.B. N.S. 214.

(*g*) *Treacher* v. *Hinton*, 4 B. & Ald. 413.

(*h*) *Collins* v. *Butler*, 2 Str. 1087.

amount, instead of being indebted to the holder of the bill" (*i*). "But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He (the indorser) is in the nature of a surety or guarantee of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawer and drawee" (*k*). His liability, therefore, upon the bill does not arise until presentment has been duly made, and he has received notice of dishonour.

Days of grace—Calculation of time.—"Where a bill is not payable on demand the day on which it falls due is determined as follows: (1.) Three days (*l*), called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (*m*): Provided that—(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day (*n*); (b) when the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day (*o*). (2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. (3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery. (4.) The term 'month' in a bill means calendar month" (*p*).

Presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge

(*i*) *Terry* v. *Parker*, 6 Ad. & E. 507; 6 L.J. Q.B. 249. See *Bethell, In re*, 34 Ch.D. 561; 56 L.J. Ch. 334; and sect. 46 (2) (c), *ante*, p. 1270.

(*k*) *Carter* v. *Flower*, 16 L.J. Ex. 202; 16 M. & W. 743.

(*l*) By s. 92, where the time limited for doing any act or thing is less than three days, in reckoning time, the following days are excluded:—Sunday, Good Friday, Christmas Day, bank holidays, days appointed by royal proclamation as public fast or thanksgiving days.

(*m*) *Kennedy* v. *Thomas*, (1894) 2 Q.B. 759; 63 L.J. Q.B. 761.

(*n*) As to the term "business day," see sect. 92. It excludes both statutory and common law holidays.

(*o*) The above provision effects some alteration in the law.

(*p*) 45 & 46 Vict. c. 61, s. 14.

the antecedent parties (*q*). A note dated the 31st January is payable "without grace" one month after date. It is due on February 28. A note for 280*l.* is made payable by two equal instalments, on January 1st and February 1st. The instalments fall due on January 4th and February 4th (*r*). Where a bill is dishonoured by non-payment on the last day of grace, no right of action arises till the next day (*s*). Foreign bills are sometimes drawn payable at one or more usances. Usance is the common period, fixed by the usage or habit of dealing between the country where the bill is drawn, and that where it is payable, for the payment of bills. As this usage or custom is different in different countries, it follows that the same phrase imports different periods of time, according to the country in which the bill is drawn. It sometimes means a month, sometimes two or more months, sometimes half a month. Moreover, bills may be drawn payable at usance, at half usance, or at double or treble usance. Where usance is a month, half usance means fifteen days. The existence of a usance will not be judicially noticed. It must be proved (*t*).

Notice of dishonour.—A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid (*u*). Subject to the provisions of the Bills of Exchange Act, 1882, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder (*x*).

Subject to the provisions of the Bills of Exchange Act, 1882 (*y*), when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; provided that—(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission. (2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted (*z*).

(*q*) Byles, 283 (ed. 17); *Tassell* v. *Lewis*, 1 Ld. Raym. 743. Sect. 14 (1), *ante*, p. 1271.

(*r*) *Oridge* v. *Sherborne*, 11 M. & W. 374; 12 L.J. Ex. 313. See also *Smith* v. *Kendall*, 6 T.R. 123.

(*s*) *Kennedy* v. *Thomas*, (1894) 2 Q.B. 759; 63 L.J. Q.B. 761.

(*t*) Mozeley & Whiteley's Law Dict. 466. See a table of "usances" given by *Nouguier* (ed. 1875), sect. 144.

(*u*) 45 & 46 Vict. c. 61, s. 47 (1).

(*x*) *Ib.*, s. 47 (2). *Kennedy* v. *Thomas*, *supra*.

(*y*) For provisions referred to, see sect. 50, excuses for non-notice and delay.

(*z*) 45 & 46 Vict. c. 61, s. 48. See

Rules as to notice of dishonour.—By sect. 49 of the Bills of Exchange Act, 1882, "Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill (*a*). (2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not (*b*). (3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given. (4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given. (5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment (*c*). (6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour (*d*). (7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby (*e*). (8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf. (9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be

Ceylon Coaling Co. v. *Goodrich*, (1904) P. 319; 73 L.J. P. 104.

(*a*) See *Chapman* v. *Keane*, 3 Ad. & E. 193; 4 L.J. K.B. 185.

(*b*) *Stewart* v. *Kennett*, 2 Campb. 177; *Harrison* v. *Ruscoe*, 15 M. & W. 231; 15 L.J. Ex. 110; *Berridge* v. *Fitzgerald*, L.R. 4 Q.B. 639; 38 L.J. Q.B. 335; *Phillips* v. *Gould*, 8 C. & P. 355; *Hartley* v. *Case*, 4 B. & C. 339; 3 L.J. (O.S.) K.B. 262; *Lewis* v. *Gompertz*, 6 M. & W. 403; 9 L.J. Ex. 182; *East* v. *Smith*, 16 L.J. Q.B. 295; *Carter* v. *Flower*, 16 M. & W. 743; 16 L.J. Ex. 201; *Chard* v. *Fox*, 14 Q.B. 201; *Everard* v. *Watson*, 22 L.J. Q.B. 222; 1 E. & B. 801; *Caunt* v. *Thompson*, 7 C.B. 411; 18 L.J. C.P. 128; *Metcalfe* v. *Richardson*, 11 C.B. 1011; *Maxwell* v. *Brain*, 10 Jur. N.S. 777.

(*c*) *Caunt* v. *Thompson*, 18 L.J. C.P. at p. 127; 7 C.B. 411; *Shelton* v. *Braithwaite*, 7 M. & W. 436; *Everard* v. *Watson*, 1 E. & B. at p. 804; 22 L.J. Q.B. 222. The notice need not expressly state that the bill has been presented and dishonoured (*Paul* v. *Joel*, 4 H. & N. 355; 28 L.J. Ex. 143), nor that it has been protested, if protest be necessary (*Lowenthal*, *Ex parte*, L.R. 9 Ch. 591; 43 L.J. Bankr. 83).

(*d*) Sub-sect. (6) effected an alteration in the law.

(*e*) *Houlditch* v. *Cauty*, 4 Bing. N.C. 411 at p. 419; 7 L.J. C.P. 217; and see *Metcalfe* v. *Richardson*, 11 C.B. 1011, as to verbal notice.

found. (10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee. (11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others. (12.) The notice may be given as soon as the bill is dishonoured (*f*) and must be given within a reasonable time thereafter (*g*). In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—(a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill (*h*); (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day (*i*), and if there be no such post on that day then by the next post thereafter (*k*). (13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour. (15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office."

If the bill has been duly presented to the acceptor, and the days of grace have elapsed, and the bill remains unpaid, the holder should give prompt notice of the dishonour of the bill to all the other parties to the instrument against whom he intends to proceed (*l*). A plaintiff in an action on the bill need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill (*m*). When the

(*f*) *Burbridge* v. *Manners*, 3 Campb. 193; *Kennedy* v. *Thomas*, (1894) 2 Q.B. 759; 63 L.J. Q.B. 761.

(*g*) *London & River Plate Bank* v. *Bank of Liverpool*, (1896) 1 Q.B. 7; 65 L.J. Q.B. 80; *Hirschfield* v. *Smith*, L.R. 1 C.P. 340, at p. 351; 35 L.J. C.P. 177.

(*h*) *Smith* v. *Mullett*, 2 Campb. 208.

(*i*) *Williams* v. *Smith*, 2 B. & Ald. at p. 500.

(*k*) *Fielding* v. *Corry*, 67 L.J. Q.B. 7; *Ceylon Coaling Co.* v. *Goodrich*, (1904) P. 319; 73 L.J. P. 104.

(*l*) *Maltass* v. *Siddle*, 6 C.B. N.S. 501; 28 L.J. C.P. 257.

(*m*) Jervis, C.J., *Rowe* v. *Tipper*, 13 C.B. 256; 22 L.J. C.P. 135.

bill becomes payable on a Sunday, Good Friday, or Christmas Day, the notice need not be given until the day after (*n*). Where a bill of exchange was indorsed to a branch bank of a London banking-house who sent it to another branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the branch banks was to be considered an independent indorsee or holder, and each entitled to the usual notice of dishonour (*o*). Any agent in possession of the bill may give the notice; and it need not state at whose request it was given, nor who was the owner of the bill. Any persons also who pay the bill for the honour of a party thereto become, on payment, holders as upon a transfer from the person for whom they made the payment, and are entitled to avail themselves of a notice of dishonour given by any of the parties to the bill (*p*).

What amounts to notice of dishonour.—A mere demand of payment of a bill was always held not to amount to notice of dishonour (*q*); but an intimation that the bill has not been paid by the acceptor, or that it has not been paid in regular course, accompanied or unaccompanied by a demand of payment, was held to be sufficient (*r*). A mistake in the name of the person on whose behalf the notice is given will not avoid the notice, but will place the party giving it in the same situation as to the party to whom it is given as if the representation had been true, so that the defendant will have every defence against the plaintiff that he would have had if the notice had been really given by the party named (*s*). A misdescription, also, of the bill, not misleading the party receiving the notice, will not vitiate such notice (*t*). If the bill has really been dishonoured at the time the notice is given, but the party giving the notice was not himself certain of the fact at the time he gave the notice, it is no objection to the notice (*u*).

Posting the notice.—The notice of dishonour should, if possible, be communicated by the next post, if a post leaves within a few hours after information of the dishonour of the bill (*x*). The letter, when sent by post, must of course be

(*n*) Sect. 92, *ante*, p. 1271, note (*l*).
(*o*) *Clode* v. *Bayley*, 12 M. & W. 51; 13 L.J. Ex. 17.
(*p*) *Goodall* v. *Polhill*, 1 C.B. 242; 14 L.J. C.P. 146. See sect. 68, *post*, p. 1282.
(*q*) *Solarte* v. *Palmer*, 7 Bing. 530; 2 Cl. & F. 97.
(*r*) *Bailey* v. *Porter*, 14 M. & W. 44; 14 L.J. Ex. 244; *Paul* v. *Joel*, 4 H. & N. 355; 28 L.J. Ex. 143. See now s. 49 (5), p. 1273.
(*s*) Parke, B., *Harrison* v. *Ruscoe*, 15 M. & W. 236; 15 L.J. Ex. 110.
(*t*) *Bromage* v. *Vaughan*, 16 L.J. Q.B. 10; 9 Q.B. 608; *Rowlands* v. *Springett*, 14 M. & W. 7; 14 L.J. Ex. 227; *Mellersh* v. *Rippen*, 21 L.J. Ex. 221; 7 Exch. 578. Sect. 49 (7), *ante*, p. 1273.
(*u*) *Jennings* v. *Roberts*, 24 L.J. Q.B. 102; 4 E. & B. 615.
(*x*) *Darbishire* v. *Parker*, 6 East, 3. Sect. 49 (12), (15), *ante*, p. 1274.

properly directed (*y*). An action is maintainable immediately after the notice has been received by the party to whom it is addressed; and it is sufficient for the plaintiff to show that the defendant must have received it according to the usual routine of the post-office delivery prior to the issuing of the writ (*z*).

Foreign bill — Protest — Noting — Damages — Re-exchange.—By the Bills of Exchange Act, 1882, s. 51, "(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser. (2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary (*a*). (3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment. (4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. (5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (6.) A bill must be protested at the place where it is dishonoured: Provided that—(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day; (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and

(*y*) When duly addressed, the party is not answerable for miscarriage by the Post Office. Sect. 49 (15), p. 1274. Parke, B., *Woodcock* v. *Houldsworth*, 16 L.J. Ex. 49; 16 M. & W. 124; *Walter* v. *Haynes*, R. & M. 149; *Clarke* v. *Sharpe*, 3 M. & W. 166; *Burmester* v. *Barron*, 17 Q.B. 828; 21 L.J. Ex. 135; *Baker*, *Ex parte*, 4 Ch.D. 795; 46 L.J. Bankr. 60.

(*z*) *Castrique* v. *Bernabo*, 6 Q.B. 498; 14 L.J. Q.B. 3.

(*a*) Sub-sect. (2) effects an alteration in the law. See *English Bank of River Plate, In re*, (1893) 2 Ch. 438; 62 L.J. Ch. 578.

no further presentment for payment to, or demand on, the drawee is necessary. (7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—(a) The person at whose request the bill is protested; (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. (8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence."

For the purposes of the Bills of Exchange Act, 1882, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting (*b*). Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill. The form given in Schedule 1 to the Bills of Exchange Act, 1882, may be used with necessary modifications, and if used shall be sufficient (*c*).

The protest simply announces the presentment and non-acceptance or non-payment of the bill. Noting is a minute made on the bill by the officer at the time of the refusal to accept, and is the preparatory step to protest. Notice of protest and of the dishonour of a foreign bill should always be sent by the

(*b*) 45 & 46 Vict. c. 61, s. 93.

(*c*) *Ib.*, s. 94. The form is as follows :—Know all men that I. A.B. (householder), of , in the county of , in the United Kingdom, at the request of C.D., there being no notary public available, did on the day of 19 , at , demand payment [*or* acceptance] of the bill of exchange hereunder written, from E.F., to which demand he made answer (*state answer, if any*), wherefore I now, in the presence of G.H. and J.K., do protest the said bill of exchange.—Signed A.B. G.H. and J.K., witnesses. N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

first available opportunity (*d*). A bill of exchange payable in France, though drawn in England, is a foreign bill; and notice of dishonour according to French law is sufficient in an action against an indorser in England (*e*).

Proof of notice of dishonour.—A promise by the defendant, after the bill becomes due, to pay the amount thereof, or a part payment, or the offer of it, or an admission by the defendant of his liability upon the bill, is evidence that notice of dishonour was duly given (*f*), or that without such notice the defendant is the proper person to pay the bill (*g*). A promise, after the bill is due, to pay the holder the amount of the bill, operates as "an admission on the part of the defendant that the holder had a right to resort to him upon the bill;" and, "if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest or of want of notice, it is a question for the jury whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken" (*h*). If the defendant has suffered judgment by default in a prior action against him on the same bill, this is an admission by him of his liability upon the instrument, so as to dispense with proof of notice of dishonour (*i*).

Excuses for delay in giving notice of dishonour.—Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence, but when the cause of delay ceases to operate the notice must be given with reasonable diligence (*k*).

Dispensation of notice of dishonour.—Notice of dishonour is dispensed with—(a) When, after the exercise of reasonable diligence, notice as required by the Bills of Exchange Act, 1882, cannot be given to or does not reach the drawer or indorser sought to be charged (*l*); (b) By waiver express or

(*d*) *Muilman* v. *D'Eguino*, 2 H.Bl. 565. See sect. 51, *ante*, p. 1276.

(*e*) *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; 35 L.J. C.P. 177; *Horne* v. *Rouquette*, 3 Q.B.D. 514. Sect. 72 (3), *post*. As to the damages recoverable in the case of a bill dishonoured abroad, see Bills of Exchange Act, 1882, s. 57 (2), *post*, p. 1298.

(*f*) *Hicks* v. *Beaufort* (*Duke*), 4 Bing. N.C. 229; 7 L.J. C.P. 131; *Brownell* v. *Bonney*, 1 Q.B. 39; 10 L.J. Q.B. 71; *Jackson* v. *Collins*, 17 L.J. Q.B. 142.

(*g*) *Potter* v. *Rayworth*, 13 East, 418.

(*h*) *Campbell* v. *Webster*, 2 C.B. 258; 13 L.J. C.P. 4.

(*i*) *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L.J. Ex. 170.

(*k*) 45 & 46 Vict. c. 61, s. 50 (1). See *Studdy* v. *Beesty*, 60 L.T. 647; *The Elmville*, (1904) P. 319; *sub nom. Ceylon Coaling Co.* v. *Goodrich*, 63 L.J. P. 104; *Allen* v. *Edmundson*, 2 Ex. at p. 723; 17 L.J. Ex. 291.

(*l*) *Allen* v. *Edmundson*, 2 Ex. at p. 723; 17 L.J. Ex. 291; discussed *Studdy* v. *Beesty*, 60 L.T. at p. 649; *Mackay* v. *Judkens*, 1 F. & F. 208, Byles, J.; cp. s. 49 (15); *Carew* v. *Duckworth*, L.R. 4 Ex. at p. 319; 38 L.J. Ex. 149.

implied (*m*). Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice; (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person (*n*) or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment; (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person (*n*) or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation (*o*).

If the party to whom the notice is to be given absents himself from his place of business, and the holder goes or sends there, and finds no one to receive the notice, this is equivalent to a dispensation of notice, since, according to the usage of merchants, a man who puts his name to a bill ought to be ready at his place of business to receive notice of dishonour (*p*). It has been also held that notice of dishonour to the drawer had been dispensed with or waived in the following cases:—where the drawer had himself countermanded the payment of the bill (*q*); where he stated, the day before a bill became due, that it would not be paid, and that it was not worth while to trouble him with a post letter to give him notice (*r*); where his residence was unknown, and the holder could not, by the exercise of reasonable diligence and inquiry, discover it (*s*); where he had no effects at any time in the hands of the acceptor, and would have no remedy against the acceptor or any other person in consequence of his being obliged to pay the bill (*t*); where, although goods had been sold by him to the drawee, yet a long period of credit had been given, and he had drawn the

(*m*) *Phipson* v. *Kellner*, 4 Campb. 285; *Cordery* v. *Colville*, 14 C.B. N.S. 374; 32 L.J. C.P. 210; *Keith* v. *Burke*, 1 C. & F. 551; see also *Fenwick, Stobart & Co., In re*, (1902) 1 Ch. 507; 71 L.J. Ch. 321.

(*n*) See *Vagliano* v. *Bank of England*, (1891), A.C. 107, 60 L.J. Q.B. 145; *Vinden* v. *Hughes*, (1905) 1 K.B. 795; 74 L.J. K.B. 710; *North and South Wales Bank* v. *Macbeth*, (1908) A.C. 137; 77 L.J. K.B. 464.

(*o*) 45 & 46 Vict. c. 61, s. 50 (2).

(*p*) *Allen* v. *Edmundson*, 17 L.J. Ex. 291; 2 Ex. 719.

(*q*) *Hill* v. *Heap*, D. & R. N.P.C. 57.

(*r*) *Burgh* v. *Legge*, 5 M. & W. 421; 8 L.J. Ex. 258.

(*s*) *Bateman* v. *Joseph*, 2 Campb. 461; *Sharp* v. *Bailey*, 9 B. & C. 44; 7 L.J. (O.S.) K.B. 138.

(*t*) *Cory* v. *Scott*, 3 B. & Ald. 619; *Thomas* v. *Fenton*, 5 D. & L. 28; 16 L.J. Q.B. 362; *Carew* v. *Duckworth*, L.R. 4 Ex. 313; 38 L.J. Ex. 149.

bill without any reasonable expectation that it would be accepted or paid (*u*). And a waiver of notice of dishonour may be inferred from a subsequent promise to pay, or any admission of liability on the bill, by the party entitled to notice (*x*).

If the drawer draws on a person who is not his debtor, nor has received any value for the bill, the bill must be considered *primâ facie* an accommodation bill. In such a case, the drawer is himself the person who ought to provide funds and pay the bill; and he is not, consequently, entitled to notice of dishonour (*y*). But the case is otherwise where the drawer has a fluctuating balance in the hands of the drawee (*z*); for the drawer has a right to notice of dishonour, if he has effects in the hands of the acceptor at any time from the drawing of the bill till it becomes due (*a*). Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonour (*b*). The bankruptcy of the drawee or acceptor, however notorious, constitutes no excuse for an omission to give notice of dishonour (*c*): and the knowledge of the bankruptcy by the party entitled to notice is not equivalent to notice (*d*).

Transfer by delivery without indorsement.—Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery" (*e*).

A transferor by delivery is not liable on the instrument (*f*).

A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (*g*).

If a man goes into the money market with a bill of exchange, and gets it discounted without putting his name upon the back of it, and, in effect, sells the bill for what he can get for it, he is not responsible for the repayment of the money he received in exchange for it, if the parties to the bill turn out to be insolvent and the bill becomes worthless, unless he knew of

(*u*) *Claridge* v. *Dalton*, 4 M. & S. 231.

(*x*) *Woods* v. *Dean*, 3 B. & S. 101; 32 L.J. Q.B. 1; *Cordery* v. *Colville*, 14 C.B. N.S. 374; 32 L.J.C.P. 210; *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L.J. Ex. 170.

(*y*) *Bickerdyke* v. *Bollman*, 1 T. R. 405. Sect. 52 (2), p. 1270; sect. 50 (2) (c), p. 1279.

(*z*) *Blackhan* v. *Doren*, 2 Campb. 503.

(*a*) *Hammond* v. *Dufrene*, 3 Campb. 145.

(*b*) *Turner* v. *Samson*, 2 Q.B.D. 23; 46 L.J. Q.B. 167.

(*c*) *Thackray* v. *Blackett*, 3 Campb. 164.

(*d*) *Esdaile* v. *Sowerby*, 11 East, 114.

(*e*) 45 & 46 Vict. c. 61, s. 58 (1). "Delivery" means transfer of possession, actual or constructive, from one person to another: sect. 2.

(*f*) *Ib.*, s. 58 (2).

(*g*) *Ib.*, s. 58 (3).

the insolvency and the consequent worthlessness of the bill at the time he offered it for sale in the market (*h*). But, if the bill is a forgery, and is not what it purports upon the face of it to be, the transferor is bound to refund the money he received by way of discount upon the bill, as the transferee has not got what was agreed to be transferred to him in exchange for his money, and there is consequently a total failure of the consideration for the money (*i*).

Bills taken up suprà protest.—Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà protest*, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (*k*). A bill may be accepted for honour for part only of the sum for which it is drawn (*l*). An acceptance for honour *suprà protest* in order to be valid must—(a) be written on the bill, and indicate that it is an acceptance for honour: (b) be signed by the acceptor for honour (*m*).

Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (*n*). Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour (*o*). The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts (*p*). The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted (*q*). Where a dishonoured bill has been accepted for honour *suprà protest*, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need (*r*). Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where

(*h*) *Fenn* v. *Harrison*, 3 T.R. 579; *Shuttleworth*, *Ex parte*, 3 Ves. 368; *Fydell* v. *Clark*, 1 Esp. 447.
(*i*) *Gurney* v. *Womersley*, 4 E. & B. 131; 24 L.J. Q.B. 46.
(*k*) 45 & 46 Vict. c. 61, s. 65 (1).
(*l*) *Ib.*, s. 65 (2).
(*m*) *Ib.*, s. 65 (3).
(*n*) *Ib.*, s. 65 (4).
(*o*) *Ib.*, s. 65 (5).
(*p*) *Ib.*, s. 66 (1).
(*q*) *Ib.*, s. 66 (2).
(*r*) *Ib.*, s. 67 (1).

the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him (*s*). Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (*t*). When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him (*u*).

Where a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (*x*). Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference (*y*). Payment for honour *supra protest*, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it (*z*). The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays (*a*).

Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party (*b*). The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest (*c*). If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages (*d*). Where the holder of a bill refuses to receive payment *supra protest*, he shall lose his right of recourse against any party who would have been discharged by such payment (*e*).

When the acceptor is holder at maturity.—When the acceptor

(*s*) 45 & 46 Vict. c. 61 s. 67 (2).

(*t*) *Ib.*, s. 67 (3).

(*u*) *Ib.*, s. 67 (4).

(*x*) *Ib.*, s. 68 (1). Payment for honour is known in Continental countries as payment by "intervention," which expresses its nature as a *negotiorum gestio*.

(*y*) *Ib.*, s. 68 (2).

(*z*) *Ib.*, s. 68 (3).

(*a*) *Ib.*, s. 68 (4).

(*b*) *Ib.*, s. 68 (5).

(*c*) This means the necessary protest for non-payment: *English Bank of River Plate, In re*, (1893) 2 Ch. 438; 62 L.J. Ch. 578.

(*d*) *Ib.*, s. 68 (6).

(*e*) *Ib.*, s. 68 (7).

of a bill is or becomes the holder of it at or after its maturity, in his own right (*f*), the bill is discharged (*g*).

Renunciation of bills—Express waiver.—When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged (*h*). The renunciation must be in writing, unless the bill is delivered up to the acceptor (*h*). The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation (*i*).

It has been held that where the holder of a note on his deathbed wished to forgive the debt to the promisor, and his nurse, at his dictation, wrote a paper to that effect, and that the note should be destroyed as soon as found, such renunciation was not an absolute and unconditional renunciation. The question of the effect of want of signature was not decided (*k*).

Rules as to sets.—Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill (*l*). Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills (*m*). Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this subsection shall affect the rights of a person who in due course accepts or pays the part first presented to him (*n*). The acceptance may be written on any part, and it must be written on one part only (*o*). If the drawee accepts more than one part, and such accepted parts get into the hands of different

(*f*) *Nash* v. *De Freville*, (1900) 2 Q. B. 72; 69 L.J. Q.B. 484.

(*g*) 45 & 46 Vict. c. 61, s. 61. *Nash* v. *De Freville*, *supra*. See sect. 37, *ante*, p. 1250. Sect. 61 effects an alteration in the law. As to the discharge of bills by indorsers, see sect. 59.

(*h*) *Ib.*, s. 62 (1).

(*i*) *Ib.*, s. 62 (2). This section effects an alteration in the law. See "holder in due course" defined by s. 29; and see *Ingham* v. *Primrose*, 7 C.B. N.S. 82; 28 L.J. C.P. 295.

(*k*) *Francis* v. *Bruce*, 44 Ch. D. 627; 59 L.J. Ch. 709; *Edwards* v. *Walters* (1890), 2 Ch. 157; 65 L.J. Ch. 557.

(*l*) 45 & 46 Vict. c. 61, s. 71 (1). If one part of a set omits reference to the rest, it becomes a separate bill in the hands of a bona fide holder. See *Kearne* v. *West Grenada Mining Co.*, 1 H. & N. 412; 26 L.J. Ex. 15; *Pinard* v. *Klockman*, 3 B. & S. 388; 32 L.J. Q.B. 82. Only one part of a set requires to be stamped. The remaining parts are exempt "unless issued or in some manner negotiated apart" from the stamped part. If the stamped part of a set be lost or destroyed, the unstamped parts are admissible in evidence on proof of such loss or destruction: Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 39.

(*m*) *Ib.*, s. 71 (2).

(*n*) *Ib.*, s. 71 (3).

(*o*) *Ib.*, s. 71 (4).

holders in due course, he is liable on every such part as if it were a separate bill (*oo*). When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof (*p*). Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged (*q*).

Promissory Notes.—By the Bills of Exchange Act, 1882, Part IV., s. 89, "(1.) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. (2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. (3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—(a) Presentment for acceptance; (b) Acceptance; (c) Acceptance *supra protest;* (d) Bills in a set. (4.) Where a foreign note is dishonoured, protest thereof is unnecessary."

A promissory note is an unconditional promise in writing made by one person to another signed by the maker (*r*), engaging to pay, on demand (*s*) or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer (*t*). An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker (*u*). A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof (*x*). A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note, and any other note is a foreign note (*y*). A promissory note is inchoate and incomplete until delivery (*z*) thereof to the payee

(*oo*) 45 & 46 Vict. c. 61, s. 71 (4).

(*p*) *Ib.*, s. 71 (5).

(*q*) *Ib.*, s. 71 (6).

(*r*) As to signature by the hands of an agent, see s. 91 (1), and as to the seal of a corporation in lieu of signature see s. 91 (2).

(*s*) See s. 10.

(*t*) 45 & 46 Vict. c. 61, s. 83 (1). *Kirkwood* v. *Carroll*, (1903) 1 K.B. 531; 72 L.J. K.B. 208. Many instruments may require to be stamped as promissory notes which have not the mercantile incidents of notes as prescribed by the Bills of Exchange Act, 1882. See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33. A promissory note issued in the United Kingdom must be on an impressed stamp. See Stamp Act, 1891, s. 2.

(*u*) *Ib.*, s. 83 (2).

(*x*) *Ib.*, s. 83 (3). See *Yates* v. *Evans*, 61 L.J. Q.B. 446; and *Kirkwood* v. *Carroll*, (1903) 1 K.B. 531; 72 L.J. K.B. 208; overruling *Kirkwood* v. *Smith*, (1896) 1 Q.B. 582; 65 L.J. Q.B. 408.

(*y*) *Ib.*, s. 83 (4).

(*z*) "Delivery" means transfer of possession, actual or constructive, from one person to another: sect. 2.

or bearer (*a*). A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor (*b*). Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note (*c*).

Liability of maker.—The maker of a promissory note by making it engages that he will pay it according to its tenor and he is precluded from denying to a holder in due course (*d*) the existence of the payee and his then capacity to indorse (*e*). A promise to pay "to A., B., and C., or to their order, or the major part of them, 100*l*.," is a promissory note (*f*). If it appears doubtful whether the instrument was intended to be a bill or a note, it may be treated either as the one or the other, at the election of the payee (*g*). An instrument in the form of a bill of exchange addressed to no one, but accepted by the defendant, may be treated as a promissory note (*h*). But if it is a mere inchoate instrument, having neither the name of a drawer nor of a payee upon it, it is not a note (*i*). A promissory note need not contain an express promise in terms upon the face of it; it is sufficient if the promise appears by necessary inference from the words used (*k*). And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title deeds as a collateral security for the payment of the money (*l*). But it must in all cases, like bills of exchange, be drawn or made for the payment of money by some certain person absolutely and unconditionally. Any words, indeed, upon the face of the note qualifying the promise, and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability, and render it a mere agreement (*m*). A promise to pay is none the less an unconditional promise because it refers to an agreement, if such agreement does not qualify the promise (*n*). Before the Bills of

(*a*) 45 & 46 Vict. c. 61, s. 84.

(*b*) *Ib.*, s. 85 (1). See *Honey, Ex parte*, L.R. 7 Ch. 178; 41 L.J. Bankr. 9.

(*c*) *Ib.*, s. 85 (2). *Buckley, Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341.

(*d*) See s. 29, *ante*, p. 1255.

(*e*) *Ib.*, s. 88.

(*f*) *Watson* v. *Evans*, 1 H. & C. 662; 32 L.J. Ex. 137. See also *Grant* v. *Vaughan*, 3 Burr. 1527.

(*g*) *Edis* v. *Bury*, 6 B. & C. 435; 5 L.J. (O.S.) K.B. 179.

(*h*) *Peto* v. *Reynolds*, 9 Exch. 415; 23 L.J. Ex. 98; *Fielder* v. *Marshall*, 9 C.B. N.S. 606; 30 L.J. C.P. 158.

(*i*) *M'Call* v. *Taylor*, 19 C.B. N.S. 301; 34 L.J. C.P. 365, *ante*, p. 1244.

(*k*) *Miller* v. *Thomson*, 3 M. & Gr. 576; 11 L.J. C.P. 21. See also *Morris* v. *Lee*, 2 Ld. Raym. 1396; 1 Str. 629; 8 Mod. 562.

(*l*) *Wise* v. *Charlton*, 4 Ad. & E. 786; 6 L.J. K.B. 80. Sect. 83 (3), *ante*, p. 1284.

(*m*) *Robins* v. *May*, 11 Ad. & E. 213; 9 L.J. Q.B. 22; *Clark* v. *Percival*, 2 B. & Ald. 660; 9 L.J. (O.S.) K.B. 296; *Ferris* v. *Bond*, 4 B. & Ald. 679; *Blackenhagen* v. *Blundell*, 2 B. & Ald. 417; *Hill* v. *Halford*, 2 Bos. & P. 413; *Homes* v. *Jaques*, L.R. 1 Q.B. 376; 35 L.J. Q.B. 130; *Absolon* v. *Marks*, 11 Q.B. 19; 17 L.J. Q.B. 7.

(*n*) *Jury* v. *Baker*, E.B. & E. 459; 28 L.J. Q.B. 255; *Oridge* v. *Sherborne*, 11 M. & W. 380; 12 J. Ex. 313; *Carlon* v.

Exchange Act, 1882, it was held in England, but not in Scotland, that a bill or note drawn payable to a specified person without the addition of words authorising transfer, *e.g.*, "Pay A.," was not negotiable (*o*), and the action upon it must have been brought in the name of the original promisee or payee. But now by sect. 8, sub-sect. 4 of the Act of 1882, a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." And sub-sect. 3 of sect. 8 provides that "a bill is payable to bearer, which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." But, if the words "or order" or "or bearer" have been omitted by mistake, they may, after the bill or note has been signed, be inserted with the consent of all parties in pursuance of an original intention to make the instrument negotiable (*p*).

The maker of a promissory note stands in the same position as the acceptor of a bill of exchange (*ante*, p. 1284). He is the party primarily liable upon the instrument, and is bound, when the note falls due, to seek out and pay the holder. He is not entitled to presentment, unless the note is payable at or after sight, or is made payable at some particular place (*q*). A promissory note, payable on demand, need not be presented to the maker in order to charge him, the commencement of an action against him being a sufficient demand of the money. But, in order to charge the indorser, the instrument, whether payable on demand or not, must be duly presented to the maker, and notice of dishonour given (*ante*, p. 1272); and, if payable on demand, it must be presented within a reasonable time, that is, a period reasonable with respect to the circumstances connected with each particular case (*r*).

Transfer of promissory notes.—If the maker of the note promises to pay the amount of the note to his own order, the note is not a promissory note within the statute until it has been indorsed by the maker; and then it becomes, in legal effect, a note payable to bearer, and so falls within the statute (*s*).

Kenealy, 12 M. & W. 139; 13 L.J. Ex. 64. See s. 9 (c), *ante*, p. 1245.

(*o*) *Plimley* v. *Westley*, 2 Bing. N.C. 249; 5 L.P. C.P. 51; but see s. 8, *ante*, pp. 1246, 1252.

(*p*) *Kershaw* v. *Cox*, 3 Esp. 246.

(*q*) Sect. 87, *post*, p. 1287.

(*r*) *Chartered Mercantile Bank of India* v. *Dickson*, L.R. 3 P.C. 574. Sect. 86, *post*, p. 1287.

(*s*) Sect. 83 (2), *ante*, p. 1284; *Brown* v. *De Winton*, 17 L.J. C.P. 285; 6 C.B. 336; *Masters* v. *Baretto*, 8 C.B. 433; 19 L.J. C.P. 50; *Hooper* v. *Williams*, 2 Exch. 20; 17 L.J. Ex. 315; *Gay* v. *Lander*, 17 L.J. C.P. 287; 6 C.B. 336; *Flight* v. *Maclean*, 16 M. & W. 51; 16 L.J. Ex. 23; *Wood* v. *Mytton*, 10 Q.B. 805; 16 L.J. Q.B. 446.

The first transfer of a note payable to order must, as in the case of bills, be made by indorsement and delivery. If such a note is delivered in the first instance without indorsement, the equitable interest only is transferred to the holder; and, if the note is indorsed by the maker, and not delivered, no right to sue upon the instrument is transferred; and a subsequent delivery by the executor of the maker will not complete the informal transfer, and enable the holder to sue upon the instrument (*t*).

Note payable on demand.—Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement, and if it be not so presented the indorser is discharged (*u*). In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case (*x*). Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (*y*).

Presentment of note for payment.—Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable, but in any other case, presentment for payment is not necessary in order to render the maker liable (*z*). Presentment for payment is necessary in order to render the indorser of a note liable (*a*). Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice (*b*). Where a promissory note is made payable at a particular place, presentment for payment at that place is under sect. 87 of the Bills of Exchange Act, 1882 (*c*), necessary in order to render the maker of the note liable, although such place of pre-

(*t*) *Bromage* v. *Lloyd*, 1 Exch. 32; 16 L.J. Ex. 257. See s. 84, *ante*, p. 1285.

(*u*) 45 & 46 Vict. c. 61, s. 86 (1). By s. 10 read with s. 89, a note is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.

(*x*) *Ib.*, s. 86 (2).

(*y*) *Ib.*, s. 86 (3). This sub-section negatives the application of sect. 36 (3) to promissory notes payable on demand.

(*z*) *Ib.*, s. 87 (1).

(*a*) *Ib.*, s. 87 (2).

(*b*) *Ib.*, s. 87 (3). By virtue of sect. 89, presentment for payment will be governed by the same rules as applying to bills, as to which see sect. 45. As to excuses for non-presentment and delay, see s. 46.

(*c*) 45 & 46 Vict. c. 61.

sentment may have been inserted merely for the purpose of giving jurisdiction to a particular Court. Where a plaintiff may succeed by proving either presentment for payment at a place within the jurisdiction of a particular Court, or, in the alternative, dispensation with such presentment, prohibition ought not to issue if the plaintiff undertakes to rely upon the case involving presentment within the jurisdiction (*d*).

Indorsement of notes and bills overdue.—As a rule of law the indorsee of a bill or note which is overdue must take it on the credit of the indorser, and can stand in no better position (*e*). He takes it subject to all its equities (*f*). But an original absence of consideration in an accommodation bill does not, it seems, attach to the document, so as to defeat the title of a *bonâ fide* indorsee for value (*g*). In the case of a note payable on demand the same rule will not hold, at all events where the note or cheque has not been made a very long time, for they are not overdue at any particular date. The question for the jury is whether under all the circumstances the indorsee ought to have been led to inquire into the title of the indorser (*h*). A promissory note payable on demand cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement (*i*). Notes payable at and after sight must be presented to the maker before an action can be maintained against him for non-payment. "He is to see the note before he is to be called upon to pay it" (*k*). When a note is made payable a certain time after sight, the time does not begin to run from the day of the date, but from the day of the note being presented for sight (*l*).

Days of grace are allowed on promissory notes (*m*), as well as on bills of exchange (*ante*, p. 1271).

Bills and notes for payment of sums under 1*l.*—Section 1 of 26 & 27 Vict. c. 105, repeals 17 Geo. 3, c. 30, and so much of any other Act as prohibits or restrains, or imposes any penalty for, the uttering or negotiating any promissory note (not being

(*d*) *Josolyne* v. *Roberts*, (1908) 2 K.B. 349 ; 77 L.J. K.B. 845.

(*e*) *Brown* v. *Davis*, 3 T.R. 80 ; *Borough* v. *White*, 4 B. & C. 325 ; 3 L.J. (O.S.) K.B. 227.

(*f*) *Sturtevant* v. *Ford*, 4 M. & Gr. 101 ; 11 L.J. C.P. 245. Sect. 36, *ante*, p. 1260, and sect. 89, p. 1284.

(*g*) *Carruthers* v. *West*, 17 L.J. Q.B. 4 ; 11 Q.B. 143 ; *Swan, Ex parte*, L.R. 6 Eq. 345 ; *Sturtevant* v. *Ford*, *supra*.

(*h*) *London & County Banking Co.* v. *Groome*, 8 Q.B.D. 288 ; 51 L.J. Q.B. 224. See sect. 86, *supra*.

(*i*) *Brooks* v. *Mitchell*, 9 M. & W. 15 ; 11 L.J. Ex. 51.

(*k*) *Dixon* v. *Nuttall*, 1 Cr. M. & R. 307 ; 3 L.J. Ex. 290.

(*l*) *Sturdy* v. *Henderson*, 4 B. & Ald. 592.

(*m*) *Brown* v. *Harraden*, 4 T.R. 153.

a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of 20*s.*, or above that sum and less than 5*l.*, or on which 20*s.* or above that sum and less than 5*l.*, shall remain undischarged, made, drawn, or indorsed in any other manner than as directed by the said Act. By 7 Geo. 4, c. 6, s. 3 (*n*), heavy penalties are imposed upon all persons issuing or negotiating promissory notes payable to the bearer on demand for any sum of money less than 5*l.* The issue of bank notes has been subjected to various prohibitions and restrictions by the legislature (*o*).

Dividend warrants (*p*), issued by the Bank of England for the payment of dividends on stock in the public funds, are not negotiable, so as to entitle the holder to demand the dividend; but, as there is in general an acknowledgment at the foot of the warrant by the payee of his having received the dividend therein mentioned, it is the custom of the bank to pay the amount to the holder of the warrant and receipt; and these documents are accordingly transferred from hand to hand, and are generally considered to be negotiable (*q*).

Foreign scrip.—Scrip issued in England by a foreign government entitling the holder to delivery of definitive bonds of the foreign government, which by the usage of trade is transferred by mere delivery, passes by such delivery to a *bonâ fide* holder for value without notice that the vendor had no title (*r*). But the mere fact that an instrument is negotiable in a foreign country is not sufficient to make it so by English law (*s*).

Bankers' cheques.—By the Bills of Exchange Act, 1882, s. 73, "A cheque is a bill of exchange drawn on a banker payable on demand (*t*). Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Presentment of cheque for payment.—Subject to the pro-

(*n*) This section is partially repealed; see St. L. Rev. Acts, 1873.

(*o*) 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32. These statutes are partially repealed; see St. L. Rev. Acts, 1861, 1874.

(*p*) As to crossed dividend warrants, see sect. 95, *post*, p. 1293.

(*q*) *Partridge* v. *Bank of England*, 9 Q.B. 424—427.

(*r*) *Goodwin* v. *Robarts*, 1 App. Cas. 476; 45 L.J. Q.B. 478; see also *Rumball* v. *Met. Bank*, 2 Q.B.D. 194; 46 L.J. Q.B. 346; *Fine Art Society* v. *Union Bank*, 17 Q.B.D. 705; 56 L.J. Q.B. 70; *London Joint Stock Bank* v. *Simmons*, (1892) A.C. 201; 61 L.J. Ch. 723; *Edelstein* v. *Schuler*, (1902) 2 K.B. 144; 71 L.J. K.B. 572. As to what amounts to notice of the vendor's lack of title, see *Sheffield (Earl)* v. *London Joint Stock Bank*, 13 App. Cas. 333; 57 L.J. Ch. 986; *Venables* v. *Baring*, (1892) 3 Ch. 527; 61 L.J. Ch. 609.

(*s*) *Picker* v *London & County Bank*, 18 Q.B.D. 515; 56 L.J. Q.B. 299; *Williams* v. *Colonial Bank*, 15 App. Cas. 267; 60 L.J. Ch. 131.

(*t*) See *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199, and *Imperial Bank of Canada* v. *Bank of Hamilton*, (1903) A.C. 49; 72 L.J. P.C. 1.

visions of the Bills of Exchange Act, 1882, where a cheque is not presented for payment within a reasonable time (*u*) of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid (*x*). In determining what is a reasonable time regard is to be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (*y*). The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him (*z*).

It has been held that the holder of a cheque does not lose his remedy against the drawer by reason of non-presentment within any period short of six years after taking it, unless the insolvency of the banker on whom it is drawn has taken place in the interval, or unless there is an actual loss to the drawer by the delay (*a*). If the cheque is presented in due time and refused payment, the loss will fall on the drawer (*b*). Sending a cheque by post to the banker on whom it is drawn is generally a good presentment (*c*). If the holder of a cheque sends it to his agent for presentment by the post on the day after that on which he has received it, the agent has the following day to present it for payment (*d*). If the cheque is delivered to the holder by the drawer after banking hours, and after it has become impossible to pay the cheque to a banker on that day, the delivery will count from the succeeding day; and, if the cheque is drawn upon a country bank situate at a distance, such distance must be taken into consideration in determining whether the cheque has been presented within a reasonable time (*e*).

(*u*) Whether or not a cheque has been presented within a reasonable time of its issue is a question of fact for the jury: *Wheeler* v. *Young*, 13 T.L.R. 468.

(*x*) 45 & 46 Vict. c. 61, s. 74 (1); *Hopkins* v. *Ware*, L.R. 4 Ex. 268; 38 L.J. Ex. 147.

(*y*) *Ib.*, s. 74 (2).

(*z*) *Ib.*, s. 74 (3). This section effects some alteration in the law.

(*a*) *Robinson* v. *Hawksford*, 9 Q.B. 52; 15 L.J. Q.B. 377. See also *Defries & Sons, Ltd., In re*, 78 L.J. Ch. 720; (1909) 2 Ch. 423.

(*b*) *Laws* v. *Rand*, 3 C.B. N.S. 442; 27 L.J. C.P. 76; *Bailey* v. *Bodenham*, 16 C.B. N.S. 288; 33 L.J. C.P. 252.

(*c*) *Heywood* v. *Pickering*, L.R. 9 Q.B. 428; 43 L.J. Q.B. 145. Sect. 45 (8), *ante*, p. 1268.

(*d*) *Rickford* v. *Ridge*, 2 Campb. 537; *Hare* v. *Henty*, 10 C.B. N.S. 65; 30 L.J. C.P. 302; *Prideaux* v. *Criddle*, L.R. 4 Q.B. 455; 38 L.J. Q.B. 232.

(*e*) *Bond* v. *Warden*, 1 Coll. Ch. C. 583.

Garnishees had given a judgment debtor a cheque, but upon service of the order immediately stopped the cheque at the bank; it was held that the giving of the cheque had not extinguished the debt, which was therefore still capable of being attached(*f*).

Revocation of banker's authority.—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1.) Countermand of payment: (2) Notice of the customer's death (*g*).

Crossed cheques (*h*).—Where a cheque bears across its face an addition of—(a) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or (b) Two parallel transverse lines simply, either with or without the words "not negotiable"; that addition constitutes a crossing, and the cheque is crossed generally (*i*). Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker (*k*). A cheque may be crossed generally or specially by the drawer (*l*). Where a cheque is uncrossed, the holder may cross it generally or specially (*m*). Where a cheque is crossed generally the holder may cross it specially (*n*). Where a cheque is crossed generally or specially, the holder may add the words "not negotiable" (*o*). Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection (*p*). Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (*q*).

A crossing authorized by the Bills of Exchange Act, 1882, is a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorized by the Act, to add to or alter the crossing (*r*).

(*f*) *Cohen* v. *Hale*, 3 Q.B.D. 371; 47 L.J. Q.B. 496.

(*g*) 45 & 46 Vict. c. 61, s. 75; *Curtice* v. *London, City & Midland Bank*, (1908) 1 K.B. 293; 77 L.J. K.B. 341; *Backhouse* v. *Charlton*, 8 Ch.D. 444; *Beaumont, In re*, (1902) 1 Ch. 889; 71 L.J. Ch. 478. Cp. *Cohen* v. *Hale*, 3 Q.B.D. 371; 47 L.J. Q.B. 496; *M'Lean* v. *Clydesdale Bank*, 9 App. Cas. 95.

(*h*) Sects. 76—82 are extended by 46 & 47 Vict. c. 55, s. 17, to any document issued by a customer of any banker and intended to enable any person to obtain payment from the banker of the sum mentioned in the document, just as if the document were a cheque. See the origin of crossing cheques explained by Parke, B., in *Bellamy* v. *Marjoribanks*, 7 Exch. 389, at p. 402; 21 L.J. Ex. 70; and the common law effect of crossing commented on by Lord Cairns in *Smith* v. *Union Bank of London*, 1 Q.B.D. 31, at p. 33; 44 L.J. Q.B. 117.

(*i*) *Ib.*, s. 76 (1).

(*k*) *Ib.*, s. 76 (2). See *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199.

(*l*) *Ib.*, s. 77 (1).

(*m*) *Ib.*, s. 77 (2).

(*n*) *Ib.*, s. 77 (3).

(*o*) *Ib.*, s. 77 (4).

(*p*) *Ib.*, s. 77 (5).

(*q*) *Ib.*, s. 77 (6).

(*r*) *Ib.*, s. 78. See *Abrokerri* (*Ashanti*) *Mines* v. *Economic Bank*, (1904) 2 K.B.

Duties of banker as to crossed cheque.—Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof (*s*). Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (*t*). Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be (*t*).

Where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof (*u*). Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (*x*).

Where a banker in good faith and without negligence receives payment for a customer (*y*) of a cheque crossed generally or

465, at p. 472 ; 73 L.J. K.B. 742. It may be negligence on the part of a banker to receive payment for a customer of a crossed cheque marked "account of payee" when the banker has information which may lead him to think that the account into which he is paying the amount of the cheque is not the payee's account : *Becan* v. *The National Bank, Ltd.*, 23 T.L.R. 65.

(*s*) 45 & 46 Vict. c. 61, s. 79 (1).
(*t*) *Ib.*, s. 79 (2).
(*u*) *Ib.*, s. 80.
(*x*) *Ib.*, s. 81.
(*y*) The word "customer" in s. 82 of the Bills of Exchange Act, 1882, involves use and habit, and bankers who collect a cheque for an absolute stranger cannot claim the protection afforded them by this section when it turns out that

specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment (*z*). A banker receives payment of a crossed cheque for a customer within the meaning of sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof (*a*). A banker's draft addressed by one branch of a bank to another is not a cheque within the meaning of sect. 82 of the Bills of Exchange Act, 1882 (*b*).

The provisions of the Bills of Exchange Act, 1882 (*c*), as to crossed cheques apply to a warrant for payment of dividend (*d*).

When a cheque is drawn payable to bearer, it is treated as money or cash, and is transferable from hand to hand, like a bill of exchange, but does not require any acceptance by the banker on whom it is drawn to establish its validity. A person therefore who receives a cheque payable to bearer *bonâ fide* for value, relying on the order of the party making it, is entitled to recover the amount from him, although the cheque has been lost or stolen (*e*). A banker's cheque payable to bearer on demand, given on account of a pre-existing debt, and received by the bearer *bonâ fide*, is indefeasible, although it may have been obtained from the drawer by fraud (*f*). In this respect it does not differ from a bill. When it is drawn payable to order, it is a bill of exchange, and negotiable as such when indorsed (*g*). The holder cannot sue the banker upon whom it has been drawn, unless the banker has accepted the cheque, or promised to pay it to the holder. The post-dating of a cheque, whether it is payable to order or bearer, does not invalidate the instrument in the hands of a *bonâ fide* holder for value with notice that it was post-dated (*h*).

Cancellation of bills and notes.—Where a bill is intention-

the stranger had no title to the cheque; *Matthews* v. *Brown & Co.*, 63 L.J. Q.B. 494. As to who is a "customer," see *La Cave* v. *Crédit Lyonnais*, (1897) 1 Q.B. 148; 66 L.J. Q.B. 226; *G. W. Ry.* v. *London & County Banking Co.*, (1901) A.C. 414; 70 L.J. Q.B. 915.

(*z*) *Ib.*, s. 82. *Clarke* v. *London & County Banking Co.*, (1897) 1 Q.B. 552; 66 L.J. Q.B. 354.

(*a*) 6 Edw. 7, c. 17, s. 1. This Act was passed in consequence of the decision of the House of Lords in *Capital & Counties Bank* v. *Gordon*, (1903) A.C. 240; 72 L.J. K.B. 451.

(*b*) *Capital & Counties Bank* v. *Gordon, supra.*

(*c*) 45 & 46 Vict. c. 61, ss. 76—82.

(*d*) *Ib.*, s. 95.

(*e*) *Watson* v. *Russell*, 5 B. & S. 968; 34 L.J. Q.B. 93.

(*f*) *Misa* v. *Currie*, 1 App.Cas. 554; 45 L.J. Ex. 852.

(*g*) *Keene* v. *Beard*, 8 C.B. N.S. 372; 29 L.J. C.P. 287; as to presentment of cheques, see *ante*, p. 1289.

(*h*) *Whistler* v. *Foster*, 14 C.B. N.S. 248; 32 L.J. C.P. 161; *Austin* v. *Bunyard*, 6 B. & S. 687; 34 L.J. Q.B. 217; *Bull* v. *O'Sullivan*, L.R. 6 Q. B. 209; 40 L.J. Q.B. 141; *Gatty* v. *Fry*, 2 Ex.D. 265; 46 L.J. Ex. 605; see sect. 13, *ante*, p. 1245.

ally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged (*i*). In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent (*k*). In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged (*k*). A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority (*l*). If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces are pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it without having any just cause for supposing that it had been cancelled. This has been held to be the case where the appearance of the instrument was consistent with its having been divided into two parts for the purpose of safe transmission through the post, and where it was believed to have been so divided by the plaintiff who received it (*m*).

Alterations in bill or note avoiding the contract.—Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers (*n*). Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour (*n*). In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*o*).

(*i*) 45 & 46 Vict. c. 61, s. 63 (1).
(*k*) *Ib.*, s. 63 (2).
(*l*) *Ib.* s. 63 (3).
(*m*) *Ingham* v. *Primrose*, 7 C.B. N.S. 82; 28 L.J. C.P. 295.
(*n*) *Ib.*, s. 64 (1). *Imperial Bank of Canada* v. *Bank of Hamilton*, (1903) A.C. 49; 72 L.J. P.C. 1. The proviso does not apply to Bank of England notes. *Leeds and County Bank* v. *Walker*, 11 Q.B.D. 84; 52 L.J. Q.B. 90.
(*o*) *Ib.*, s. 64 (2). As to material alterations, see *Knill* v. *Williams*, 10 East, 431; *Outhwaite* v. *Luntley*, 4 Campb. 179; *Société Générale* v. *Metropolitan Bank*, 21 W.R. 335; *Sutton* v. *Toomer*, 7 B. & C. 416; 6 L.J. (O.S.) K.B. 49; *Warrington* v. *Early*, 2 E. & B. 763; 23 L.J. Q.B. 47; *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; 35 L.J. C.P. 177. As to immaterial alterations, see *Attwood* v. *Griffin*, 2 C. & P. 368; *Farquhar* v.

An alteration of a bill or note in a material particular, after it has been negotiated, will avoid the contract, such as the addition to a promissory note for the payment of money with lawful interest, of the words "Interest at £6 per cent." written in the corner of the note, without the assent of the maker, after the note had been signed by him (*p*); the cutting off the signature of one of several joint promisors who have united together in undertaking a joint liability by their joint note of hand (*q*); the addition to the note of the name of a new promisor without the consent of the defendant (*r*); the acceleration of the time of payment of a bill of exchange by an alteration in the date of the bill and the time that it has to run (*s*), or the postponement of the date of payment of a cheque (*t*); an insertion of an incorrect date, where the bill bore no date upon the face of it (*u*); an alteration in the place of payment; or an insertion of some particular place of payment, without the privity and assent of the acceptor (*x*). The acceptor of a bill of exchange, however, is not under a duty to take precautions against fraudulent alterations in the bill after acceptance (*y*); and this principle applies equally as between a customer of a bank and the bank (*z*).

Immaterial alterations.—Whenever the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated, although the alteration has been made by the plaintiff himself (*a*). Where, therefore, the date of a bill, payable three months after date, was altered from the 2nd to the 22nd of March, it was held, as between the indorsee and the acceptor, that the alteration was an immaterial alteration, the time of payment not being accelerated (*b*). Where a promissory note expressed no time for payment, and, while

Southey, M. & M. 14; 2 C. & P. 497; but see *Bank of Montreal* v. *Exhibit and Trading Co.*, 11 Com. Cas. 250 as to adding the word "Limited" to the name of an unincorporate company.

(*p*) *Warrington* v. *Early*, 2 E. & B. 763; 23 L.J. Q.B. 47; and see *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; 35 L.J. C.P. 177.

(*q*) *Mason* v. *Bradley*, 11 M. & W. 590; 12 L.J. Ex. 425.

(*r*) *Gardner* v. *Walsh*, 5 E. & B. 91; 24 L.J. Q.B. 285.

(*s*) *Master* v. *Miller*, 4 T.R. 320; 5 T.R. 367; 1 Smith's L.C. 747 (ed. 10); *Hirschman* v. *Budd*, L.R. 8 Ex. 171; 42 L.J. Ex. 113. See s. 64, *supra*.

(*t*) *Vance* v. *Lowther*, 1 Ex.D. 176; 45 L.J. Ex. 200.

(*u*) *Harrison* v. *Cotgreave*, 4 C.B. 562; 16 L.J. C.P. 198.

(*x*) See now sect. 64 (2) of the Act, *supra*; *Calvert* v. *Baker*, 4 M. & W. 417; 8 L.J. Ex. 40; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *Desbrow* v. *Wetherby*, 1 Mood. & R. 438; *Crotty* v. *Hodges*, 4 M. & Gr. 561; 11 L.J. C.P. 289; *Burchfield* v. *Moore*, 23 L.J. Q.B. 261; 3 E. & B. 683.

(*y*) *Scholfield* v. *Londesborough* (*Earl*), (1896) A.C. 514; 65 L.J. Q.B. 593.

(*z*) *Colonial Bank of Australia* v. *Marshall*, (1906) A.C. 559; 75 L.J. P.C. 76.

(*a*) *Aldous* v. *Cornwell*, *post*, p. 1296.

(*b*) *Parry* v. *Nicholson*, 13 M. & W. 778; 14 L.J. Ex. 119.

it was in the possession of the payee, the words "on demand" were added without the assent of the maker, it was held, in an action by the payee against the maker, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument (*c*). An alteration or addition, moreover, to the contract, before it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary (*d*). Where a joint and several promissory note was altered after the two first makers had signed the instrument, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was requisite (*e*). Where a bill was made payable on the 1st of January, and the person to whom it was directed struck out the word January, and inserted March, and then accepted the bill, and sent it to the drawer, who, perceiving the enlarged acceptance, struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January, and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original acceptance (*f*). Where the holder of a bill for value agreed to take a new bill, and a bill at three months was sent him, to which he objected, requiring a bill at two months, and the three was accordingly altered to two, and the bill made payable at two instead of three months, it was held that the alteration did not invalidate the bill (*g*). Where the defendant signed an acceptance, leaving the amount in the body of the bill blank, but put the sum for which he desired to accept in the margin, and handed it to the drawee, who filled it up for a larger amount, and altered the figures in the margin accordingly; it was held that the defendant was liable to *bonâ fide* holders for value for the larger amount, because the marginal figures were no essential part of the bill (*h*).

Whenever the plaintiff has altered a bill or note so as to vitiate the security, and deprive the defendant of a remedy which he would otherwise have had upon the instrument against

(*c*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; 37 L.J. Q.B. 201.

(*d*) *Fitch* v. *Jones*, 5 E. & B. 238; 24 L.J. Q.B. 293.

(*e*) *Wright* v. *Inshaw*, 1 Dowl. N.S. 802.

(*f*) *Price* v. *Shute*, cited 4 T.R. 336.

(*g*) *Tarleton* v. *Shingler*, 7 C.B. 812.

(*h*) *Garrard* v. *Lewis*, 10 Q.B.D. 30.

the parties whose names are upon the face of it, the plaintiff will not only be deprived of all right of action upon the bill, but he will also lose all remedy for the recovery of the debt for which the bill was given (*i*). But, if the defendant has assented to the alteration, and the security is vitiated for want of a new stamp, or the bill has been accidentally or ignorantly altered by the plaintiff, without any fraudulent intent, and the defendant's remedy against any other parties is not affected by the alteration, the plaintiff's right of action for the recovery of the debt on account of which the bill was given is not discharged (*k*). Where a sum of 250*l.* had been advanced to a banker upon the security of a promissory note, and the note was subsequently altered by the parties, and vitiated by reason of there being no fresh stamp, it was held that the 250*l.* might be recovered independently of the note, upon a common count for money lent (*l*). And, where the names of prior indorsers of a bill had been struck out by mistake, it was held that the erasure might be corrected (*m*). It lies upon the party suing upon a bill or note to account for any material alteration appearing upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument, or render a fresh stamp necessary (*n*), unless the making of the bill, as set out by the plaintiff, is admitted on the record, the defendant merely denying the indorsement to the plaintiff (*o*), or the alteration is immaterial, and does not affect the plaintiff's right of action (*p*).

If a bill of exchange or note is altered in any material particular, and the alteration is apparent (see sect. 64, p. 1294), the remedy of the *bonâ fide* holder for value is confined to a right to recover the consideration for the bill as between himself and the party from whom he received it. A similar remedy may be resorted to by each indorsee against his immediate indorser, till the party is reached through whose fraud or laches the alteration was made; and the loss must rest with him, as it was

(*i*) *Alderson* v. *Langdale*, 3 B. & Ad. 660; 1 L.J. K.B. 273.

(*k*) *Atkinson* v. *Hawdon*, 2 Ad. & E. 628; 4 L.J. K.B. 85; *Sloman* v. *Cox*, 1 C. M. & R. 471; 4 L.J. Ex. 7.

(*l*) *Sutton* v. *Toomer*, 7 B. & C. 416; 6 L.J. (O.S.) K.B. 49.

(*m*) *Wilkinson* v. *Johnston*, 3 L.J. (O.S.) K.B. 58; 3 B. & C. 428.

(*n*) *Knight* v. *Clements*, 8 Ad. & E. 215; 7 L.J. Q.B. 144; *Henman* v. *Dickinson*, 5 Bing. 183; 7 L.J. (O.S.) C.P. 68; *Clifford* v. *Parker*, 3 Sc. N.R. 233; 10 L.J. C.P. 227; *Cariss* v. *Tattersall*, 3 Sc. N.R. 257; 10 L.J. C.P. 187.

(*o*) *Sibley* v. *Fisher*, 7 Ad. & E. 444; 7 L.J. Q.B. 2.

(*p*) *Falmouth* (*Earl*) v. *Roberts*, 9 M. & W. 469; 11 L.J. Ex. 180; and even where the alteration is material, a written contract may be looked at to see the terms of a parol contract: *Pattinson* v. *Luckley*, L.R. 10 Ex. 330; 44 L.J. Ex. 180, *ante*, p. 190.

his duty to have preserved the instrument in its original state (*q*).

Lost instruments.—Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again (*r*). If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so (*r*). In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question (*s*). If the bill or note was not originally negotiable, that is, payable to bearer or to order, the loss of it is no defence to an action upon the instrument (*t*). But, if a negotiable bill or note has been lost, the loss, if permitted to be set up, is an answer as well to an action upon the instrument as for the recovery of the debt for which it was given (*u*).

Damages recoverable on the dishonour of bills.—By the Bills of Exchange Act, 1882, s. 57, "Where a bill is dishonoured (*x*), the measure of damages (*y*), which shall be deemed to be liquidated damages, shall be as follows:

"(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case (*z*); (c) The expenses of noting (*a*), or, when protest is necessary (*b*), and the protest has been extended, the expenses of protest.

"(2) In the case of a bill which has been dishonoured abroad,

(*q*) *Burchfield* v. *Moore*, 3 E. & B. 687; 23 L.J. Q.B. 263. See *Leeds and County Bank* v. *Walker*, 11 Q.B.D. 84; 52 L.J. Q.B. 90. See sect. 64, p. 1294.

(*r*) 45 & 46 Vict. c. 61, s. 69.

(*s*) *Ib.*, s. 70.

(*t*) *Charnley* v. *Grundy*, 14 C.B. 614; 23 L.J. C.P. 121.

(*u*) *Hansard* v. *Robinson*, 7 B. & C. 90; 5 L.J. (O.S.) K.B. 242; *Crowe* v. *Clay*, 9 Exch. 608; 23 L.J. Ex. 150.

(*x*) See sect. 43, dishonour by non-acceptance; sect. 47, dishonour by non-payment.

(*y*) Damages given by this section can be recovered under Order XIV. See also the notes to Order III., Rule 6, in the Annual Practice.

(*z*) *London & Universal Bank* v. *Clancarty*, (1892) 1 Q.B. 689; 61 L.J. Q.B. 225; *Lawrence* v. *Willocks*, (1892) 1 Q.B. 696; 61 L.J. Q.B. 519.

(*a*) *Dando* v. *Boden*, (1893) 1 Q.B. 318; 62 L.J. Q.B. 339.

(*b*) As to what protest is necessary, see *English Bank of River Plate, In re*, (1893) 2 Ch. 438; 62 L.J. Ch. 578.

in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

" (3) Where by this Act interest may be recovered as damages such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

Notwithstanding the provisions of sub-s. (1), the drawer of a foreign bill is entitled, upon its being dishonoured and protested here, to recover from the acceptor damages in the nature of re-exchange which the drawer is by the foreign law liable to pay to the holder of the bill (*c*). But protest for better security where the acceptor becomes insolvent before maturity is not necessary, and the expenses of such a protest are not recoverable by the drawer from the acceptor (*d*). When a bill has been dishonoured abroad the only damages are the amount of re-exchange with interest thereon, under sub-s. (2), and not the amount of the bill and interest under sub-s. (1) (*e*).

Damages for not meeting bills at maturity.—Where the defendants, a banking company, had, under a special agreement, accepted the plaintiffs' bills, but their bank stopped before the bills arrived at maturity, and the plaintiffs arranged with another house to take up the bills, and paid commission, and also paid the expenses of protesting the bills and of telegraphing, it was held that, although as a general rule in an action on a bill of exchange by an indorsee against the acceptor neither general nor special damages can be recovered, yet, under the above circumstances, the commission and other expenses were recoverable, as the reasonable and natural consequences of the defendants' breach of contract (*f*).

Specific appropriation of securities.—Securities held by an acceptor against his acceptances are available to the billholders if both drawer and acceptor become insolvent, on the ground that the equity of the drawer to the surplus produce of the securities after answering the demand upon them can only be accomplished by first satisfying the amount due on the bills (*g*).

(*c*) *Gillespie, In re,* 18 Q.B.D. 286; 56 L.J. Q.B. 74.

(*d*) *English Bank of River Plate, In re ante,* p. 1298.

(*e*) *Commercial Bank of Australia, In re,* 36 Ch.D. 522; 57 L.J. Ch. 131.

(*f*) *Prehn* v. *Royal Bank of Liverpool,* L.R. 5 Ex. 92; 39 L.J. Ex. 41.

(*g*) *Waring, Ex parte,* 19 Ves. 345; see *Banner* v. *Johnson,* L.R. 5 H.L. 157; 40 L.J. Ch. 730; *Mann,*

There must not only be an insolvency, but both estates must be in a course of judicial administration (*h*), and the mere fact that the acceptor or drawer, a joint-stock company, has been ordered to be wound up, is not sufficient proof of insolvency (*i*). Where only one of the parties is within the jurisdiction of the Court, and the other is not, the latter is still free to dispose of his property as he sees fit, and he may object to his property being appropriated in a particular manner, and may recall a previous direction respecting it (*k*).

In a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods is binding on the agent, and he cannot set up a general lien against such direction (*l*). But as between vendor and purchaser where bills are drawn by the vendor upon the purchaser, with directions to place them to the account of the shipment of goods, and the bills of lading are handed to the purchaser, there is no specific appropriation, but the goods pass by the bills of lading (*m*).

If the securities are not realized until after the billholder has proved against the estate, his proof must be reduced by the amount received from the securities, and any dividend received on the excess of the original over the reduced proof must be refunded (*n*).

Parties to bills and notes—Capacity and authority of parties.—By the Bills of Exchange Act, 1882, s. 22: "(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations (*o*). (2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a

Ex parte, 5 Ch. D. 367; 46 L.J. Bank. 107; *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App.Cas. 366; *Dever, Ex parte* (No. 2), 14 Q.B.D. 611; 54 L.J. Q.B. 390. As to what amounts to a specific appropriation, see *Banner, Ex parte*, 2 Ch. D. 278; 45 L.J. Bank. 93.

(*h*) *General South American Co., Ex parte*, L.R. 10 Ch. 635.

(*i*) *Kickie & Co.'s Case*, L.R. 4 Eq. 226; 36 L.J.Ch. 809.

(*k*) *General South American Co., Ex parte, supra.*

(*l*) *Frith* v. *Forbes*, 4 De. G. F. & J. 409; 32 L.J. Ch. 10. See *Dever, Ex parte*, 13 Q.B.D. 766.

(*m*) *Entwistle, In re*, 3 Ch.D. 477.

(*n*) *Barned's Banking Co., In re, Joint Stock Discount Co., Ex parte*, L.R. 10 Ch. 198; 44 L.J. Ch. 494. As to a lien on cargo being given to meet bills, see *Frith* v. *Forbes*, 4 De G. F. & J. 409; 32 L.J. Ch. 10. This case appears to rest upon its own peculiar facts. See *Dever, Ex parte*, 13 Q.B.D. 766 and the other cases cited. *Ranken* v. *Alfaro*, 5 Ch.D. 786; 46 L.J. Ch. 832. But see *Robey & Co.* v. *Ollier*, L.R. 7 Ch. 695; *Phelps & Co.* v. *Comber*, 29 Ch.D. 813; 54 L.J. Ch. 1017; *Brown & Co.* v. *Kough*, 29 Ch.D. 848; 54 L.J. Ch. 1024.

(*o*) As to signing by corporations, see *ante*, p. 1242, note (*g*).

bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

Parties to bills and notes—Signature essential to liability.—"No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that (1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name; (2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm" (*p*).

Forged or unauthorised signature on bill.—"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an authorized signature not amounting to a forgery" (*q*).

Signature by procuration.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*r*).

Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability (*s*). Determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted (*t*).

Stranger signing bill liable as indorser.—Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course (*u*).

(*p*) 45 & 46 Vict. c. 61, s. 23.
(*q*) *Ib.*, s. 24. As to this section, see *Addison on Torts*, 628 (ed. 8).
(*r*) *Ib.*, s. 25. *Reid* v. *Rigby*, (1894) 2 Q.B. 40; 63 L.J. Q.B. 451.
(*s*) *Ib.*, s. 26 (1).
(*t*) *Ib.*, s. 26 (2).
(*u*) See *Steele* v. *McKinley*, 5 App.

Parties to bills and notes—General principles.—The liabilities *inter se* of successive indorsers of a bill must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnify a subsequent one; but this may be qualified or even inverted by considering the true relations between the parties (*x*).

When the drawee is requested to pay a certain sum of money "on behalf," or "on account," of a named third party, and the drawee accepts in his own name on behalf of such third party, and the surrounding circumstances show that he had authority so to accept, and that he has bound such third party by his acceptance, he will not himself be personally liable upon his acceptance (*y*); but, if the bill is drawn upon him without qualification, and he accepts in his own name, he cannot exempt himself from the ordinary liability of an acceptor by saying that he accepts on behalf of some third party on whom the bill is not drawn (*z*). If a bill of exchange is addressed to several persons, and one of them alone accepts it, he is personally responsible upon the bill (*a*). Where a bill upon the face of it purports to be accepted "per procuration," that circumstance is a notice to whoever takes the bill that it has been accepted by an agent acting under an authority given to him by a principal; and the holder cannot maintain an action against the principal, if the authority has been exceeded (*b*).

If a party signs a promissory note whereby he promises in his own name to pay a sum of money on behalf of a third party, he will himself be personally responsible for the payment of the money (*c*), unless it plainly appears from the surrounding circumstances that he contracted as agent, and bound his principal by the contract (*d*). Parties who promise in their own names to pay money cannot exonerate themselves from personal liability by describing themselves as "trustees," "treasurers," "directors," or "secretaries" of a named charity, company, or

Cas. 574; *Edwards* v. *Barnard*, 32 Ch.D. 447; 55 L.J. Ch. 935; *Jenkins* v. *Comber*, (1898) 2 Q.B. 168; 67 L.J. Q.B. 780.

(*x*) *Macdonald* v. *Whitfield*, 8 App. Cas. 733; 52 L.J. P.C. 70

(*y*) *Leadbitter* v. *Farrow*, 5 M. & S. 345, *ante*, p. 349.

(*z*) *Mare* v. *Charles*, 5 E. & B. 31; 25 L.J. Q.B. 119; *Nicholls* v. *Diamond*, 9 Exch. 154; 23 L.J. Ex. 1; *ante*, p. 349.

(*a*) *Owen* v. *Van Uster*, 10 C.B. 318; 20 L.J. C.P. 61; but see *Edwards* v. *Barnard*, *supra*.

(*b*) *Stagg* v. *Elliott*, 12 C.B. N.S. 373; 31 L.J. C.P. 260; *Eyre* v. *M'Dowell*, 14 Ir. C.L.R. 314. Sect. 25, *ante*, p. 1301.

(*c*) *Healey* v. *Story*, 3 Exch. 3; 18 L.J. Ex. 8, *ante*, p. 349.

(*d*) *Agg* v. *Nicholson*, 1 H. & N. 165; 25 L.J. Ex. 348; *Lindus* v. *Melrose*, 3 H. & N. 137; 27 L.J. Ex. 327.

association (*e*), or as "executors" (*f*). But, if the promise is, on the face of the note, expressed to be made by a principal, and the party whose signature is attached to it signs the name of the principal to the instrument, adding his own name only as agent, he will, as we have seen, incur no personal liability upon the note, provided he was duly authorized to act in the matter (*g*).

A partner in a mercantile or trading firm may draw, accept, or indorse bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes are usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. But it is not every partnership which gives such an authority. Solicitors and professional men in partnership have no such power; nor have brokers who are in partnership for the mere purpose of obtaining orders on commission and dividing the expenses (*h*). Every one of the partners in a mercantile firm is liable upon such bills or notes, whether his individual name is or is not used in the collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is dormant and secret, or a known and active member of the co-partnership, and whether the proceeds of such bill or note are dedicated and applied to partnership purposes, or to the private use of the individual partner (*i*). Where one of the acting partners of a firm accepted a bill in the name of the firm to obtain a loan, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill (*k*). And, where a bill was indorsed by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument (*l*). "There may be partnerships," observes Lord Ellenborough, "where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts

(*e*) *Price* v. *Taylor*, 5 H. & N. 540; 29 L.J. Ex. 331; *Bottomley* v. *Fisher*, 1 H. & C. 211; 31 L. J. Ex. 417; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; 40 L.J. Q.B. 175.

(*f*) *Childs* v. *Monins*, 5 Moo. 282.

(*g*) *Buckley, Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341; *Alexander* v. *Sizer*, L.R. 4 Ex. 102; 38 L.J. Ex. 59; *ante*, pp. 344—350.

(*h*) See sect. 23, *ante*, p. 1301; *Yates* v. *Dalton*, 28 L.J. Ex. 69; *Forster* v. *Macreth*, L.R. 2 Ex. 163; 36 L.J. Ex. 94.

(*i*) *Lloyd* v. *Ashby*, 2 B. & Ad. 23; 9 L.J. (O.S.) K.B. 144; *Brown* v. *Kidger*, 3 H. & N. 853; 28 L.J. Ex. 66.

(*k*) *Wintle* v. *Crowther*, 1 Cr. & J. 316; 9 L.J. (O.S.) Ex. 65.

(*l*) *Vere* v. *Ashby*, 10 B. & C. 288; 8 L.J. (O.S.) K.B. 57.

of any of the partners in the name of the firm or partnership"(*m*). But, if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership transaction, but the private affair and dealing of the single partner, the other members of the firm will not be liable thereon. The bill or note must, in order to bind the partnership, be made, accepted, or indorsed in the trading name of the firm, or in some adopted name, recognised and used by the partnership in its ordinary course of business; or, if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for, and as the act of, the firm at large (*n*). Where a signature to a bill is common to an individual partner and to the firm, a *bonâ fide* holder for value without notice has not the option to sue either the individual or the firm. The presumption is that the bill was given for the firm, but this may be rebutted, and if so it is immaterial that the holder took it as the bill of the firm (*o*). Where a member of a firm has no authority to bind his partners by drawing or accepting bills, he cannot bind them by giving a post-dated cheque (*p*).

Where a bill of exchange was drawn upon a firm, and accepted by one of the partners in his own name, it was held that he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn (*q*). Thus, where a bill of exchange was addressed to "James Masterman & Co.," and was accepted by James Masterman only, without the words "and Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it (*r*). If, however, the bill or note is drawn, or made, or accepted, or indorsed by the one partner in his own name only without mention of the partnership, and without its being expressed on the face of the instrument that the drawing or making, acceptance or indorsement, is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of the firm, unless the partnership has been in the habit of paying bills and notes so made and negotiated, and has consequently adopted the name of the partner as the name

(*m*) *Swan* v. *Steele*, 7 East, 210; *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

(*n*) *Smith* v. *Jarves*, 2 Raym. 1484; *Galway* v. *Matthew*, 1 Campb. 403.

(*o*) *Yorks Banking Co.* v. *Beatson*, 5 C.P.D. 109; 49 L.J. C.P. 380.

(*p*) *Forster* v. *Mackreth*, L.R. 2 Ex. 163; 36 L.J. Ex. 94.

(*q*) *Mason* v. *Rumsey*, 1 Campb. 384; but see sect. 23, *ante*, p. 1301.

(*r*) *Wells* v. *Masterman*, 2 Esp. 730. See sect. 23, *ante*, p. 1301.

of the firm in bill transactions (*s*). A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm and adding his own underneath: it was held that the acceptance was that of the firm, and that the addition of B.'s name did not make him separately liable (*t*). If the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm; and all the partners, consequently, will be liable upon the instrument (*u*). The plaintiff pressed C., his partner, for payment of a debt, and C. gave him two bills purporting to be accepted by the defendant's firm, and the plaintiff at first believed they were so accepted; in fact, one partner had accepted without the authority of the other. There was no drawer's name, and the plaintiff subsequently, knowing something was wrong, and therefore knowing that he had no authority, filled in the name of his own firm. It was held he could not recover on the bills against the partner who had not authorised the acceptance (*x*).

A partnership may have divers trading names, and it may be bound by the use of any one of them by one of the partners. If a firm has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the ordinary trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of (*y*). If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name (*z*). When any one of the partners has accepted a bill of exchange, or endorsed a promissory note, in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted or issued the bill or note on his own account, and not in the exercise of his general authority as a partner (*a*).

(*s*) *Emly* v. *Lye*, 15 East, 7.

(*t*) *Edwards* v. *Barnard*, 32 Ch.D. 447; 55 L.J. Ch. 935.

(*u*) *South Carolina Bank* v. *Case*, 8 B. & C. 427; 5 L.J. (O.S.) K.B. 364; and see *Stephens* v. *Reynolds*, 5 H. & N. 513; 29 L.J. Ex. 278.

(*x*) *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339.

(*y*) *Williamson* v. *Johnson*, 1 B. & C. 146; 1 L.J. (O.S.) K.B. 65.

(*z*) *Ball* v. *Gordon*, 9 M. & W. 345; 11 L.J. Ex. 221.

(*a*) *Faith* v. *Richmond*, 11 Ad. & E. 339; 9 L.J. Q.B. 97; *Kirk* v. *Blurton*, 9 M. & W. 284; 12 L.J. Ex. 117; *Norton* v. *Seymour*, 3 C.B. 792; 16 L.J. C.P. 100; *Stephens* v.

Where the plaintiff sued as indorsee for value of a bill of exchange drawn on C. Brothers, accepted by an agent (appointed for the purpose of liquidating the affairs of C. Brothers) in his own name and that of the defendant, a former partner, but the defendant knew nothing about it, it was held that the agent had no authority to accept in defendant's name; and that, not being a partner, he had no authority to accept bills drawn on the firm (*b*).

Bills and notes by trustees or directors of co-partnerships.—In order to render the shareholders or co-partners liable upon bills of exchange or promissory notes, accepted, made, or indorsed by the trustees or directors in the trading name of the co-partnership, it must be made out affirmatively by the parties suing upon such bills or notes that the directors had either an express or an implied authority to bind the other members by drawing, accepting, or making, or indorsing bills and notes, either by showing that companies instituted for similar purposes have constantly been in the habit of vesting such a power in the hands of their directors, or that it was absolutely necessary for the purpose of carrying on the concern that such a power should be placed in their hands (*c*). If the directors are authorised to issue bills, they must be drawn in conformity with mercantile custom and usage (*d*).

Bills and notes by corporations.—When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange, and making the promise implied by law from making a bill, and is liable to be sued on the bill (*e*).

Bills of exchange and promissory notes by registered companies.—A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed, on behalf of the company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (*f*). This section does not confer on all companies registered under the Act the power of issuing bills of exchange, such a power only existing where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred (*g*). A promise by directors in their own names on behalf of the com-

Reynolds, 5 H. & N. 517; 29 L.J. Ex. 278.

(*b*) *Odell* v. *Cormack Brothers*, 19 Q.B.D. 223.

(*c*) *Dickinson* v. *Valpy*, 10 B. & C. 137; 8 L.J. (O.S.) K.B. 51; *Steele* v. *Harmer*, 14 M. & W. 831; 15 L.J. Ex. 217.

(*d*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

(*e*) *Murray* v. *East India Co.*, 5 B. & Ald. 204. See sect. 22, *ante*, p. 1300, and sect. 91 (2), *ante*, p. 1242.

(*f*) 8 Edw. 7, c. 69, s. 77.

(*g*) *Peruvian Ry. Co.* v. *Thames & Mersey Marine Ins. Co.*, L.R. 2 Ch. 617; 36 L.J. Ch. 864.

pany will be binding on the company under this section, and will not, if the directors were duly authorised to make the promise, render them personally responsible (*h*). But, if any director, manager, or officer of any registered limited company, or any person on its behalf, signs, or authorises to be signed, on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, or issues, or authorises to be issued, any bill of parcels, invoice, receipt or letter of credit of the company, wherein the name of the company is not mentioned with the word "limited" after it, he is personally liable to the holder of the bill, &c., for the amount thereof, unless the same is duly paid by the company (*i*). If the directors are, by the deed of settlement or articles of association, absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company cannot be made responsible upon bills or notes issued in defiance of the prohibition (*k*), unless the shareholders acquiesce in the proceeding, and do not call the directors to account (*l*). If bills or notes issued by directors in their own names on behalf of the company are drawn or made without authority, or are informally drawn, and are not, consequently, binding upon the company, the parties who have signed them will themselves be responsible upon them (*m*). When the directors are expressly authorised to accept bills or issue promissory notes on behalf of the company, the company will be bound if the authority is substantially acted upon. It need not be exercised in the very terms in which it is given, or be strictly or technically accurate in point of form (*n*); and, if there has been a plain departure from the terms of the authority, and the shareholders have acquiesced in it, the company will be bound (*o*). A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void (*p*). Where a company is being voluntarily wound up,

(*h*) *Lindus* v. *Melrose*, 3 H. & N. 177; 27 L.J. Ex. 327; *Chapman* v. *Smethurst*, 78 L.J. K.B. 654; (1909) 1 K.B. 927; *Aggs* v. *Nicholson*, 1 H. & N. 165; 25 L.J. Ex. 348; *Forbes* v. *Marshall*, 11 Exch. 166; 24 L.J. Ex. 305; *Halford* v. *Cameron's, &c. Co.*, 16 Q.B. 442; 20 L.J. Q.B. 160; *Edwards* v. *Cameron's, &c. Co.*, 6 Exch. 269; *Alexander* v. *Sizer*, L.R. 4 Ex. 102; 38 L.J. Ex. 59.

(*i*) See 8 Edw. 7, c. 69, s. 63 (3). *Penrose* v. *Martyn*, 28 L.J. Q.B. 28; E. B. & E. 499.

(*k*) *Balfour* v. *Ernest*, 5 C.B. N.S. 601; 28 L.J. C.P. 170.

(*l*) Martin, B., *Forbes* v. *Marshall*, 11 Exch. 179; 24 L.J. Ex. 305.

(*m*) *Penkivil* v. *Connell*, 5 Exch. 381; 19 L.J. Ex. 305; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; 40 L.J. Q.B. 175; *Premier Industrial Bank* v. *Crabtree*, 78 L.J. K.B. 105, (1909) 1 K.B. 106.

(*n*) *Thompson* v. *Wesleyan Newspaper Assoc.*, 8 C.B. 861; 19 L.J. C.P. 114; *Land Credit Co. of Ireland, In re*, L.R. 4 Ch. 460; 40 L.J. Ch. 341.

(*o*) *Allen* v. *Sea, &c. Ins. Co.*, 9 C.B. 578; 19 L.J. C.P. 305.

(*p*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300; see sect. 3, *ante*, p. 1242.

and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*q*).

Conversion of bills and notes.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and, if he does so, he is responsible for a conversion of the instrument (*r*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatory, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security (*s*); but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money (*t*).

Conversion of lost or stolen bank-notes or negotiable securities.—If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all further responsibility in respect of it (*u*). If the person to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it (*x*), or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no better title than the person from whom he has received it (*y*), and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bonâ fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away (*z*). If he has given full value for the instru-

(*q*) *London & Mediterranean Bank, In re*, L.R. 5 Ch. 567; 40 L.J. Ch. 26; *London & Mediterranean Bank, In re, Birmingham Banking Co., Ex parte*, L.R. 3 Ch. 651; 36 L.J. Ch. 807; *London & Mediterranean Bank, In re*, L.R. 6 Ch. 206; 40 L.J. Ch. 26.

(*r*) *Alsager* v. *Close*, 10 M. & W. 583; 12 L.J. Ex. 50.

(*s*) *Cranch* v. *White*, 1 Bing. N.C. 414; *Atkins* v. *Owen*, 4 Ad. & E. 819; 6 L.J. K.B. 267.

(*t*) *Palmer* v. *Jarmain*, 2 M. & W. 282.

(*u*) See Addison on Torts, 626 (ed. 8).

(*x*) *Burn* v. *Morris*, 2 Cr. & M. 579; 3 L.J. Ex. 193; *Rice* v. *Reed*, (1900) 1 Q.B. 54; 69 L.J. Q.B. 33; *Lovell* v. *Martin*, 4 Taunt. 799.

(*y*) *Bailey* v. *Bidwell*, 13 M. & W. 73; 13 L.J. Ex. 264.

(*z*) *Miller* v. *Race*, 1 Burr. 452; 1

ment, that is in general conclusive evidence of *bona fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way (*a*). The whole burthen of impeaching the title of the holder of the instrument falls upon the plaintiff, who disputes that title (*b*). It is not enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant (*c*). The latter is not bound, from proof of those circumstances alone, to account for his possession of the security (*d*). But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and he declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument (*e*); and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security (*f*); but gross negligence may be evidence of *mala fides*, though it is not the same thing (*g*).

In the case of stolen notes, if the possession is recent, and the surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony. In all cases he should use diligence to apprise the public of his loss (*h*).

Smith's L.C. 747 (ed. 10); *Grant* v. *Vaughan*, 3 Burr. 1524; *Lawson* v. *Weston*, 4 Esp. 57; see sect. 29, p. 1255, and sect. 38.

(*a*) *Raphael* v. *Bank of England*, 17 C.B. 173; 25 L.J. C.P. 33.

(*b*) *Worc. Co. Bank* v. *Dorch. & Milt. Bank*, 10 Cush. 489; *Wyer* v. *Dorch. &c. Bank*, 11 Cush. 51; see sect. 30 of the Act, *ante*, p. 1257.

(*c*) *Miller* v. *Race*, *supra*. But see sect. 30, *ante*, p. 1257.

(*d*) *King* v. *Milsom*, 2 Campb. 5. But see sect. 30, *ante*, p. 1257.

(*e*) *Bailey* v. *Bidwell*, 13 M. & W. 76; 13 L.J. Ex. 264.

(*f*) Bayley, J., *Backhouse* v. *Harrison*, 5 B. & A. 1105; *Raphael* v. *Bank of England*, *supra*, overruling *Snow* v. *Leathem*, 2 C. & P. 317; *Snow* v. *Peacock*, 3 Bing. 406; 4 L.J. (O.S.) C.P. 120; and *Easley* v. *Crockford*, 10 Bing. 243; 3 L.J. C. P. 22.

(*g*) *Goodman* v. *Harvey*, 4 Ad. & E. 870; 6 L.J. K.B. 260; *Arbouin* v. *Anderson*, 1 Q.B. 498; 11 L.J. Q.B. 31.

(*h*) *Beckwith* v. *Corral*, 3 Bing. 444; 4 L.J. (O.S.) C.P. 139.

CHAPTER VII.

CONTRACTS OF ASSOCIATION.

THE subjects of partnership and joint stock companies have, because of their magnitude and perplexity, been omitted from the present edition, and the reader must be referred to those works which deal specially with these subjects, but the questions relating to contracts made by and with partnerships will be found in their proper places throughout the work.

OF MARRIAGE.

Contracts in restraint of marriage are void, as being contrary to the public policy of the law (*a*). A covenant or promise, therefore, which restrains a party from marrying AT ALL, unless he marries a particular person, is null and void (*b*). If the restraint is not to operate for an indefinite period, but only for six years, there must be reasonable grounds to restrain the party for that period (*c*). But the law recognizes in a husband a species of interest in the widowhood of his wife, which makes it lawful for him to grant an annuity to his widow, to continue so long only as she remains unmarried (*d*).

Marriage brokerage contracts, or contracts for the payment of money, or the conveyance of property, or the performance of some act or duty, on the condition of the procurement of a particular marriage, are void, as being contrary to public policy. If, therefore, a man binds himself to pay a sum of money to another, on condition that he will bring about a particular marriage, the instrument is void (*e*), whether the condition, or cause, or consideration for the bond or covenant does or does

(*a*) *Baker* v. *White*, 2 Vern. 215; *Hartley* v. *Rice*, 10 East, 22; *Bonfield* v. *Hassell*, 32 L.J. Ch. 475; 32 Beav. 217; *Robinson* v. *Ommaney*, 23 Ch.D. 285; 52 L.J. Ch. 440.

(*b*) *Lowe* v. *Peers*, 4 Burr. 2230—2234.

(*c*) *Hartley* v. *Rice*, 10 East, 22. But a covenant to pay a woman a sum of money, so long as she continues sole and unmarried, is not illegal: *Gibson* v. *Dickie*, 3 M. & S. 463.

(*d*) *Lloyd* v. *Lloyd*, 21 L.J. Ch. 596; 2 Sim. N.S. 255; *Newton* v. *Marsden*, 2 Jo. & H. 356; 31 L.J. Ch. 690.

(*e*) *Hall* v. *Potter*, 3 Lev. 411; Show. P.C. 76; 4 Br. P.C. 145, n.; 3 P. Wms. 76.

not appear upon the face of it (*f*). A bond, given by the husband to the wife's father to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage brokerage contract, and contrary to public policy (*g*). And there is no difference between a bond to pay money, and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians (*h*). A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease (*i*). Money paid under an agreement by which the defendant undertook to assist the plaintiff to get married by the introduction of suitors is recoverable by the plaintiff, such an agreement being an illegal marriage brocage contract (*k*).

Bonds and unilateral covenants to marry.—If a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him (*l*). If the covenantee is ready and willing to receive the covenantor as a husband, and the latter neglects to fulfil his contract, he is liable to an action, for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man (*m*). A woman is also as much bound by such a deed or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith; but, as women are in general peculiarly liable to be deceived and imposed upon in affairs in which their feelings are concerned, such a contract or engagement obtained from a woman is regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part (*n*). If such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation in life of the party to whom it is given, it is undoubtedly fraudulent, and may be set aside (*o*). Where a bond was given by the defendant, a single lady, which recited that a marriage had been agreed upon between her and the

(*f*) *Collins* v. *Blantern*, 2 Wils. 347; *Arundel* v. *Trevillian*, 1 Ch. Rep. 47; *Drury* v. *Hooke*, 1 Vern. 412; *Debenham* v. *Ox*, 1 Ves. senr. 276; *Smith* v. *Aykwell*, 3 Atk. 566; *Cole* v. *Gibson*, 1 Ves. senr. 503; *Booth* v. *Warrington* (*Earl*), 4 Br. P.C. 163.

(*g*) *Keat* v. *Allen*, 2 Vern. 588; Pre. Ch. 267.

(*h*) *Hamilton* (*Duke*), v. *Mohun* (*Lord*), 1 P. Wms. 118; 2 Vern. 652; 1 Salk. 158.

(*i*) *Stribblehill* v. *Brett*, 2 Vern. 446; 4 Br. P.C. 145.

(*k*) *Hermann* v. *Charlesworth*, (1905) 2 K.B. 123; 74 L.T. K.B. 620.

(*l*) *Atkins* v. *Farr*, 1 Atk. 287.

(*m*) *Holcroft* v. *Dickenson*, 1 Freem. 346; *Seymour* v. *Gartside*, 1 L.J. (O.S.) K.B. 12; 2 D. & R. 55.

(*n*) *Cock* v. *Richards*, 10 Ves. 437.

(*o*) *Key* v. *Bradshaw*, 2 Vern. 102.

plaintiff, but had been deferred at her request until after the death of her father, and as a provision for the plaintiff she bound herself to give him 1,200*l.*, and interest at 5*l.* per cent., in case she should refuse to marry him on her father's death, or should intermarry with anybody else, and the lady broke her engagement by marrying a third party, it was held that she and her husband were responsible for the payment of the money (*p*). But, if a bond of this description has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, it is a fraud upon the latter; and the Court, if appealed to, will set it aside (*q*).

Contracts of betrothment are contracts between a man and a woman to marry at a future time. If a man makes an offer of marriage to a woman, the acceptance thereof by the latter may, so far as it is necessary to be proved in order to enable her to sustain an action against the man for a breach of his engagement, be established through the medium of her conduct and actions at the time, as well as by express words (*r*). If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, that is sufficient evidence of a promise on her side (*s*). Therefore, where a man asked for and obtained the consent of the parents to his marriage with their daughter, and she stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence afforded as cogent evidence of her assent as an express affirmative (*t*).

Authentication of contract.—Oral engagements and promises to marry will sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract (*ante*, p. 34). A man who was paying attentions to a girl was asked what his intentions were, and he replied, "I have pledged my honour to marry the girl in a month after Christmas;" and it was held that this declaration, taken in connection with his visits to the house and conduct towards the girl, was sufficient evidence of a promise of marriage (*u*). But a mere vague intimation by a party of his future intentions is no evidence of a promise of marriage (*x*). The statute 32 & 33 Vict. c. 68,

(*p*) *Box* v. *Day*, 1 Wils. 59.
(*q*) *Woodhouse* v. *Shepley*, 2 Atk. 539; *Drury* v. *Hooke*, 1 Vern. 412; *Hartley* v. *Rice*, 10 East, 22.
(*r*) *Harvey* v. *Johnston*, 17 L.J. C.P. 298; 6 C.B. 295.
(*s*) *Hutton* v. *Mansell*, 6 Mod. 172.
(*t*) *Daniel* v. *Bowles*, 2 C. & P. 553.
(*u*) *Potter* v. *Deboos*, 1 Stark. 82.
(*x*) *Cole* v. *Cottingham*, 8 C. & P. 75.

which enables the parties to an action for breach of promise of marriage to be called as witnesses, also provides that the plaintiff's evidence must be corroborated by some other material evidence in support of the promise (*y*).

Time of performance.—If the marriage is appointed to take place at a remote and unreasonably distant time, the contract would be voidable at the option of either of the parties, as being in restraint of matrimony (*ante*, p. 78). If no time is fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request; and either of the parties may call upon the other to fulfil the engagement, and, in case of default, may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing contract, the engagement will be deemed to be abandoned by mutual consent. If the time of performance is fixed, and, by bodily disease, it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement of performance, on giving notice to the other party (*z*). If either of the parties puts it out of his or her power to fulfil the contract, by marrying somebody else, there is a breach of the engagement; and a right of action at once attaches. If in such a case the contract was a contract to marry on request, no request need be made, as the defendant by his conduct has dispensed with the necessity of it, and rendered it useless (*a*). So, if there is a promise to marry at a fixed time, and before the time arrives one of the parties absolutely refuses to fulfil the promise, there is a breach, for which an action will lie at once (*b*).

Excuses for non-performance.—If the party making the promise was married at the time it was made, and was consequently incapable of entering into the contract or of performing it, the incapacity constitutes no excuse for non-performance (*c*); but a promise of marriage made by a married man to a woman who at the time of the promise knew that he had a wife living is void as being against public policy, and no action for damages will lie for breach of such a promise after the wife's death (*d*).

(*y*) As to what is "material evidence in support of the promise," see *Bessela* v. *Stern*, 2 C.P.D. 265; 46 L.J. C.P. 467; *Wiedemann* v. *Walpole*, (1891) 2 Q.B. 534; 60 L.J. Q.B. 762.

(*z*) *Hall* v. *Wright*, E. B. & E. 746; 29 L.J. Q.B. 43.

(*a*) *Short* v. *Stone*, 8 Q.B. 358; 15 L.J. Q.B. 143; *Lovelock* v. *Franklyn*, 8 Q.B. 378; 15 L.J. Q.B. 145.

(*b*) *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*c*) *Wild* v. *Harris*, 7 C.B. 999; 18 L.J. C.P. 297; *Millward* v. *Littlewood*, 20 L.J. Ex. 2; 5 Exch. 775.

(*d*) *Wilson* v. *Carnley*, (1908) 1 K.B. 729; 77 L.J. K.B. 594; approving *Spiers* v. *Hunt*, (1908) 1 K.B. 720; 77 L.J. K.B. 321.

Previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a promise of marriage (*e*). Notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill, she has a right to say she will not commit her happiness to such keeping (*f*).

Conditional promises of marriage.—If a man promises to marry a woman if she will come from America to England and marry him, or will do any other particular act or thing, there is a sufficient consideration for the promise; and, if the condition precedent is accomplished,—if, for instance, the voyage is performed, or the act done, and the woman is ready, and willing and able to be married to the man,—he is responsible for the non-fulfilment of his promise. The validity of conditional promises of marriage will depend upon the reasonableness of the condition and the time limited for its accomplishment. If the marriage is to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of the parties, it would be a contract in restraint of marriage. If the condition is a lawful condition, the liability attaches as soon as the condition has been accomplished (*g*). If it is stipulated that the woman shall have a certain marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And, if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged.

Fraudulent concealment of material circumstances—Misrepresentation and deceit.—It is no answer to an action for a breach of promise of marriage to show that the plaintiff at the time of the making of the promise was engaged to marry someone else; and that the pre-engagement was concealed from the defendant. A party is not bound in all cases to disclose such a fact; but the concealment of it might, under certain circumstances, amount to a fraud (*h*). Neither is a party bound to disclose that at some previous period of his life he was of unsound mind, and had been confined in a lunatic asylum (*i*). If a woman at the time of the betrothment was a woman of loose and immodest character, and this was unknown at the time to the man who promised to marry her, the latter is entitled,

(*e*) *Baker* v. *Cartwright*, 10 C.B. N.S. 124; 30 L.J. C.P. 364.

(*f*) *Leeds* v. *Cook*, 4 Esp. 257.

(*g*) *Harvey* v. *Johnston*, 17 L.J. C.P. 298; 6 C.B. 295.

(*h*) *Beachey* v. *Brown*, E. B. & E. 796; 29 L.J. Q.B. 105.

(*i*) *Baker* v. *Cartwright*, 10 C.B. N.S. 124; 30 L.J. C.P. 364.

as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such a case (*k*); or, if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement (*l*). If false representations are made by a woman, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, the fraud is an answer to any action that may be brought for a breach of the promise of marriage (*m*).

Accidents and mishaps altering condition of either of parties.—If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease, accident, or mutilation, becomes impotent, he could never maintain an action against a woman for refusing to marry him (*n*).

Abandonment of contract.—Parties who have exchanged mutual promises of marriage may, of course, at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent (*o*).

Damages for breach of promise of marriage.—In an action for breach of promise of marriage, wherein it is laid as special damage that the defendant debauched the plaintiff and ruined her character, it would be misdirection to tell the jury that they might give her damages as a *solatium* for the injured feelings of her parents and family; but, where the defendant is a person of property, they may take into their consideration not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. In such an action the damages cannot be measured by a known standard, as in commercial cases, but the amount is peculiarly

(*k*) *Foulkes* v. *Sellway*, 3 Esp. 236.

(*l*) *Irving* v. *Greenwood*, 1 C. & P. 350; *Young* v. *Murphy*, 3 Bing. N.C. 54; 6 L.J. C.P. 180; *Bench* v. *Merrick*, 1 Car. & K. 467.

(*m*) *Wharton* v. *Lewis*, 1 C. & P. 529.

(*n*) *Hall* v. *Wright*, E. B. & E. 763; 29 L.J. Q.B. 43.

(*o*) *King* v. *Gillett*, 7 M. & W. 55; 10 L.J. Ex. 164; as to evidence of exoneration and discharge from the contract, see *Davis* v. *Bomford*, 30 L.J. Ex. 139; 6 H. & N. 245.

a question for the jury; and, where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person in humble life, and her witnesses, which failed, and the jury gave 2,500*l.* damages against the defendant, who was a person of property, and a new trial was asked for simply upon the ground that the damages were excessive, the application was refused (*p*). An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of a deceased promisor (*q*). As to ratification of a promise by a minor, see *ante*, p. 404.

Promises of portions and settlements.—A promise to give a woman a specific sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them, in the event of their marrying, creates a binding obligation in the eye of the law; for "marriage is one of the strongest considerations in the law to found a contract, gift, or grant" (*r*). But the promise must be made by a person of full age, and must not be the expression of a mere desire or wish to make a settlement (*s*). It must also be authenticated, as we have before seen, by a note in writing, signed by the promisor or his agent (*t*). If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her, she has nothing to rely upon but his honour; and if, after the marriage, he breaks his word, she has no remedy against him (*u*). Subsequent marriage is not part performance of a parol contract in consideration of marriage; nor will acts of part performance by the party sought to be charged prevent the operation of the statute (*x*). But, if a husband writes a letter promising to make a settlement upon his intended wife, or a father, by a letter, promises "to give such a fortune with his daughter to one who shall marry her," this is a sufficient compliance with the requirements of the statute. But the promise must be an absolute promise, and not dependent upon conditions and contingencies remaining unaccomplished (*y*). Where a person by writing

(*p*) *Berry* v. *Da Costa*, L.R. 1 C.P. 331; 35 L.J. C.P. 191.

(*q*) *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q.B. 247.

(*r*) *Laver* v. *Fielder*, 32 Beav. 1; 32 L.J. Ch. 365.

(*s*) *Beaumont* v. *Carter*, 32 Beav. 586; *Moorhouse* v. *Colvin*, 15 Beav. 341; 21 L.J. Ch. 177, 782.

(*t*) *Ante*, p. 33; *Randall* v. *Morgan*, 12 Ves. 73; *Bawdes* v. *Amhurst*, Pr. Ch. 404; *Caton* v. *Caton*, L.R. 2 H.L. 127; 36 L.J. Ch. 886.

(*u*) *Montacute* v. *Maxwell*, 1 P. Wms. 620; *Caton* v. *Caton*, L.R. 1 Ch. 137; 35 L.J. Ch. 292; but see *Williams* v. *Williams*, 37 L.J. Ch. 854.

(*x*) *Caton* v. *Caton*, *supra*.

(*y*) *Bird* v. *Blosse*, 2 Ventr. 361; *Moore* v. *Hart*, 1 Vern. 110; *Alt* v. *Alt*, 4 Giff. 84; 32 L.J. Ch. 52.

promised, as a mark of esteem and friendship to a young man, that he would allow him 500*l.* a year, and at his death bequeath him 10,000*l.*, and this writing was shown to the parent of a young woman, who thereupon gave consent to the marriage, it was held to be a mere *nudum pactum*, for that there was no connection between the promisor and the parent (*z*).

Contracts in fraud of settlements and promises of marriage portions.—Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open, public agreement, made in consideration of marriage, is fraudulent and void (*a*). A bond, for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and of all the parties to the treaty of marriage, is fraudulent and void, and cannot be enforced against him. If the father, or any other relation or friend of the husband or wife, who has agreed to make a settlement of property upon one or both of them on their marriage, or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to repay the whole or any part of such marriage portion, or to re-convey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians who had a right to give or withhold their consent to the marriage (*b*).

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to repay the money advanced after her marriage, the bond is void (*c*). So, if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property, to enable him to make a show of wealth in order to obtain a corresponding portion with his wife, and takes from such husband a bond or covenant for the repayment of the money advanced, or the surrender of the property intrusted to him, the bond or covenant will be void, and the husband will be entitled to hold the property for his own use, notwithstanding that he was himself a party to the deceit (*d*). Where a widow, on the marriage of her son, agreed with the intended wife's relations to make a

(*z*) *Dashwood* v. *Jermyn*, 12 Ch.D. 776.

(*a*) *Kemp* v. *Coleman*, 1 Salk. 156; *Turton* v. *Benson*, 2 Vern. 764; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 380; 1 Ves. sen. 277.

(*b*) 1 Eq. Abr. 88, E. 3; *Peyton* v. *Bladwell*, 1 Vern. 240; *Scott* v. *Scott*, 1 Cox, 367; *Palmer* v. *Neave*, 11 Ves. 165; *Morrison* v. *Arbuthnot*, 8 Br. P.C. 247; 1 Br. Ch.C. 548, n.

(*c*) *Gale* v. *Lindo*, 1 Vern. 475.

(*d*) *Thompson* v. *Harrison*, 1 Cox, 346; *Webber* v. *Farmer*, 4 Br. P.C. 170.

settlement on him and his wife and the children of the marriage, of certain lands which she had in jointure, but she, at the same time, obtained a secret agreement from her son to pay her an annuity, it was held that this agreement was fraudulent and void (*e*). If a man about to be married is largely indebted, and a relation comes forward and pays off his debts in order to enable him to gain the consent of the parents of the lady to the match, and at the same time takes a bond from the lady and her intended husband to pay him a certain sum within a specified period from the celebration of the nuptials, the bond is a fraud upon the parents, and the husband and wife are entitled, after the marriage, to set it aside, although they were both parties to the fraud (*f*).

Upon the same principle, creditors, who conceal wholly, or in part, debts due to them from a man about to be married, and represent that he is not indebted, or is only indebted to them to a less amount, in order to serve the turn of their debtor, and get the parents of the woman to consent to the marriage, will be bound by such fraudulent representations, and will be barred from all remedy for obtaining payment of their debts, just as effectually as if they had executed a release under seal (*g*).

Marriage settlements.—In a former edition of this work the subject of the rights of husband and wife under settlements made upon the wife was partially and inadequately treated. It has here been entirely omitted, as being outside the scope of this work.

Marriage contract, its nature and requisites.—Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others (*h*). The marriage contract itself is founded on the consent of the parties, and ranges amongst that class of contracts called consensual contracts. Consent of parents and guardians was, by 26 Geo. 2, c. 33, and 4 Geo. 4, c. 17, made essential to the validity of all marriages of minors by licence (not being widowers or widows, who were deemed to be emancipated), so that, after a marriage had been actually celebrated and consummated, and followed by the pro-creation of children and a lengthened cohabitation, it might be annulled by the Ecclesiastical Court, and declared

(*e*) *Lamlee* v. *Hanman*, 2 Vern. 466, 499.

(*f*) *Redman* v. *Redman*, 1 Vern. 347; *Montefiori* v. *Montefiori*, 1W. Bl. 363; *Money* v. *Jorden*, 21 L.J. Ch. 531; *Maunsell* v. *White*, 22 L.T. 293.

(*g*) *Nevill* v. *Wilkinson*, 1 Br. Ch. 543; *Eastabrooke* v. *Scott*, 3 Ves. 460; 16 Ves. 125.

(*h*) *Hyde* v. *Hyde*, L.R. 1 P. & M. 130; 35 L.J. P. & M. 57; *Brinkley* v. *Att.-Gen.*, 17 P.D. 76; 59 L.J. P.D.A. 51; *Bethell, In re*, 38 Ch. D. 220; 57 L.J. Ch. 487.

void *ab initio*, by reason of the want of such consent prior to the celebration of the nuptials (*i*). But this was found to be productive of so much mischief that these Acts were repealed; and it has now been enacted that, after the marriage has been actually solemnised, it shall not be necessary in support of such marriage to give any proof of the residence of the parties previous to the marriage within the district where the marriage was solemnised, or of the consent of any person whose consent to the marriage is required by law, and that no evidence shall be given to prove the non-residence or non-consent in any suit touching the validity of such marriage (*k*).

Age of consent.—The age of consent to marriage is fourteen in males and twelve in females. If, however, a boy under fourteen, or a girl under twelve, actually go through the form of marriage, such marriage is not absolutely void; it is inchoate and imperfect only. If, on arriving at the age of consent, they cohabit, or continue a cohabitation previously begun, the marriage is a good marriage, by reason of the subsequent ratification of the contract (*l*).

Presumption of marriage.—Where the form of marriage has been gone through, it will be presumed that all the requisites of a valid marriage have occurred until the contrary be shown, there being a strong legal presumption in favour of marriage particularly after a great length of time (*m*), for the presumption of marriage is much stronger than the presumption raised with regard to other facts (*n*). Where, therefore, a man and woman are proved to have lived together as man and wife for a considerable time, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage (*o*); and where it is proved that there was an intention to marry and that some form was gone through to perfect that intention, those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies were performed according to law (*p*).

Void marriages.—All marriages celebrated after the 31st of August, 1835, between persons within the prohibited degrees

(*i*) *Harrison* v. *Southampton*, 22 L.J. Ch. 722; 4 De G. M. & G. 137.

(*k*) 4 Geo. 4, c. 76, ss. 16, 26; *R.* v. *Birmingham*, 8 B. & C. 29; 7 & 8 Vict. c. 56, s. 3; 19 & 20 Vict. c. 119, s. 17.

(*l*) Co. Litt. 79 a, 79 b; 1 Rolle Abr. 341.

(*m*) *Piers* v. *Piers*, 2 H.L. Cas. 331, 361.

(*n*) *De Thoren* v. *Att.-Gen.*, 1 App. Cas. 686, 690.

(*o*) *Shephard, In re; George* v. *Thyer*, (1904) 1 Ch. 456; 73 L.J. Ch. 401; *Aronegary* v. *Sambonade*, 6 App. Cas. 364, 371; 50 L.J. P.C. 28, 32; *Sichel* v. *Lambert*, 33 L.J. C.P. 137; 15 C.B. N.S. 781.

(*p*) *Shephard, In re, supra; Piers* v. *Piers, supra.*

of affinity are absolutely void (*q*). And this rule applies to Jews who are domiciled British subjects as well as to Christians (*r*). If a widow, therefore, goes through the marriage ceremony with the brother of her deceased husband, the ceremony is a mere form, and will be productive of no legal marriage between the parties (*s*). But by the Deceased Wife's Sister's Marriage Act, 1907 (*t*), "no marriage heretofore or hereafter (*u*) contracted between a man and his deceased wife's sister (*x*), within the realm or without shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity," and provided also that in case, before the passing of this Act, any such marriage shall have been annulled, or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto, lawfully married another as aforesaid." The Act further provides that notwithstanding anything contained therein or in the Matrimonial Causes Act, 1857 (*y*), it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife (*z*). It has been enacted that, if any persons knowingly and wilfully intermarry in any other place than a church or chapel, or registered building, or the registrar's office, without licence, or due publication of banns, or due notice to the superintendent-registrar, or without certificate of notice duly issued, the marriage of such persons shall be absolutely null and void (*a*). But it must be shown that *both* parties have knowingly and wilfully disregarded the provisions of the Marriage Acts. If the disobedience and misconduct are on one side only, the marriage is not invalid (*b*). And by 19 & 20 Vict. c. 119, s. 17, it is enacted that, after any marriage shall have been solemnised under the authority of 6 & 7 Will. 4, c. 85, of 1 Vict. c. 22, and of 3 & 4 Vict. c. 72, it shall not be necessary

(*q*) 5 & 6 Will. 4, c. 54.

(*r*) *De Wilton, In re*, (1900) 2 Ch. 481; 69 L.J. Ch. 717.

(*s*) *Reg.* v. *Chadwick*, 11 Q.B. 173, 205; 15 C.B. N.S. 781.

(*t*) 7 Edw. 7, c. 47, s. 1.

(*u*) The Act was passed on August 28, 1907.

(*x*) The word "sister" includes a sister of the half-blood: 7 Edw. 7, c. 47, s. 5.

(*y*) 20 & 21 Vict. c. 85.

(*z*) 7 Edw. 7, c. 47, s. 3 (2).

(*a*) 4 Geo. 4, c. 76, s. 22; 6 & 7 Will. 4, c. 85, s. 42; 61 & 62 Vict. c. 58, s. 15; *Reg.* v. *Millis*, 10 Cl. & F. 534; 7 Jur. 911; *Catherwood* v. *Caslon*, 13 M. & W. 261; 13 L.J. Ex. 334. Where during the publication of the banns one of the parties was resident in Scotland, see 49 & 50 Vict. c. 3; and where one party was resident in Ireland, see 62 & 63 Vict. c. 27; as to the validity of marriages in contravention of the Indian Divorce Act, see *Warter* v. *Warter*, 15 P.D. 152; 59 L.J. P. 45.

(*b*) *Wright* v. *Elwood*, 1 Curt. 49, 662; *Dormer* v. *Williams*, *ib.* 874.

in support of such marriage to give any proof that the registered building in which any marriage may have been solemnised had been certified as a place of religious worship, or that it was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit touching the validity of the marriage.

Publication of banns and celebration of marriage in false name.—If banns have been published in a false name with the knowledge of both the parties to the marriage contract for purposes of fraudulent concealment, the marriage will be invalid (*c*); but no court of justice, ecclesiastical or civil, will lend its aid to enable a man who has concealed his true name at the time of the publication of the banns, or has purposely procured the banns to be published in false names, without the knowledge of the woman he was about to marry, to turn round upon her and annul the marriage and bastardise his children on the ground that he had knowingly and wilfully evaded the provisions of the Marriage Acts (*d*). Where one of the parties to the marriage contract had assumed a false name, and procured the publication of the banns and the celebration of the marriage in such false name, for the purpose of concealing his or her real condition in life, the other party who had been deceived was entitled to a declaration of the nullity of the marriage from the ecclesiastical court (*e*). If the error is not a mere *error nominis*, or misnomer, but an error *de corpore*, or *de personâ*, the contract is voidable as to the party who has been deceived; but, if it is a mere misnomer, and the party has married the person that he or she intended to marry, the mere verbal mistake will not suffice to invalidate the marriage (*f*). Numerous cases have occurred where, in the publication of banns, there has been a partial departure from the true name, and the marriage has, notwithstanding, in the absence of fraud, been held to be valid on the ground that the name, though incorrect, designated the right person (*g*).

Marriage by licence in a false name is not of the same importance as marriage by banns in a false name. A mere misdescription or misnomer of the parties in the licence will not avoid the marriage, provided the incorrect name represents the

(*c*) *Midgley* v. *Wood*, 30 L.J. P. 57; it must be shown that both parties knowingly and wilfully concurred: *Gompertz* v. *Kensit*, L.R. 13 Eq. 369; 41 L.J. Ch. 382.

(*d*) *Rex* v. *Wroxton*, 4 B. & Ad. 640; 2 L.J. M.C. 64; *Rex* v. *Billingshurst*, 3 M. & S. 257; *Pougett* v. *Tomkyns*, *ib.* 262, n.

(*e*) *Frankland* v. *Nicholson*, 3 M. & S. 261, n.; *Midgley* v. *Wood*, *supra*.

(*f*) *Clowes* v. *Clowes*, 3 Curt. 190; *Rex* v. *Burton-on-Trent* (*Inhabitants*), 3 M. & S. 537.

(*g*) *Sullivan* v. *Sullivan*, cited *Bevan* v. *M'Mahon*, 30 L.J. P. 71; 2 Sw. & T. 230.

right person (*h*). But, if any fraud or intentional deception has been practised with the knowledge and connivance of *both* parties upon the ordinary, "if, for instance, a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid" (*i*).

Marriage before registrar.—Where a widow went through a form of second marriage at a registry office, her surname, condition and the places of residence of both husband and wife being wrongly stated in the formal notice handed in to the registrar, it was held that, notwithstanding these irregularities, the marriage was valid (*k*).

Fraudulent celebration of sham marriage.—A party cannot avail himself of his own fraud to annul an apparent marriage. If a man has imposed a pretended clergyman and a supposititious licence upon a young unmarried woman, the Court will not at *his* instance annul the apparent marriage (*l*). If persons, professing to marry according to the rites of the Church of England, knowingly or wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage is null and void (*m*).

Test of validity of marriage—Conflict of laws.—The law of the country where a marriage is solemnized does not always determine the validity of the marriage. A union formed between a man and a woman in a foreign country, although in that foreign country it may bear the name of marriage, is not valid in England unless it is in its essence the voluntary union for life of one man and one woman to the exclusion of all others (*n*). Restrictions and prohibitions against marriage are decided upon by the law of the place where the marriage is celebrated; so that in the case of a marriage in England, where the marriage is valid of a British woman domiciled in England with a man domiciled in a country where in the circumstances the marriage would be invalid, the law of England, as the place where the marriage is celebrated, will prevail as the proper test, at all events in England, of the validity of the marriage (*o*). A marriage celebrated in France, however, may be valid in this country, though it is invalid according to French law (*p*). A

(*h*) *Bevan* v. *M'Mahon, ante,* p. 1321.

(*i*) *Lane* v. *Goodwin,* 4 Q.B. 366; 12 L.J. Q.B. 157.

(*k*) *Rutter, In re,* (1907) 2 Ch. 592; 77 L.J. Ch. 34.

(*l*) *Hawke* v. *Corri,* 2 Hag. Consist. 288.

(*m*) 4 Geo. 4, c. 76, s. 22.

(*n*) *Bethell, In re,* 38 Ch.D. 220; 57 L.J. Ch. 487; *Brinkley* v. *Att.-Gen.,* 15 P.D. 76; 59 L.J. P. 51.

(*o*) *Ogden* v. *Ogden,* (1907) P. 107; 76 L.J. P. 9; *Sottomayer* v. *De Mattos,* 5 P.D. 94; 49 L.J. P. 9; *Simonin* v. *Mallac,* 29 L.J. P. & M. 97; 2 Sw. & Tr. 67; *Hay* v. *Northcote,* (1900) 2 Ch. 262; 69 L.J. Ch. 586.

(*p*) *Este* v. *Smith,* 18 Beav. 112; 23 L.J. Ch. 705.

marriage with a deceased husband's brother, if valid according to the law of the country where it was celebrated, and in which the parties were then domiciled, is valid in this country (*q*).

Whenever any attempt is to be made to invalidate a marriage, parties must not slumber over their rights; for "everything," observes Sir William Scott, "is to be presumed in favour of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved, unless by some pressing obligations of law" (*r*).

Release by marriage.—If a creditor marries his debtor, the debt is released and extinguished, but a contract not broken nor converted into a *chose in action* at the time of the marriage, or during the coverture, will not be released by the marriage. Consequently, if a man, in contemplation of marriage, enters into a contract in writing with his intended wife, to the effect that his heirs or executors shall, after his decease, pay her a certain sum of money in case she should survive him, this contract is not released and discharged by the marriage. Therefore a bond, the condition of which cannot be broken during coverture, is not extinguished by the marriage of the obligor and obligee (*s*). And such contract will be enforced when it would be in furtherance of the manifest intention of the parties to do so, as in the case of an agreement by persons about to marry for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage. If an executrix marries the debtor, it is no release in law, because she has the debt in another right (*t*). Therefore, if the executrix of the obligee of a bond marry the obligor, there is no release of the debt; and after the death of such executrix an action may be maintained in respect of it by the administrator *de bonis non* (*u*). Where a man covenanted to pay a woman an annuity for her separate use free from anticipation, and afterwards married her, it was held that the annuity was only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequently to the death of the husband (*x*). An obligation in which the husband is obligor and the wife is obligee is destroyed by the marriage, but this does not affect the rights of third parties. Where the wife is

(*q*) *Bozelli, In re,* (1902) 1 Ch. 751; 71 L.J. Ch. 505. As to such a marriage in this country being invalid, see *Reg.* v. *Chadwick, ante,* p. 1320, note (*s*).

(*r*) *Diddear* v. *Faucit,* 3 Phil. 581; *Piers* v. *Piers,* 2 H.L.C. 367; *Field's Marriage Bill, ib.* 48.

(*s*) *Milbourn* v. *Ewart,* 5 T.R. 385; *Cage* v. *Acton,* 1 Ld. Raym. 515; 1 Salk. 325; *Dolling* v. *White,* 22 L.J. Q.B. 327.

(*t*) *Needham's case,* 8 Co. 136, a.

(*u*) *Wankford* v. *Wankford,* 1 Salk. 306.

(*x*) *Fitzgerald* v. *Fitzgerald,* L.R. 2 P.C. 83; 37 L.J. P.C. 44.

entitled to the bond as legal personal representative, and the extinguishment of the bond would prejudice creditors or legatees, such extinguishment will not take place; but where a wife besides being personal representative was also sole legatee, and all debts had been paid, it was held that a bond given by her husband to his mother-in-law, the testatrix, was extinguished (*y*).

Deeds of separation (*z*).—The husband and wife could not at common law by contract between themselves change their legal capacities or characters (*a*). Formerly, when by reason of matrimonial differences they wished to live separate upon certain terms, it was necessary that a trustee should be appointed to contract with the husband for that purpose (*b*); but this is not so where the contract is by way of compromise of legal proceedings (*c*). The husband may covenant with any third party to pay to him a certain sum of money for the separate use of the wife (*d*) either for a term of years or during her natural life, provided the covenant is absolute and unqualified, and the performance of it is not made to depend upon the contingency of a future separation, or made conditional upon the wife's consent to live separate (*e*). If it appears by the deed that the separation is not a present, immediate, and actually accomplished separation, but is subsequently to be carried into effect, the contract will be void, as being contrary to the public policy of the law (*f*). But a deed, made at a time when the parties are living apart and entered into for the purpose of enabling them to live together, to protect the wife and so prevent a future separation, is not against the policy of the law (*g*); nor is it so if it is only intended to provide for such a separation as the wife may be entitled to by law (*g*). A trust for a wife so long as she shall continue to cohabit with her husband, with

(*y*) *Price, In re*, 11 Ch. D. 163; 48 L.J. Ch. 478.

(*z*) As to when the Court will insert a *dum sola et casta* clause, see *Wood* v. *Wood*, (1891) P. 272; 60 L.J. P. 66; *Lander* v. *Lander*, (1891) P. 161; 60 L.J. P. 65.

(*a*) Co. Litt. 112, a; *Ewers* v. *Hutton*, 3 Esp. 254; *Garth* v. *Earnshaw*, 3 Y. & C. 584; *St. John* (*Ld.*), v. *St. John* (*Ly.*), 11 Ves. 530.

(*b*) *Sanders* v. *Rodway*, 22 L.J. Ch. 230; 16 Beav. 207; *Hunt* v. *Hunt*, 31 L.J. Ch. 161; 31 Beav. 89.

(*c*) *McGregor* v. *McGregor*, 21 Q.B.D. 424; 57 L.J. Q.B. 59.

(*d*) As to power of Court to increase alimony, see *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154; *Bishop* v. *Bishop*, (1897) P. 138; 66 L.J. P. 69.

(*e*) *Clough* v. *Lambert*, 10 Sim. 174; *Bostock* v. *Hume*, 7 M. & Gr. 893; 13 L.J. C.P. 225; *Logan* v. *Birkett*, 1 Myl. & K. 225; 2 L.J. Ch. 52. As to what amounts to a breach of covenant not to molest, see *Fearon* v. *Aylesford*, 14 Q.B.D. 792; 54 L.J. Q.B. 33; *Sweet* v. *Sweet*, (1895) 1 Q.B. 12; 64 L.J. Q.B. 108; *Hunt* v. *Hunt*, (1897) 2 Q.B. 547; 67 L.J. Q.B. 18.

(*f*) *Westmeath* v. *Salisbury*, 5 Bl. N.S. 393; *Hindley* v. *Westmeath*, 6 B. & C. 200; 5 L.J. (O.S.) K.B. 115.

(*g*) *Harrison* v. *Harrison*, (1910) 1 K.B. 35; 79 L.J. K.B. 133.

a gift over to the latter, is not void as being against public policy on the ground that it contemplates a future separation (*h*). A covenant by the trustee to indemnify the husband against debts and expenses contracted by him and his wife during the time they were cohabiting together, as well as against debts that may subsequently be contracted by her, is not, in contemplation of law, a covenant or engagement to pay money as an inducement for a separation, and is not consequently void (*i*). If the husband has been induced to execute the separation deed by fraudulent misrepresentation or fraudulent concealment on the part of the trustee, the deed will be invalid, and the husband cannot be sued upon it (*k*). All contracts for the prevention of cohabitation between husband and wife are null and void (*l*), unless it appears that the husband has by cruelty or misconduct forfeited his marital rights (*m*). An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, has been decreed to be specifically performed (*n*). Where an annuity was given to a wife while living separate, during the joint lives of the husband and wife, it was continued even where the parties were subsequently divorced (*o*); but where the husband covenanted to pay his wife for her sole and separate use during her life if she should "so long continue to live separate and apart" an annuity for her maintenance, clothes and other necessaries, and the wife, after her husband's death, remarried, it was held that the annuity ceased to be payable on the death of her husband (*p*). The question whether a deed is a separation deed or a post-nuptial settlement depends on the intention of the parties, to be gathered from the terms of the deed (*q*). The existence of a deed of separation containing a covenant not to sue for restitution of conjugal rights is

(*h*) *Hope Johnstone, In re*, (1904) 1 Ch. 470; 73 L.J. Ch. 321.

(*i*) *Jones* v. *Waite*, 5 Sc. N.R. 951; 9 Cl. & F. 88; *Summers* v. *Ball*, 8 M. & W. 596; 10 L.J. Ex. 368.

(*k*) *Evans* v. *Edmonds*, 22 L.J. C.P. 211; 13 C.B. 777; *Evans* v. *Carrington*, 30 L.J. Ch. 364; 1 Jo. & H. 598; but see *Kendall* v. *Webster*, 1 H. & C. 440; 31 L.J. Ex. 492.

(*l*) *Wren* v. *Bradley*, 17 L.J. Ch. 172; 2 De G. & S. 49; *Cartwright* v. *Cartwright*, 22 L.J. Ch. 841; 3 De G. M. & G. 982.

(*m*) *Westmeath* v. *Westmeath*, 2 Hagg. Eccles. Sup. 115; *Swift* v. *Swift*, 34 L.J. Ch. 209, 394; 34 Beav. 266.

(*n*) *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374; and see 36 Vict. c. 12, s. 2.

(*o*) *Charlesworth* v. *Holt*, L.R. 9 Ex. 38; 43 L.J. Ex. 25.

(*p*) *Gilling, In re*, 74 L.J. Ch. 335.

(*q*) *Rowell* v. *Rowell*, (1900) 1 Q.B. 9; 69 L.J. Q.B. 55.

not to be disregarded by the Court because the respondent in a suit for that purpose does not appear in it to set up the deed(*r*).

Subsequent reconciliation puts an end to the husband's covenant to pay an annuity to the wife (*s*), unless it is provided that a subsequent cohabitation shall in no wise alter or affect such liability (*t*); but it does not, it seems, amount to an accord and satisfaction of her claims for arrears (*u*). Mere casual acts of intercourse are not conclusive evidence that the parties to a deed of separation have ceased to live apart (*x*). If the husband has not forfeited his marital rights by his own misconduct, he may discharge himself from his liability thereon by offering to receive back the wife (*y*), unless he has covenanted absolutely and unconditionally with the trustee to pay the annuity during the life of the wife (*z*), in which case his liability to pay the annuity is not discharged by the subsequent commission of adultery by the wife, or by a decree for a judicial separation pronounced in consequence of such adultery (*a*). When a separation has taken place, and property has been settled upon the wife and children of the marriage for their support, the settlement will be upheld against the future creditors of the husband, unless it appears that the separation was illusory and without adequate cause (*b*). Articles of agreement made in contemplation of a separation, and by which funds were vested in a trustee upon trust for the wife and children, have been held not to be rendered void by a subsequent reconciliation and resumption of cohabitation, but to be a subsisting voluntary settlement (*c*).

(*r*) *Kennedy* v. *Kennedy*, (1907) P. 49; 76 L.J. P. 34; which see also as to the time for the consideration of the deed by the Court where such a suit is followed by one of divorce.

(*s*) *St. John* (*Ld.*) v. *St. John* (*Ly.*), 11 Ves. 537; *Bateman* v. *Ross*, 1 Dow, 245; *Nicol* v. *Nicol*, 31 Ch.D. 524; 55 L.J. Ch. 437. As to the effect on a quasi-separation deed between persons who have been living in concubinage, see *Abdy, In re*, (1895) 1 Ch. 455; 64 L.J. Ch. 465.

(*t*) *Wilson* v. *Mushett*, 3 B. & Ad. 751; 1 L.J. K.B. 250; *Webster* v. *Webster*, 22 L.J. Ch. 837; 4 De G. M. & G. 437.

(*u*) *Macau* v. *Macau*, 70 L.J. K.B. 90.

(*x*) *Rowell* v. *Rowell*, (1900) 1 Q.B. 9; 69 L.J. Q.B. 55.

(*y*) *Whorewood* v. *Whorewood*, Ch. Cas. 250.

(*z*) *Seeling* v. *Crawley*, 2 Vern. 386.

(*a*) *Baynon* v. *Batley*, 1 L.J. C.P. 75; 8 Bing. 256; *Jee* v. *Thurlow*, 2 B. & C. 551; 2 L.J. (O.S.) K.B. 81; *Seagrave* v. *Seagrave*, 13 Ves. 439; *Fearon* v. *Aylesford* (*Earl*), 14 Q.B.D. 792; 54 L.J. Q.B. 33.

(*b*) *Hobbs* v. *Hull*, 1 Cox, 445; *Nunn* v. *Wilsmore*, 8 T.R. 529; *Stephens* v. *Olive*, 2 Br. C.C. 90.

(*c*) *Spark's Trusts, In re*, (1904) 1 Ch. 451; 73 L.J. Ch. 259, following *Ruffles* v. *Alston*, L.R. 19 Eq. 539; 44 L.J. Ch. 308. The Court of Appeal subsequently sanctioned a compromise as being for the benefit of the infants interested; see (1904) 2 Ch. 121; 73 L.J. Ch. 576.

APPENDIX ON STAMPS.

CHAPTER I.

GENERAL PRINCIPLES.

The Stamp Act, 1891.—The Stamp Act, 1891 (*a*), consolidated and amended the provisions theretofore contained in various Acts relating to stamp duties (*b*).

Interpretation of terms.—By sect. 122, it is enacted that in this Act unless the context otherwise requires "The Commissioners" means the Commissioners of Inland Revenue; "Material" includes every sort of material upon which words or figures can be expressed; "Instrument" includes every written document; "Stamp" means as well a stamp impressed by means of a die as an adhesive stamp; "Stamped," with reference to instruments and material, applies as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto; "Executed" and "Execution," with reference to instruments not under seal, mean signed and signature; "Money" includes all sums expressed in British or in any foreign or colonial currency; "Stock" includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, company, corporation, or society in the United Kingdom, or of any foreign or colonial company, corporation, or society; "Marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom (*c*); "Steward" of a manor includes deputy steward.

Section 1 grants the duties specified in the schedule to the Act (*d*).

(*a*) 54 & 55 Vict. c. 39.

(*b*) The Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), contains provisions relating principally to offences, and to the sale of stamps.

(*c*) See *Texas Land Co.* v. *Inland Rev. Com.*, 26 Scot. L.R. 49.

(*d*) See *Onslow* v. *Inland Rev. Com.*, (1891) 1 Q.B. 239; 60 L.J. Q.B. 138.

By sect. 120, any instrument which, by any Act passed before 1st January, 1871, and not relating to stamp duties, is specifically charged with the duty of 35*s.*, shall be chargeable only with the duty of 10*s.* in lieu of the said duty of 35*s.*

Instruments relating to Crown property.—By sect. 119, except where express provision to the contrary is made by this or any other Act, an instrument relating to property belonging to the Crown, or being the private property of the Sovereign, is to be charged with the same duty as an instrument of the same kind relating to property belonging to a subject.

How instruments are to be written and stamped.—By sect. 2, all stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

By sect. 3 (1), every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped, is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material (*e*).

Stamping of instruments after execution.—By sect. 15 (1) save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2.) In the case of such instruments hereinafter mentioned as are chargeable with *ad valorem* duty, the following provisions shall have effect:—

(a) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the commissioners with respect to the amount of duty with which the instrument is chargeable has, before

(*e*) As to instruments charged with more than one duty, see sect. 3 (2), *post*, p. 1330.

such expiration, been required under the provisions of this Act:

(b) If the opinion of the commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the commissioners within fourteen days after notice of the assessment:

(c) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the commissioners, or of the Court, judge, arbitrator, or referee before whom it is produced (*f*):

(d) The instruments (*g*) and persons to which the provisions of this sub-section are to apply are as follows:—

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Bond, covenant, or instrument of any kind whatsoever.	The obligee, covenantee, or other person taking the security.
Conveyance on sale	The vendee or transferee.
Lease or tack	The lessee.
Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment.	The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security.
Settlement	The settler.

(3.) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(a) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(*f*) See sect. 14, *post*, p. 1334.

(*g*) The provisions of paragraph (d) apply to conveyances or transfers operating as voluntary dispositions *inter vivos*, see 10 Edw. 7, c. 8, s. 74 (3).

(b) The commissioners may, if they think fit, mitigate or remit any penalty payable on stamping (*h*).

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

Instruments to be charged with more than one duty.—By sect. 3 (2), if more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable. By sect. 4, except where express provision to the contrary is made by this or any other Act: (a) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; (b) an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the considerations.

Several deeds on one sheet of paper, vellum, &c., made to answer several unconnected purposes, must bear a distinct stamp in respect of each; but if the contract, though effecting several purposes, carries into effect only one entire transaction, one stamp only is required. Thus, if a lease (*i*) under seal also contains a covenant on the part of the lessor to sell the demised premises to the lessee, a deed stamp is not requisite in addition to the lease stamp, as the sale is ancillary to the lease (*k*); but, if the covenant embraces other and different premises, there must be a deed stamp in addition to the lease stamp. If a lease also contains a guarantee by a third party as surety for the payment of the rent, the guarantee is ancillary to the lease, and the lease stamp suffices (*l*); but if the lease be under seal and the guarantee refers to the payment of the price of goods and chattels covenanted to be bought and sold, or any matter not ordinarily or necessarily incident to the lease, there must be a deed stamp as well as a lease stamp (*m*). If several leases are granted to different lessees (*n*), or several surrenders of leases (*o*), or several releases of separate causes of action, are

(*h*) By the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 15, the limit of time prescribed by this section was repealed.

(*i*) As to leases, see sect. 77 (2), *post*, p. 1357

(*k*) *Worthington* v. *Warrington*, 5 C.B. 635; 17 L.J. C.P. 117.

(*l*) *Price* v. *Thomas*, 2 B. & Ad. 218; *Pratt* v. *Thomas*, 4 C. & P. 554.

(*m*) *Wharton* v. *Walton*, 7 Q.B. 471; 14 L.J. Q.B. 321; *Lovelock* v. *Franklyn*, 8 Q.B. 371; 15 L.J. Q.B. 146.

(*n*) *Doe* v. *Day*, 13 East, 241.

(*o*) *Reg.* v. *Everdon*, 16 L.J. Q.B. 18.

made to different parties (*p*), or several annuities are granted by one deed, engrossed on one piece of parchment, separate stamps are required; but if there be several leases of different properties to one lessee (*q*), or a release of several causes of action against one releasee, or of one joint cause of action against several persons jointly liable (*r*), or the grant of one annuity only, payable in different proportions to different individuals (*s*), one stamp suffices. And if there are two deeds on the same piece of parchment or paper, the circumstance of one of them being unstamped will not prevent the other from being given in evidence if duly stamped (*t*). An appointment of new trustees, which also vests the property in them, is chargeable in respect of each of such matters (*u*); and also a deed of transfer made between four residuary legatees for dividing amongst them parts of the testator's personal estate (*x*).

It has been held that several matters set forth and authenticated by one written document were so connected together as to form one contract and transaction, and to require only one stamp, in the following cases: where a sale and mortgage were simultaneously agreed upon and carried into effect by one and the same deed (*y*); where a bond and covenant to pay money, and also where a lease contained a power of attorney, and the deed and power in each case related to the same subject-matter; where a conveyance of land was coupled with a declaration of trust as to stock ancillary to such conveyance (*z*); where a lease under seal also contained a covenant to insure (*a*); where a surety became bound with his principal, and by the same bond the principal bound himself to indemnify the surety against loss (*b*); where a transfer deed of shares also contained a covenant on the part of the purchaser to observe the rules of the company (*c*); where indentures of apprenticeship divided a seven years' binding into two distinct periods, to be served with two different masters, and contained separate covenants with the several masters (*d*); where a deed of surrender of a

(*p*) *Rex* v. *Weeks*, 2 Ld. Raym. 1445.

(*q*) *Blount* v. *Pearman*, 1 Sc. 55; 4 L.J. C.P. 149.

(*r*) *Perry* v. *Bouchier*, 4 Campb. 80.

(*s*) *Cook* v. *Jones*, 15 East, 237.

(*t*) *Anon.*, Salk. 162.

(*u*) *Hadgett* v. *Inland Rev. Com.*, 3 Ex. D. 46.

(*x*) *Freeman* v. *Inland Rev. Com.*, L.R. 6 Ex. 101; 40 L.J. Ex. 85.

(*y*) *Rushbrook* v. *Hood*, 5 C.B. 131; 17 L.J. C.P. 58.

(*z*) *Doe* v. *Fereday*, 12 Ad. & E. 23; 11 L.J. Q.B. 19.

(*a*) *Wilson* v. *Smith*, 12 M. & W. 401; 13 L.J. Ex. 113.

(*b*) *Annandale* v. *Pattison*, 9 B. & C. 919; 8 L.J. (O.S.) K.B. 66.

(*c*) *Wolseley* v. *Cox*, 2 Q.B. 321; 11 L.J. Q.B. 9.

(*d*) *Rex* v. *Louth*, 8 B. & C. 247; 6 L.J. (O.S.) M.C. 107.

lease also contained a covenant on the part of the surrenderee to grant a new lease (*e*).

Agreements and leases (*f*) on one sheet of paper must have both a lease and an agreement stamp, unless the agreement is strictly ancillary to the lease, and the two are necessarily connected together and form part of one entire contract (*g*). Where leasehold and copyhold premises were put up to auction in two separate lots, and the purchaser signed a memorandum agreeing to purchase the two lots at separate prices, it was held that two agreement stamps were necessary (*h*). If an agreement for a lease also contains an agreement on the part of the intended lessor to give the lessee the option of purchasing the premises, separate agreement stamps are not necessary; but, if the agreement to sell includes more premises than are comprised in the agreement for the lease, or relates to other and different premises, there are then two several contracts, and there must be two agreement stamps (*i*). There may be a variety of stipulations and engagements entered into at the same time by divers parties, forming the several parts of one contract, together constituting one transaction, and requiring consequently but one stamp (*k*). "Where a debtor compounds with his creditors, and where each creditor signs the same deed covenanting either to give further day of payment or to take a certain sum as a composition, . . . every covenant is in fact a separate covenant and the several deed of each creditor who signs the deed; but, the whole being only one transaction, a separate stamp for each person is never required" (*l*). An agreement by several persons to subscribe to one common fund, or to do certain things in furtherance of one common purpose, requires but one stamp, although the parties may have several interests, and subject themselves to separate liabilities (*m*). Where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them, it was held

(*e*) *Doe* v. *Phillips*, 11 Ad. & E. 796; 3 P. & D. 603.

(*f*) As to leases, see also sect. 77 (2), *post*, p. 1357.

(*g*) *Wharton* v. *Walton*, 7 Q.B. 474; 14 L.J. Q.B. 321.

(*h*) *Watling* v. *Horwood*, 12 Jur. 48.

(*i*) *Lovelock* v. *Franklyn*, 8 Q.B. 379; 16 L.J. Q.B. 182; *Worthington* v. *Warrington*, 5 C.B. 635; 17 L.J. C.P. 117.

(*k*) *Rex* v. *Louth*, 8 B. & C. 247; 6 L.J. (O.S.) M.C. 107; *Stead* v. *Liddard*, 8 Moore, 2; 1 Bing. 196; 1 L.J. (O.S.) C.P. 52.

(*l*) Mansfield, C.J., *Bowen* v. *Ashley*, 1 B. & P. N.R. 278; *Ramsbottom* v. *Davis*, 4 M. & W. 584; 8 L.J. Ex. 80.

(*m*) *Davis* v. *Williams*, 13 East, 232; *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 525.

that this was one transaction, and that the instrument required but one stamp (*n*).

Appropriated stamps.—By sect. 10 (1), a stamp which, by any word or words on the face of it, is appropriated to any particular description of instrument, is not to be used, or, if used, is not to be available for any instrument of any other description. (2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid, is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated. An instrument liable to duty as a promissory note, stamped with a penny "Postage and Inland Revenue" stamp only, was not allowed to be given in evidence to prove payment of the sum in dispute (*o*).

Facts affecting duty to be set forth.—By sect. 5, all the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument, under a penalty of 10*l.* for certain offences mentioned.

Valuation of foreign or colonial money, or stock and marketable securities.—By sect. 6 (1), where an instrument is chargeable with *ad valorem* duty in respect of any money in any foreign or colonial currency, or any stock, or of any marketable security (*p*), such duty shall be calculated on the value of such money in British currency, according to the current rate of exchange on the day of the date of the instrument, or of the stock or security according to the average price thereof. The Finance Act, 1899, amends this by fixing a rate of exchange according to which the *ad valorem* duty shall be calculated in the case of all such instruments, except bills of exchange and promissory notes (*q*).

Effect of statement of value.—By sect. 6 (2), where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with such statement, it is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Denoting stamp.—By sect. 11, where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of the last-mentioned duty shall, upon application to the commissioners,

(*n*) *Allen* v. *Morrison*, 8 B. & C. 565; 7 L.J. (O.S.) K.B. 106.

(*o*) *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 396.

(*p*) See as to the meaning of these terms, sect. 122, *ante*, p. 1327.

(*q*) 62 & 63 Vict. c. 9, s. 12.

and production of both the instruments, be denoted in such manner as the commissioners think fit.

Reception in evidence of unstamped instruments. — By sect. 14 (1), upon the production of an instrument chargeable with any duty as evidence in any Court of Civil Judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator or referee, of any omission or insufficiency of the stamp thereon; and, if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of 1*l.*, be received in evidence (*r*), saving all just exceptions on other grounds. The section then directs the officer of the Court to account for the duties and penalties, and provides for the denoting of the payment of the duty and penalty upon the instrument (sub-sects. 2 and 3).

A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp (*s*). The ruling of the judge is final only when he decides that the instrument is admissible in evidence (*t*). If the judge rules that the stamp upon a document is sufficient, no appeal lies against his ruling, even though it should appear to be incorrect (*u*).

By sect. 14 (4), save as aforesaid, an instrument executed in any part of the United Kingdom (*x*), or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed (*y*); see sect. 38 (1), post, p. 1377. The presumption is that an instrument has been duly stamped in the absence of evidence to the contrary (*z*).

(*r*) See *Mason* v. *Motor Traction Co.*, (1905) 1 Ch. 419; 74 L.J. Ch. 273, for instance where the Court looked at an unstamped copy of a document, not as an agreement, but as evidencing the terms of a proposal of sale.

(*s*) R. S. C., Order XXXIX., r. 8.

(*t*) *Sharples* v. *Richard*, 26 L.J. Ex. 302.

(*u*) *Blewitt* v. *Tritton*, (1892) 2 Q.B. 627; 61 L.J. Q.B. 773.

(*x*) *E.g.*, executed in England upon a sale in Australia: *Wright* v. *Inland Rev. Com.*, 11 Exch. 458; 25 L.J. Ex. 49.

(*y*) See *Clarke* v. *Roche*, 3 Q.B.D. 170; 47 L.J. Q.B. 147; *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 306; *Birchall* v. *Bullough*, (1896) 1 Q.B. 325; 65 L.J. Q.B. 252; *Coolgardie Gold Fields, In re*, (1900) 1 Ch. 475; 69 L.J. Ch. 868.

(*z*) *Marine Ins. Co.* v. *Haviside*, L.R. 5 H.L. 624; 42 L.J. Ch. 173.

Sections 12, 13, provide for the mode to be pursued in order to procure the commissioners to express their opinion as to the duty, the effect of such a proceeding, and the mode of appealing from the commissioners' assessment.

Use of adhesive stamps.—By sect. 7, any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

Cancellation of adhesive stamps.—By sect. 8 (1), an instrument the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp, cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp, and renders the same incapable of being used for any other instrument or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time. An adhesive stamp used on a letter or power of attorney for appointing a proxy to vote at a meeting is sufficiently cancelled within the meaning of sect. 8, sub-sect. 1 of the Stamp Act, 1891, by the writing across it of the date of cancellation alone, or other marks of a defacing nature (*a*). If there are several stamps, the cancellation must extend to all; see sect. 8 (2). (3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in manner aforesaid, shall incur a fine of 10*l.*

Section 9 imposes a fine of 50*l.* for frauds in relation to adhesive stamps and duties. Section 121 provides for the recovery of penalties.

Restamping altered contracts.—If, after a contract has been entered into and executed, the parties vary the terms thereof either by an alteration in the body of the written instrument, or by an indorsement, qualifying and restricting or extending its operation, and neglect to have the writing restamped, they will be unable to recover upon either contract (*b*). If the first agreement is altered, and turned into another and different agree-

(*a*) *M'Mullen* v. *"Sir Alfred Hickman" Steamship, Ltd.*, 71 L.J. Ch. 766.

(*b*) *Reed* v. *Deere*, 7 B. & C. 265; 3 C. & P. 624.

ment, and the plaintiff brings his action thereon, and then finds that the substituted contract cannot be enforced by reason of its being unstamped, he cannot resort back to the contract which was abandoned by consent, and seek to recover upon it in its original state. If a bill of exchange or a promissory note is altered in any material particular, it becomes a new security, and must be re-stamped (*c*); but, whilst a contract is *in fieri*, and before it is completely executed by all parties, and perfected, an alteration may be made without rendering a new stamp necessary (*d*). Before a promissory note has been negotiated, it may be converted into a bill of exchange, or altered as to its date, or the time that it has to run, in furtherance of the original intention of all parties, and to correct a mistake (*e*). And a subsequent alteration of a written agreement in a point not material, made by consent of all parties, does not render a fresh stamp necessary, such as an alteration made for the mere purpose of adding the style or address of the parties, or adding the words "or order" accidentally omitted on a bill of exchange (*f*); or altering the name of the port whence the certificate of a ship's registry was granted, a wrong port having been inserted by mistake (*g*); or rectifying a clerical error in the name, in declaring the interest on a policy (*h*); or altering a place at which a bill is made payable, with the consent of the acceptor (*i*); or inserting it when it has been accidentally omitted; or the insertion by the *bonâ fide* holder of a bill of his name in a blank left to be filled up by the name of the payee; for the issuing of the bill in blank conveys an implied authority to the holder to insert the name; and the insertion thereof merely completes the contract, and carries into effect the original intention (*k*). If a bill of exchange or a promissory note, however, is altered in any material particular, it becomes a new security, and must be re-stamped (*l*). This will be the case if the parties by indorsement agree to enlarge the time for the fulfilment of the con-

(*c*) *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412.

(*d*) *Jones* v. *Jones*, 1 C. & M. 721; 2 L.J. Ex. 249; *Spicer* v. *Burgess*, 1 C.M. & R. 129; 3 L.J. Ex. 285; *Wright* v. *Inshaw*, 1 Dowl. N.S. 802; 6 Jur. 857.

(*e*) *Webber* v. *Maddocks*, 3 Campb. 1; *Kennerley* v. *Nash*, 1 Stark. 452; *Downes* v. *Richardson*, 5 B. & Ald. 674; 1 D. & R. 332.

(*f*) *Byrom* v. *Thompson*, 11 Ad. & E. 31; 9 L.J. Q.B. 26; *Farquhar* v. *Southey*, Moo. & M. 14; 2 C. & P. 497.

(*g*) *Cole* v. *Parkin*, 12 East, 471.

(*h*) *Robinson* v. *Touray*, 1 M. & S. 217; 3 Campb. 160; *Sawtell* v. *Loudon*, 5 Taunt. 359; 1 Marsh. 99

(*i*) *Jacob* v. *Hart*, 6 M. & S. 142; 2 Stark. 45; *Walter* v. *Cubley*, 2 Cr. & M. 151; 3 L.J. Ex. 2.

(*k*) *Crutchley* v. *Clarence*, 2 M. & S. 90.

(*l*) *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *Walton* v. *Hastings*, 4 Campb. 223; 1 Stark. 215; *Cowie* v. *Halsall*, 4 B. & Ald. 197; 3 Stark. 36.

tract (*m*), or if a fresh signature is added at the bottom of a promissory note, after it has been negotiated, so as to make the note the joint note of two promisors, instead of the note of one person only, or if the date has been altered (*n*).

Admissibility in evidence for collateral purposes of unstamped, or wrongly stamped, documents.—An unstamped writing "may be given in evidence for the purpose of showing that it is a mere piece of waste paper, from the very circumstance of its being unstamped, or to serve some collateral purpose" (*o*). An unstamped policy has been received in evidence to support an action for the penalties (*p*), and an unstamped contract to prove a fraud (*q*), and an unstamped guarantee to show that the giving of it up was a sufficient consideration for a promise (*r*). A memorandum on the back of an unstamped promissory note of the payment of a certain sum of money for interest has been allowed to be given in evidence as an admission of a certain principal sum being due (*s*). Memoranda of payments, not given in evidence or sought to be set up as an acquittance or discharge of a debt, but in order to prove an over-payment, have been held admissible unstamped (*t*); and, although an unstamped receipt for money cannot be given in evidence as an acquittance or discharge of a debt, yet it may be looked at by a witness to refresh his memory upon the subject of the receipt of the money (*u*).

When a stamped contract is in the hands of one of the parties to an action, who refuses to produce it, the Court will allow secondary evidence of the contents to be given through the medium of an unstamped draft or copy (*x*); and, if a contract is proved to be in the hands of the defendant in an action, and the latter refuses to produce it after notice, the Court will presume it to be duly stamped, unless the contrary be shown (*y*);

(*m*) *Bacon* v. *Simpson*, 3 M. & W. 78; 7 L.J. Ex. 34; *Stephens* v. *Lowe*, 2 M. & Sc. 44; 9 Bing. 32; 1 L.J. C.P. 150. See *Yates* v. *Evans*, 61 L.J. Q.B. 446.

(*n*) *Cardwell* v. *Martin*, 9 East, 190; 1 Campb. 79, 180; *Bowman* v. *Nichol*, 5 T.R. 537; *Perring* v. *Hone*, 12 Moore, 145; 5 L.J. (O.S.) C.P. 33.

(*o*) *Smart* v. *Nokes*, 13 L.J. C.P. 79; 7 Sc. N.R. 786; *Coppock* v. *Bower*, 4 M. & W. 361; 8 L.J. Ex. 9; *Williams* v. *Gerry*, 10 M. & W. 226; 11 L.J. Ex. 389; *Enthoven* v. *Hoyle*, 13 C.B. 394; 21 L.J. C.P. 100; *Matheson* v. *Ross*, 2 H.L.C. 300; 13 Jur. 307.

(*p*) *Holland* v. *Duffin*, Peake, 81.

(*q*) *Keable* v. *Payne*, 8 Ad. & E. 555; 7 L.J. Q.B. 218; *Holmes* v. *Sixsmith*, 7 Exch. 802; 21 L.J. Ex. 313.

(*r*) *Haigh* v. *Brooks*, 10 Ad. & E. 309; 9 L.J. Q.B. 194.

(*s*) *Manly* v. *Peel*, 5 Esp. 121.

(*t*) *Clark* v. *Hougham*, 3 D. & R. 323; 1 L.J. (O.S.) K.B. 249.

(*u*) *Rambert* v. *Cohen*, 4 Esp. 213; *Catt* v. *Howard*, 3 Stark. 3; *Jacob* v. *Lindsay*, 1 East, 460; *Maugham* v. *Hubbard*, 8 B. & C. 14; 6 L.J. (O.S.) K.B. 229.

(*x*) *Munn* v. *Godbold*, 11 Moore, 49; 4 L.J. (O.S.) C.P. 54; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L.J. Ex. 38.

(*y*) *Crisp* v. *Anderson*, 1 Stark. 35.

and the same presumption will be adopted where a contract has been lost (*z*).

Stamp duties on contracts executed abroad.—Our courts of law do not, as previously mentioned, take notice of the revenue laws of foreign states. Where an action was brought in this country for the recovery of money lent in France, and unstamped receipts for the money were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them evidence was rejected (*a*). But, if the law of the country in which the contract is made renders the contract null and void if it is not stamped, it cannot be enforced here if it has not the foreign stamp (*b*). Promissory notes made abroad and negotiated here are subjected to our stamp duties (*c*).

(*z*) *Rex* v. *Long Buckby*, 7 East, 45; *Pooley* v. *Goodwin*, 4 Ad. & E. 94; 5 N. & M. 466; *Hart* v. *Hart*, 1 Hare, 1; 11 L.J. Ch. 9; *Closmadeuc* v. *Carrel*, 18 C.B. 36; 35 L.J. C.P. 216. See *Marine Insurance Co.* v. *Haviside*, *ante*, p. 1334.

(*a*) *James* v. *Catherwood*, 3 D. & R. 190.

(*b*) *Bristow* v. *Sequeville*, 5 Exch. 279; 19 L.J. Ex. 289.

(*c*) See *ante*, p. 1241, Bills of Exchange.

CHAPTER II.

OF THE STAMPS APPROPRIATE TO PARTICULAR CONTRACTS.

Stamp duties on deeds.—Deeds of any kind whatsoever which are not specifically described in the schedule of the Stamp Act, 1891, are liable to a duty of 10*s.* (*a*). The mere fact of a contract having a seal placed against the signatures of the parties does not, as we have seen, make the contract a deed. A contract, therefore, does not require a deed stamp merely because there is a seal attached to it (*b*). "The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it; he must, so to speak, 'hit the bird in the very eye.' No intendments can be made in favour of the liability" (*c*). If an old deed appears on the face of it to have been stamped, and the parchment is worn and the stamp obliterated, so that the nature and amount of it cannot be ascertained, the document is admissible in evidence; and it is for the parties who seek to impeach the deed to show, either that it was not stamped at all, or that it was stamped with a wrong stamp (*d*).

Progressive duty, according to the number of words contained in a deed, used to be imposed upon all deeds, but by the Stamp Act, 1891, the duties thereinafter mentioned are granted, and there is no mention made of progressive duties, which are therefore abolished (*e*).

Attested copies—Duplicates and counterparts.—Attested or authenticated copies or extracts of certain documents mentioned are charged with the same duty as the original instruments in the case of an instrument chargeable with any duty

(*a*) 54 & 55 Vict. c. 39. See *Inland Rev. Com.* v. *Maple & Co.*, (1908) A.C. 22; 77 L.J. K.B. 55. By 46 & 47 Vict. c. 52, s. 144, every deed, &c., relating solely to property which is part of the estate of the bankrupt, and which after the execution of such deed, &c.. is, or remains, the estate of the bankrupt, or of the trustee, and every power of attorney, &c., or other instrument relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, is exempted from stamp duty (except in respect of fees under that Act). This section is extended to companies wound up by order of the Court by the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 16.

(*b*) *Chanter* v. *Johnson*, 14 M. & W. 408; 14 L.J. Ex. 289; *Brown* v. *Vawser*, 4 East, 584.

(*c*) *Per cur.*, *Phillips* v. *Morrison*, 12 M. & W. 740; 13 L.J. Ex. 213.

(*d*) *Doe* v. *Coombs*, 3 Q.B. 687; 12 L.J. Q.B. 36.

(*e*) See the preamble to the Act, and sect. 1.

not amounting to 1*s.*, and in any other case with a duty of 1*s.* (*f*). But copies or extracts of or from any law proceedings are exempt. With respect to copies and extracts, it is also enacted by sect. 63 of the Stamp Act, 1891, that an attested or otherwise authenticated copy or extract of or from—(1) an instrument, chargeable with any duty; (2) an original will, testament, or codicil; (3) the probate or probate copy of a will or codicil; (4) letters of administration or a confirmation of a testament, may be stamped at any time within fourteen days after the date of the attestation or authentication, on payment of the duty only. Duplicates or counterparts of any instrument chargeable with stamp duty, not amounting to 5*s.*, are subjected to the same duty as is charged on the original instrument; and, in any other case, the stamp duty on the duplicate or counterpart is 5*s.*

By sect. 72, the duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

A copy or extract certified of or from any register of births, baptisms, marriages, deaths, or burials is chargeable with one penny duty; and see sect. 64 of the Act.

Purchase of property under authority of statute.—The *ad valorem* duty imposed by sect. 12 of the Finance Act, 1895 (*g*), on "any property" purchased under statutory authority of which a duly stamped instrument of conveyance is required, is payable in respect of the whole property, personal as well as real, and is not confined to property which can only be transferred in writing (*h*). A conveyance which had been produced at the collector's offices in order to be provisionally marked with the duty payable and has thereafter been stamped with that duty, has not thereby been "produced to the Commissioners of Inland Revenue duly stamped" in the sense of sect. 12 of the Act of 1895. The date of the "completion of the purchase" within the section is the date of the final payment of the price (*i*).

(*f*) See the schedule, tit. "Copy."
(*g*) 58 & 59 Vict. c. 16, s. 12.
(*h*) *Eastbourne Corporation* v. *Att.-Gen.*, (1904) A.C. 155; 73 L.J. K.B. 259.
(*i*) *Lord Advocate* v. *Caledonian Ry.*, (1908) S.C. 566; *Att.-Gen.* v. *Felixtowe Gas Light and Coke Co.*, (1907) 2 K.B. 984; 76 L.J. K.B. 1107.

Conveyances or transfers on sale of any property (except certain stocks) (*k*) are subject to the *ad valorem* duty specified in the schedules to the Act varying from 6*d.*, where the value of the consideration does not exceed 5*l.*, to 1*l.* 10*s.* 0*d.*, where the value exceeds 275*l.*; and for any conveyance or transfer of any kind not thereinbefore described, to a duty of 10*s.* By sect. 73 of the Finance Act, 1910 (*l*), these duties are now double those specified in the Stamp Act, 1891; but the section *inter alia* does not apply to the conveyance or transfer of any stock or marketable security as defined by sect. 122 of the Act of 1891. By sect. 54, the term "conveyance on sale" includes every instrument, and every decree or order of any Court, or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction (*m*). This includes an agreement for the sale of the goodwill of a business (*n*).

By sect. 55 (1), where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security (*o*), the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security; (2) where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

By sect. 56 (1), where the consideration, or any part of the consideration, for a conveyance on sale, consists of money payable periodically for a definite period, not exceeding twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount; (2) where the consideration, or any part of the consideration,

(*k*) See the schedule, tit. "Conveyance or transfer."

(*l*) 10 Edw. 7, c. 8, s. 73.

(*m*) See *Inland Rev. Com.* v. *Glasgow & S. W. Ry.*, 12 App.Cas. 315; 56 L.J. P.C. 82; *G. W. Ry.* v. *Inland Rev. Com.*, (1894) 1 Q.B. 507; 63 L.J. Q.B. 405; *Huntington* v. *Inland Rev. Com.*, (1896) 1 Q.B. 422; 65 L.J. Q.B. 297; *Chesterfield Brewery* v. *Inland Rev. Com.*, (1899) 2 Q.B. 7; 68 L.J. Q.B. 204; *Bristol (Marquess)* v. *Inland Rev. Com.*, (1901) 2 K.B. 336; 70 L.J. K.B. 759; *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336. By the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6, the term "conveyance on sale" is to include a decree or order for foreclosure: see *Inland Rev. Com.* v. *Tod*, (1898) A.C. 399; 67 L.J. P.C. 42; *Lovell and Collard's Contract, In re*, (1907) 1 Ch. 249; 76 L.J. Ch. 246.

(*n*) *Inland Rev. Com.* v. *Angus*, 23 Q.B.D. 579; and see sect. 59, *post*, p. 1361.

(*o*) See *Foster* v. *Inland Rev. Com.*, (1894) 1 Q.B. 516; 63 L.J. Q.B. 173; *Dawson* v. *Inland Rev. Com.*, (1905) 2 Ir. R. 69.

for a conveyance on sale, consists of money payable periodically for a definite period exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty (*q*) on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument; (3) where the consideration, or any part of the consideration, for a conveyance on sale, consists of money payable periodically (*r*) during any life or lives, the conveyance is to be charged, in respect of that consideration, with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument; (4) provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than 10*s*.

By sect. 57, where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*s*).

By sect. 58 (1), where property contracted to be sold for one consideration for the whole, is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect

(*q*) Where part of the consideration on a sale consists of money payable periodically on a contingency for a term exceeding twenty years, or in perpetuity or for an indefinite period, *ad valorem* stamp duty must under sect. 56, sub-sect. 2, of the Stamp Act, 1891, be paid on twenty years' purchase of such annual payment: *Underground Electric Rys. Co.* v. *Inland Rev. Com.*, (1906) A.C. 21; 75 L.J. K.B. 117.

(*r*) Where part of the consideration was to be paid by instalments of 1,000*l*. each at intervals of six months, it was held to be a periodical payment within the corresponding section, and not a deferred payment merely: *Limmer Asphalte Co.* v. *Inland Rev. Com.*, L.R. 7 Ex. 211; 41 L.J. Ex. 106.

(*s*) *Inland Rev. Com.* v. *Tod*, *ante*, p. 1341; *Swayne* v. *Inland Rev. Com.*, (1900) Q.B. 172; 69 L.J. Q.B. 63

of such distinct consideration; (2) where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified; (3) where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument; (4) where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser; (5) where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty, in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration; (6) where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty. And see *post*, p. 1361, as to agreements to be deemed conveyances (sect. 59). By the Finance Act, 1900 (*t*), a conveyance on sale made for any consideration in respect whereof it is liable to *ad valorem* duty, and in further consideration of a covenant to make, or of the purchaser having made, substantial improvements or additions to the property, or of any covenant relating to the subject-

(*t*) 63 & 64 Vict. c. 7, s. 10.

matter of the conveyance, shall not be chargeable with any duty in respect of such further consideration.

By sect. 60, where, upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance or sale. This section covers the grant of an annuity for an indefinite period in consideration of the payment of a sum of money (*u*). This section does not reach a sale of property in consideration of an annuity where there is no conveyance or written contract chargeable under sect. 59 (*x*).

By sect. 61 (1), in the cases hereinafter specified the principal instrument is to be ascertained in the following manner: (a) where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument; (b) in other cases of copyhold or customary estates, the surrender or grant, if made out of Court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in Court, is to be deemed the principal instrument; (c) where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument: (2) in any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

By sect. 62, every instrument, and every decree or order of any Court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property (*y*).

Provided that a conveyance or transfer made for effectuating the appointment or retirement of a trustee is not to be charged with any higher duty than 10*s*. (*z*).

(*u*) *Mersey Docks and Harbour Board* v. *Commissioners*, (1897) 2 Q.B. 316; 66 L.J. Q.B. 697. As to stamp on undertaking to leave minerals unworked, see *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336.

(*x*) See *Blandy* v. *Herbert*, 9 B. & C. 396; 7 L.J. (O.S.) K.B. 223; *Mestayer* v. *Biggs*, 1 C. M. & R. 110; 3 L.T. Ex. 292.

(*y*) See *Kemp* v. *Inland Rev. Com.*, (1905) 1 K.B. 581; 74 L.J. K.B. 112.

(*z*) These provisions apply to any conveyance or transfer for effectuating the retirement of a trustee,

By sect. 117, every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void (*a*).

Contracts not operating as transfers and conveyances of the legal estate in property were not liable to the *ad valorem* stamp, although they might operate upon the equitable estate (*b*). Agreements in writing, consequently, for the sale of land or veins or beds of coal, which did not transfer the land or the coal to the purchaser, by reason of their not having been made under seal, needed only to be stamped with a common agreement stamp (*c*). A contract amounting to a purchase and sale of the goodwill of a business requires an *ad valorem* stamp as a conveyance (*d*); and so do simple contracts operating as transfers of fixtures or growing crops, or of any description of property, not being simple contracts for the purchase and sale of goods and chattels (*e*). Where by a marriage settlement the defendant, in consideration of a sum of money paid by the intended wife's father as a marriage portion, and also in consideration of the marriage, covenanted to pay an annuity to the plaintiff, to the use of the intended husband and wife, it was held that the transaction was not a purchase or a sale of an annuity within the language of the schedule to the 13 & 14 Vict. c. 97 (repealed), and that the *ad valorem* stamp was not requisite (*f*). And, where a person who was entitled to the reversion of stock after the death of the party entitled for life, agreed to pay the latter an annuity, in consideration of his permitting the stock to be sold and the proceeds of the sale to be received by such reversioner for his own benefit, it was held that the transaction was not a sale of an annuity in the ordinary acceptation of the

although no new trustee is appointed, see 2 Edw. 7, c. 7, s. 9; 10 Edw. 7, c. 8, s. 74 (6).

(*a*) See *Eastbourne Corporation* v. *Att.-Gen.*, (1904) A.C. 155; 73 L.J. K.B. 259; and Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12, *ante*, p. 1340.

(*b*) See now sect. 59, *post*, p. 1361; *Inland Rev. Com.* v. *Angus*, 23 Q.B.D. 579.

(*c*) *Phillips* v. *Morrison*, 12 M. & W. 742; 13 L.J. Ex. 212; *Rex* v. *Ridgwell*, 6 B. & C. 665; 5 L.J. (O.S.) M.C. 67; *Wilmot* v. *Wilkinson*, 6 B. & C. 511; 5 L.J. (O.S.) K.B. 196.

(*d*) *Potter* v. *Inland Rev. Com.*, 10 Exch. 147; 23 L.J. Ex. 345.

(*e*) *Horsfall* v. *Key*, 2 Ex. 778; 17 L.J. Ex. 266; *Cattle* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162; *Att.-Gen.* v. *Brown*, 3 Exch. 662; 18 L.J. Ex. 336.

(*f*) *Massy* v. *Nanney*, 3 Bing. N.C. 480; 6 L.J. C.P. 185.

term, and that the deed was properly stamped with a common deed stamp (*g*).

Mortgages (*h*), bonds, debentures, covenants (except a marketable security (*i*) otherwise charged with duty), warrants of attorney to confess and enter up judgment, and foreign securities of any kind, are liable, when they are the only, or principal, or primary security (other than an equitable mortgage, see *infra*), for the payment or repayment of money not exceeding 300*l*., to an *ad valorem* duty ranging from 3*d*. to 7*s*. 6*d*., and exceeding 300*l*., to a duty of 2*s*. 6*d*. for every 100*l*. or fractional part of 100*l*. When they are the collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance where the principal or primary security is duly stamped, they are liable to a duty of 6*d*. for every 100*l*. or fractional part of 100*l*. (*k*). An equitable mortgage is subject to a duty of 1*s*. for every 100*l*. and any fractional part of 100*l*.

Transfers, assignments, dispositions, or assignations of the above, except a marketable security, or of any money secured thereby, or by any warrant of attorney or judgment, are liable to a duty of 6*d*. for every 100*l*. or fractional part, exclusive of interest, which is not in arrear; and, where any further money is added to the money already secured, the same amount of duty is payable as if for a principal security. Re-conveyances, releases, discharges, surrenders, re-surrenders, warrants to vacate, or renunciations of any of the above securities, or of the benefit of them, or of the money thereby secured, are liable to a duty of 6*d*. upon every 100*l*. or fractional part of 100*l*. (*l*).

By the Stamp Act, 1891, s. 86 (1), the term "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent,

(*g*) *Blandy* v. *Herbert*, 9 B. & C. 396; 7 L.J. (O.S.) K.B. 223; *Limmer Asphalte Co.* v. *Inland Rev. Com.*, L.R. 7 Ex. 211; 41 L.J. Ex. 106; *Sweetmeat Automatic Delivery Co.* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84; *Conservators of River Thames* v. *Inland Rev. Com.*, 18 Q.B.D. 279; 56 L.J. Q.B. 181.

(*h*) Stamp Act, 1891, schedule 1, par. 1. *Harris* v. *Birch*, 9 M. & W. 593; 11 L.J. Ex. 219.

(*i*) As to stamp duty on marketable securities, see 10 Edw. 7, c. 8, s. 76.

(*k*) Stamp Act, 1891, schedule 1, par. 2. The amount of duty payable under this sub-heading has been limited by sect. 7 of the Revenue Act, 1903 (3 Edw. 7, c. 46), to the sum of 10*s*.

(*l*) See the schedule, tit. "mortgage," and *British Oil and Cake Mills* v. *Inland Rev. Com.* 72 L.J. K.B. 312; (1903) 1 K.B. 689. As to exemption of re-conveyance under Building Societies Act, see *Old Battersea Building Soc.* v. *Inland Rev. Com.*, (1898) 2 Q.B. 294; 67 L.J. Q.B. 696

advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; and includes—(a) conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever: and (b) any deed containing an obligation to infeft any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured: and (c) any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number: and (d) any defeazance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable, or explaining or qualifying, any conveyance, transfer, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security; and (e) any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title deeds for making a mortgage, wadset, or any other security or conveyance as aforesaid of any lands, estate, or property comprised in the title deeds, or for pledging or charging the same as a security: and (f) any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland: and (g) any deed operating as a mortgage of any stock or marketable security (*m*). (2) For the purpose of this Act the expression "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock

(*m*) As to debentures, see *Rowell* v. *Inland Rev. Com.*, (1897) 2 Q.B. 194; 66 L.J. Q.B. 528; *City of London Brewery Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 121; 68 L.J. Q.B. 978; *Knight's Deep* v. *Inland Rev. Com.*, (1900) 1 Q.B. 217; 69 L.J. Q.B. 66; *British Oil and Cake Mills* v. *Inland Rev. Com.*, (1903) 1 K.B. 689; 72 L.J. K.B. 312; *Att.-Gen.* v. *Regent's Canal and Dock Co.*, (1904) 1 K.B. 263; 73 L.J. K.B. 50; *Mount Lyell Mining Co.* v. *Inland Rev. Com.*, (1905) 1 K.B. 161; 74 L.J. K.B. 4; *London and India Docks Co.* v. *Att.-Gen.*, (1909) A.C. 7; 78 L.J. K.B. 132; *Firth* v. *Inland Rev. Com.*, (1904) 2 K.B. 205; 73 L.J. K.B. 632.

or marketable security) (*n*), or creating a charge on such property.

By sect. 87 (1), a security for the transfer or re-transfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation of any such security, and a re-conveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, is to be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock.

By sect. 87 (2), a security for the payment of any rent-charge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid. This section does not apply to the case of a grant of a perpetual annuity in consideration of a sum of money paid by way of purchase. Such an annuity falls under sect. 60 (*o*).

By sect. 87 (3), a transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security (*p*).

By sect. 87 (4), where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court. (5) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or

(*n*) See sect. 23, *post*, p. 1352.

(*o*) See *Mersey Docks and Harbour Board* v. *Inland Rev. Com.*, (1897) 2 Q.B. 316; 66 L.J. Q.B. 697.

(*p*) See *Wale* v. *Inland Rev. Com.*, 4 Ex.D. 270; 48 L.J. Ex. 574; *City of London Brewery Co.* v. *Inland Rev. Com.*, *ante*, p. 1347.

grant, as the case may be, is not to be charged with any higher duty than 10*s*. (6) An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser.

By sect. 88 (1), a security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited (*q*). (2) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made. (3) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security upon the dropping of any life whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

By sect. 89, the exemption from stamp duty conferred by 6 & 7 Will. 4, c. 32, for the regulation of benefit building societies, shall not extend to any mortgage to be made after the 31st July, 1868, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding 500*l*.

Marketable securities and foreign and colonial share certificates.—By the Stamp Act, 1891, s. 82 (1), marketable securities for the purpose of the charge of duty thereon (see definition, sect. 122, *ante*, p. 1327) include—(a) A marketable security, made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and (b) A marketable security by or on behalf of any foreign state or government, or foreign or

(*q*) See *Suffield* (*Baron*) v. *Inland Rev. Com.*, (1908) 1 K.B. 865; 77 L.J. K.B. 746.

colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the third day of June one thousand eight hundred and sixty-two, (i.) Which is made or issued in the United Kingdom (*r*), or (ii.) Which, though originally issued out of the United Kingdom, has been, after the sixth day of August one thousand eight hundred and eighty-five, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or (iii.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and (c) A marketable security by or on behalf of any colonial government which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security) (*s*).

By the Finance Act, 1910 (*t*), s. 77, "(2) Where a contract note is a continuation or carrying over note made for the purpose of continuing or carrying over any transaction for the sale or purchase of stock or marketable securities, the contract note, although it is made in respect of both a sale and purchase, shall be charged with duty under this section as if it related to one of these transactions only, and, if different rates of duty are chargeable in respect of these transactions, to that one of those transactions which would render the contract note chargeable at the highest rate. (3) For the purposes of this Part (*u*) of this Act, the expression "contract note" means the note sent by a broker or agent to his principal, or by any person who by way of business deals, or holds himself out as dealing, as a principal in any stock or marketable securities, advising the principal, or the vendor or purchaser, as the case may be, of the sale or purchase of any stock or marketable security, but does not include a note sent by a broker or agent to his principal where the principal is himself acting as broker or agent for a principal, and

(*r*) See *Revelstoke* (*Lord*) v. *Inland Rev. Com.*, (1898) A.C. 565; 67 L.J. Q.B. 855.

(*s*) As to the meaning of "marketable security," see *Brown, Shipley & Co.* v. *Inland Rev. Com.*, (1895) 2 Q.B. 598; 64 L.J. M.C. 241; *Knight's Deep* v. *Inland Rev. Com.*, (1900) 1 Q.B. 217; 69 L.J. Q.B. 66. As to composition for stamp duty upon transfer of Canadian and colonial stock, see sect. 114 of the Act, 1894 (57 & 58 Vict. c. 30), s. 39, to the stock of any foreign state or government which is inscribed in the books of the Bank of England, and by the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 5, to certain stock of British protectorates. As to stamp duty on other foreign or colonial securities, see the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 4.

Sect. 82 (2), and sect. 85 of the Stamp Act, 1891, were repealed by the Customs and Inland Revenue Act, 1893 (56 & 57 Vict. c. 7), s. 4.

(*t*) 10 Edw. 7, c. 8, s. 77. The stamp duties chargeable on contract notes are set out in sub-sect. 1. As to the obligation to execute contract notes and the penalties incurred for failure to do so, see sect. 78 (3), *post*, p. 1351.

(*u*) *I.e.*, Part V. of the Act.

is himself either a member of a stock exchange in the United Kingdom or a person who *bonâ fide* carries on the business of a stockbroker in the United Kingdom, and is registered as such in the list of stockbrokers kept by the Commissioners. (4) Where a contract note advises the sale or purchase of more than one description of stock or marketable security, the note shall be deemed to be as many contract notes as there are descriptions of stocks or securities sold or purchased." By sect. 79, "(1) The provisions of this Part (*uu*) of this Act as to contract notes shall apply to any contract under which an option is given or taken to purchase or sell any stock or marketable security at a future time at a certain price, as it applies to the sale or purchase of any stock or marketable security, but the stamp duty on such a contract shall be one-half only of that chargeable on a contract note: Provided that, if under the contract a double option is given or taken, the contract shall be deemed to be a separate contract in respect of each option. (2) Any contract note made or executed in pursuance and in consequence of the exercise of an option given or taken under a contract duly stamped in accordance with the provisions of this section shall be charged with one-half only of the duty which would otherwise have been chargeable thereon under this part of this Act, provided that it bears on its face a certificate by the broker, agent, or other person mentioned in the last preceding section to the effect that it is made or executed in the exercise of an option for which a duly stamped contract has been rendered on the date mentioned in the certificate."

All stamp duties on a contract note are to be denoted by an adhesive stamp appropriated to a contract note, and the stamp is to be effectively cancelled by the person by whom the note is executed by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing; and any stamp duty on a contract note may be added to the charge for brokerage or agency and is recoverable as part of such charge (*x*); but no broker, agent, or other person is to have any legal claim to any charge for brokerage, commission, or agency with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards who fails to comply with the provisions of this section (sect. 78) as to executing contract notes (*y*).

Where an instrument is liable to duty under two or more

(*uu*) *I.e.*, Part V. of the Act.
(*x*) 10 Edw. 7, c. 8, s. 78 (4), (5).
(*y*) 10 Edw. 7, c. 8, s. 78 (3).

categories of taxation, the Crown has an option to decide under which category it is to be assessed (*z*).

By sect. 83, every person who in the United Kingdom makes, issues, assigns, transfers, negotiates, or offers for subscription any foreign security or colonial government security not being duly stamped, shall incur a fine of 20*l*. By the Finance Act, 1895 (*a*), where foreign securities within the meaning of sects. 82 and 83 of the Stamp Act, 1891, are issued in the United Kingdom and the interest thereon is not payable in the United Kingdom, and such evidence of the amount of the securities as the commissioners require is produced to them, the commissioners may accept payment of the amount of stamp duty which would be payable if all the securities were duly stamped, and on such payment may dispense with the necessity of the securities being stamped.

By sect. 84, the commissioners may at any time, without reference to the date thereof, allow any foreign security or colonial government security to be stamped without the payment of any penalty, upon being satisfied, in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned, or negotiated within the United Kingdom.

By sect. 23, it is enacted (1) that every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer or foreign or colonial share certificate or any security for money transferable by delivery by way of security for any loan, shall be deemed to be an agreement and be charged with duty accordingly, and (2) the same duty is made chargeable in the case of an instrument under hand qualifying or making redeemable a duly stamped transfer of any registered stock or marketable security. (3) A release or discharge of any such instrument is not liable to *ad valorem* duty. The instrument must be under hand. If under seal it is chargeable with *ad valorem* mortgage duty under sect. 86, sub-sect. 1 (d) and (g).

A deed of assignment of goods and chattels as an additional security for the payment of a principal sum and interest thereon, already secured by a warrant of attorney, was held to be sufficiently stamped with a common deed stamp (*b*); and so also was a deed executed and indorsed on a former mortgage deed,

(*z*) *Speyer* v. *Inland Rev. Com.*, (1908) A.C. 92; 77 L.J. K.B. 302.
(*a*) 58 & 59 Vict. c. 16, s. 14.
(*b*) *Pierpoint* v. *Gower*, 5 Sc. N.R. 605; 12 L.J. C.P. 55.

as a further security for the sum thereby secured (*c*), and a declaration of trust of a surrender of copyholds by way of security (*d*). A security for contingent future payments was held to be as much within the words and meaning of the former statute as a security for certain future payments (*e*).

Covenants (*f*).—Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, is liable to a duty equal to the amount of the *ad valorem* duty payable in respect of the consideration or mortgage money, where that does not exceed 10*s*., and in any other case 10*s*. (*g*).

Exchanges, partitions, &c.—By sect. 73, where, upon the exchange of any real or heritable property for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value 100*l*. is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby the exchange or partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for the consideration, and with that duty only; and where in any such case there are several instruments for completing the title of either party, the principal instrument is to be ascertained, and the other instruments are to be charged with duty in the manner hereinbefore provided in the case of several instruments of conveyance (*h*). In any other case the instrument effecting the exchange is liable to a duty of 10*s*. (*i*).

Settlements.—Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other

(*c*) *Robinson* v. *Macdonnell*, 5 M. & S. 228.

(*d*) *Haywood* v. *Bibby*, 11 M. & W. 812; 12 L.J. Ex. 404.

(*e*) *Canning* (*Lord*) v. *Raper*, 1 E. & B. 164; 22 L.J. Q.B. 87.

(*f*) As to bonds for securing payments at certain periods, see *Jones* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84; *Clifford* v. *Inland Rev. Com.*, (1896) 2 Q.B. 187; 65 L.J. Q.B. 582; *Lewis* v. *Inland Rev. Com.*, (1898) 2 Q.B. 290; 67 L.J. Q.B. 694; *National Telephone Co.* v. *Inland Rev. Com.*, (1900) A.C. 1; 69 L.J. Q.B. 43; *County of Durham Electrical Power Distribution Co.* v. *Inland Rev. Com.*, (1909) 2 K.B. 604; 78 L.J. K.B. 1158.

(*g*) As to covenant to execute a mortgage, see *United Realization Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 361; 68 L.J. Q.B. 218.

(*h*) See sect. 58, *ante*, p. 1342. As to exchange of shares, see *Coats* v. *Inland Rev. Com.*, (1897) 2 Q.B. 423; 66 L.J. Q.B. 732.

(*i*) See the schedule, tit. "Exchange."

hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled, in any manner whatsoever, is liable for every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled, to a duty of 5*s.* (*k*). Instruments of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will or testamentary instrument creating the power are exempted from duty (*l*).

By sect. 74 (4) of the Finance Act, 1910 (*m*), where any instrument is chargeable with duty both as a conveyance or transfer under sect. 74 (which deals with stamp duty on gifts *inter vivos*) and as a settlement under the heading "Settlement" in Schedule I. to the Act of 1891, the instrument is to be charged as a conveyance or transfer under sect. 74 and not as a settlement under the Act of 1891.

By sect. 104 (1) of the Stamp Act, 1891, where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with *ad valorem* duty in respect of that money. (2) Provided as follows: (a) Where in the case of a policy, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument; (b) If in any such case the instrument contains a statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

By sect. 105, an instrument chargeable with *ad valorem* duty as a settlement in respect of any money, stock, or security is not to be charged with any further duty by reason of containing provision for the payment or transfer of the same money, stock, or security, or by reason of containing, where the money, stock, or security is in reversion, or is not paid or transferred

(*k*) Stamp Act, 1891, sched. 1, tit. "Settlement." *Inland Rev. Com.* v. *Oliver*, 78 L.J. P.C. 146; (1909) A.C. 427.

(*l*) See the Stamp Act, 1891, sched. 1, tit. "Settlement." *Russell* v. *Inland Rev. Com.*, (1902) 1 K.B. 142; 71 L.J. K.B. 201.

(*m*) 10 Edw. 7, c. 8, s. 74 (4).

upon the execution of the instrument, provision for the payment by the person entitled in possession to the interest or dividends of the money, stock, or security, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of 4*l.* per centum per annum upon the amount or value of the money, stock, or security.

By sect. 106 (1), where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds 10*s.*, one only of such instruments is to be charged with the *ad valorem* duty. (2) Where a settlement is made in pursuance of a previous agreement upon which any *ad valorem* settlement duty exceeding 10*s.* has been paid in respect of any property, the settlement is not to be charged with *ad valorem* duty in respect of the same property. (3) In each of the aforesaid cases the instruments not chargeable with *ad valorem* duty are to be charged with the duty of 10*s.* (*n*).

Revocations of uses and trusts of any property by any writing not being a will are liable to a duty of 10*s.* (*o*).

Releases or renunciations (*p*) of any property, or of any right or interest in any property, in any other case except upon a sale (see "Conveyance") or by way of security (see "Mortgage"), are liable to a duty of 10*s.* (*q*).

Under the Stamp Act, 1891, a lease or tack for any definite term not exceeding a year of any dwelling house, or part, at a rent not exceeding the rate of 10*l.* per annum, is liable to a duty of 1*d.*; and for any definite term less than a year of a furnished dwelling house or apartments where the rent exceeds 25*l.* to a duty of 2*s.* 6*d.*; and for any other lands, tenements, or heritable subjects, except or otherwise than as aforesaid, the same duty as a lease for a year at the rent reserved. A lease or tack for any other definite term, or for any indefinite term, of any lands, tenements, or heritable subjects, where the consideration consists of money, stock, or security, requires the same duty as a conveyance on a sale for the same consideration; and, where the consideration is a rent at a rate or average rate not exceeding 5*l.* up to 100*l.*, it is liable to a duty varying according to the rate of the rent, and according to the duration of the term, whether it is more or less than thirty-five years or one

(*n*) See *Onslow* v. *Inland Rev. Com.*, (1891) 1 Q.B. 239; 60 L.J. Q.B. 138.

(*o*) Schedule, tit. "Revocation."

(*p*) "Renunciation" in this connection is a term of Scotch and not of English law; see *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336.

(*q*) Schedule, tit. "Release."

hundred years. Leases of any other kind whatsoever not hereinbefore described are liable to a duty of 10*s*. (*r*).

But now by the Finance Act, 1910 (*s*), s. 75, the stamp duties chargeable under the heading "Lease or Tack" in the first schedule to the Stamp Act, 1891, are to be double those which would have been chargeable immediately before the passing of Act of 1910 under that heading, but sect. 75 is not to apply to leases or tacks on which a fixed duty of 1*d*. is chargeable under that heading.

By sect. 75 (1) of the Act of 1891, an agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. (2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6*d*. only. An agreement to take lands, &c., is not chargeable with an *ad valorem* duty. An agreement to hire, signed by the lessee only, was considered sufficiently stamped with an agreement stamp. "Even if signed by the lessor, there is nothing to stamp as a lease. It is a mere agreement which, but for the Statute of Frauds, need not have been in writing" (*t*).

By sect. 76 (1), where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty. (2) Where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at the given sum, or according to the permanent rate. (3) A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped.

(*r*) Schedule, tit. "Lease."
(*s*) 10 Edw. 7, c. 8, s. 75.
(*t*) *Glen* v. *Dungey*, 4 Ex. 61; 18 L.J. Ex. 359.

By sect. 77 (1), a lease or tack or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter. (2) A lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration (*u*). (3) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35*s*. (4) A lease for a definite term exceeding thirty-five years granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is not to be charged with any higher duty than would have been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years. (5) An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

By sect. 78 (1), the duty upon an instrument chargeable with duty as a lease or tack of—(a) any dwelling-house or tenement, or part of a dwelling-house or tenement, for a definite term not exceeding a year, at a rent not exceeding the rate of 10*l*. per annum; or (b) any furnished dwelling-house or apartments for any definite term less than a year: and upon the duplicate or counterpart of any such instrument: may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed; (2) every person who executes, or prepares, or is employed in preparing, any such instrument

(*u*) These provisions of sub-sect. 2 do not apply as respects any further consideration in the lease consisting of a covenant which if it were contained in a separate deed would be chargeable with *ad valorem* stamp duty, and accordingly the lease is in any such case to be charged with duty in respect of any such further consideration under sect. 4 of the Stamp Act, 1891; see the Revenue Act, 1909 (9 Edw. 7, c. 43), s. 8. This enactment overrides the decision in *British Electric Traction Co.* v. *Inland Rev. Com.*, (1902) 1 K.B. 441; 71 L.J. K.B. 92.

(except letters or correspondence) which is not, at or before the execution thereof, duly stamped, shall incur a fine of 5*l*.

Where the expenditure of money in improvements constitutes the consideration for the lease, it is not a lease by way of fine or premium within the meaning of the former statutes (*x*). The granting of a lease in consideration of a premium is a sale of an interest in the land for a term of years; and the premium must be "truly expressed and set forth in words at length" in the deed (*y*).

A contract for the sale of vesture and herbage and growing grass for a certain sum is properly stamped as a lease granted in consideration of a sum of money by way of fine or premium (*z*).

Every contract which operates as a demise of realty for any determinate term is in contemplation of law a lease (*a*). A mere acknowledgment of an antecedent tenancy, or of an existing tenancy, does not require a lease stamp (*b*). A lease for a term of forty-five years at a substantial rent for the first twenty-three years, and at a peppercorn rent during the remaining twenty-two years, is not a lease exceeding thirty-five years at a yearly rent (*c*).

Agreements for leases are charged with the same duty as leases (*d*).

Assignments and surrenders of leases — Agreements to surrender.—Every assignment of a lease made upon any other occasion than a sale or mortgage is subjected to duty as a conveyance (*e*). Every surrender not being of copyholds and not chargeable with duty as a conveyance on sale or mortgage is chargeable with a duty of 10*s*. (*f*). Every agreement which operates as a surrender must be stamped as a surrender (*g*).

Contracts of apprenticeship.—Instruments of apprenticeship, except those relating to any poor child apprenticed by or at the sole charge of any parish (*h*) or township, or by or at the sole charge of any public charity, and those in Ireland where pre

(*x*) *Nicholls* v. *Cross*, 14 M. & W. 42; 14 L.J. Ex. 244.

(*y*) *Doe* v. *Lewis*, 10 B. & C. 675; 8 L.J. (O.S.) K.B. 300. As to lease of telephone, see *Sweetmeat Automatic Delivery Co.* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84.

(*z*) *Cattle* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162.

(*a*) *Burton* v. *Reevell*, 16 L.J. Ex. 86; 16 M. & W. 311.

(*b*) *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 12 L.J. Ex. 359; *Glen* v. *Dungey*, 4 Ex. 61; 18 L.J. Ex. 359; *Doe* v. *Wiggins*, 4 Q.B. 367; 12 L.J. Q.B. 177.

(*c*) *Pearson* v. *Inland Rev. Com.*, L.R. 3 Ex. 242; 37 L.J. Ex. 171.

(*d*) See sect. 75, *ante*, p. 1356.

(*e*) See sect. 62, *ante*, p. 1344; and see the duties chargeable on conveyances, *ante*, p. 1341.

(*f*) See the schedule, tit. "Surrender."

(*g*) *Williams* v. *Sawyer*, 6 Moo. 226; 3 Br. & B. 70.

(*h*) See *Rex* v. *Halesworth*, 3 B. & Ad. 717; *R.* v. *Skeffington*, 3 B. & Ald. 382.

mium does not exceed 10*l.*, are liable to a duty of 2*s.* 6*d.* A sectarian charity is not considered to be a "public charity"; but a charity restricted to the members of a particular trade, or confined to the inhabitants of a particular locality, is a public charity, and instruments of apprenticeship relating to persons apprenticed at the sole cost of such a charity are exempt (*i*).

By sect. 25, every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to a solicitor or law agent or writer to the signet specifically charged with duty), is to be deemed an instrument of apprenticeship.

The following exemption from duty is contained in the general exemptions at the end of the schedule of the Stamp Act, 1891:—Instruments of apprenticeship, bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of his Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer.

If the contract is only a contract of hiring and service, it must be stamped with an agreement stamp, unless it is under seal and requires a deed stamp, or unless it is a contract "for the hire of labourers, artificers, manufacturers, or menial servants," and as such exempt from all stamp duty (*k*). In calculating the amount of the duty regard must be had only to the value of what is given, directly or indirectly, to the master as consideration for the taking of the apprentice. If the friends of the latter covenant to provide meat, lodging, and clothing, this is not a benefit rendered to the master, nor anything given to him, but to the apprentice himself, and it cannot be made the subject of stamp duty under the Act (*l*); nor can a reservation to the master of a portion of the apprentice's earnings, the master being otherwise entitled to the whole (*m*). But, if any friends of the apprentice make a secret bargain with the master, to give him some consideration beyond what is expressed upon the face of the deed of apprenticeship, the contract is void (*n*). Money promised or agreed to be paid by a person not competent to contract or to make a valid payment amounts to nothing, and

(*i*) See *Hall* v. *Derby Urban Sanitary Authority*, 16 Q.B.D. 165; 55 L.J. M.C. 21.

(*k*) See *post*, p. 1362.

(*l*) *R.* v. *St. Petrox*, 4 T.R. 196; *R.* v. *Aylesbury*, 3 B. & Ad. 569; 1 L.J. M.C. 38.

(*m*) *R.* v. *Bradford*, 1 M. & S. 151.

(*n*) *R.* v. *Amersham*, 4 Ad. & E. 508; 5 L.J. M.C. 49.

will not invalidate the deed (*o*); nor will the insertion therein of a greater sum than was actually paid (*p*).

Charter-parties, which expression includes (sect. 49 (1)) any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel, are subjected to a stamp duty of 6*d*. (*q*). By sect. 49 (2), the duty upon a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract. By sect. 50, where a charter-party is first executed out of the United Kingdom, without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument so stamped shall be deemed duly stamped. By sect. 51, a charter-party may be stamped with an impressed stamp after execution upon the following terms; that is to say, (1) within seven days after the first execution thereof, on payment of the duty and a penalty of 4*s*. 6*d*.; (2) after seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of 10*l*.; and shall not in any other case be stamped with an impressed stamp. A guarantee for the due performance of a charter-party does not require to be stamped as a charter-party (*r*).

Transfers of ships.—Instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel, are exempted from duty (*s*).

Agreements.—Any agreement or memorandum of agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument, is liable to a duty of 6*d*. Although a writing may not be evidence of the whole contract, yet, if it

(*o*) *R.* v. *Bourton*, 9 B. & C. 872.
(*p*) *R.* v. *Keynsham*, 5 East, 309.
(*q*) Schedule, tit. "Charter-party," and sect. 49 (1).
(*r*) *Rein* v. *Lane*, L.R. 2 Q.B. 144; 36 L.J. Q.B. 81.
(*s*) See the general exemptions at the end of schedule 1.

is evidence of a material part of it, and a necessary part in the proof of the contract, it requires a stamp (*t*). By sect. 22, the duty of 6*d.* upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. As to mortgages and securities deemed to be agreements, see *ante*, p. 1346.

By sect. 59 (1), any contract or agreement [made in England or Ireland under seal or under hand only, or made in Scotland with or without any clause of registration] (*u*) for the sale of any equitable estate or interest in any property whatsoever (*x*), or for the sale of any estate or interest in any property, except lands, tenements, hereditaments or heritages (*y*), or property locally situate out of the United Kingdom (*z*), or goods, wares, or merchandise, or stock or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold. (2) Where the purchaser has paid the said *ad valorem* duty and before having obtained a conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require. (3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped. (4) Provided

(*t*) *Ramsbottom* v. *Mortley*, 2 M. & S. 445; *Glover* v. *Halkett*, 2 H. & N. 487; 26 L.J. Ex. 416. See *Carlill* v. *Carbolic Smoke Ball Co.*, (1892) 2 Q.B. 484; 61 L.J. Q.B. 696.

(*u*) The words between brackets have been repealed by 9 Edw. 7, c. 43, s. 7, and schedule.

(*x*) See *Farmer* v. *Inland Rev. Com.*, (1898) 2 Q.B. 141; 67 L.J. Q.B. 775; *Chesterfield Brewery* v. *Inland Rev. Com.*, (1899) 2 Q.B. 7; 68 L.J. Q.B. 204.

(*y*) See *West London Syndicate* v. *Inland Rev. Com.*, (1898) 2 Q.B. 507; 67 L.J. Q.B. 956.

(*z*) See *Brooke* v. *Inland Rev. Com.*, (1896) 2 Q.B. 356; 65 L.J. Q.B. 657; *Smelting Co. of Australia* v. *Inland Rev. Com.*, (1897) 1 Q.B. 175; 66 L.J. Q.B. 137; *Inland Rev. Com.* v. *Muller's Margarine Co.*, (1901) A.C. 217; 70 L.J. K.B. 677; *Danubian Sugar Factories* v. *Inland Rev. Com.*, (1901) 1 K.B. 245; 70 L.J. K.B. 211.

that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof. (5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this proviso shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof. (6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

Exemptions (*a*).—The provision with respect to agreements is subject to the following exemptions:—(1) Agreement or memorandum the matter whereof is not of the value of 5*l*. (2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant. (3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise (*aa*). (4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom (*b*). With respect, however, to hire-purchase agreements, sect. 7 of the Finance Act, 1907 (*c*), provides that any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or if under seal as a deed, as the case requires, and the exemption numbered (3) under the heading "Agree-

(*a*) As to exemptions in favour of friendly societies, see 59 & 60 Vict. c. 25, s. 33.

(*aa*) As to electrical energy being within these words, see *County of Durham Electrical, &c., Co.* v. *Inland Rev. Com.*, (1909) 2 K.B. 604; 78 L.J. K.B. 1158.

(*b*) See also sect. 23, *ante*, p. 1352.

(*c*) 7 Edw. 7, c. 13, s. 7.

ment or any memorandum of an agreement," in the first schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument. Electrical energy is to be deemed to be goods, wares, or merchandise for the purposes of sect. 59 and of the third exemption under the heading "Agreement or any memorandum of an agreement" in the first schedule of the Stamp Act, 1891 (*d*).

Firemen and stokers employed on board merchant vessels worked by steam, and placed under the orders of the engineer, are to be considered as artificers and labourers, and not seamen; and contracts for the hiring and service of such persons, so to be employed, are exempt from stamp duty (*e*). All instruments between the master and seamen of any ship, required to be made in a form approved by the Board of Trade, are exempt from stamp duty (*f*). And so are indentures of apprenticeship to the sea service (*g*), and to the fishery service (*h*), a master's bond (*i*), contract tickets (*k*), passage broker's bonds (*l*), and salvage bonds for the King's ships (*m*).

Exemption of agreements relating to the sale of goods and chattels.—A written agreement by a debtor to sell and deliver goods, and by a creditor to receive them, in satisfaction and discharge of an existing debt, is an agreement "for or relating to the sale of chattels" within the exemption of the Stamp Act (*n*). But a contract under seal for the sale and purchase of goods and chattels is not exempt from the stamp duty on deeds. If the parties to a contract of purchase and sale choose to resort to a solemn and formal contract under seal, such contract, if executory, must be stamped with a deed stamp; and, if it operates as an immediate transfer of the thing sold to the purchaser, it must have an *ad valorem* conveyance stamp before it can be given in evidence in any court of justice (*o*). *Fructus industriales*, such as growing crops of turnips, potatoes, and corn, being considered, as previously mentioned, goods and chattels (*ante*, p. 27), are within the exemption of the statute; and simple contracts as to them need not, consequently, be stamped to be admissible in evidence. A contract with a water company for the supply of water is a contract for "the sale of goods, wares, and merchandise" within the exemption, and

(*d*) 9 Edw. 7, c. 34, s. 19.
(*e*) *Wilson* v. *Zulueta*, 14 Q.B. 405; 19 L.J. Q.B. 49.
(*f*) 57 & 58 Vict. c. 60, s. 721.
(*g*) *Ib.*, s. 108 (1).
(*h*) 57 & 58 Vict. c. 60, s. 395 (7).
(*i*) *Ib.*, s. 309 (2).
(*k*) *Ib.*, s. 320 (4).
(*l*) *Ib.*, s. 342 (2).
(*m*) *Ib.*, s. 563.
(*n*) *Chatfield* v. *Cox*, 18 Q.B. 321; 21 L.J. Q.B. 279.
(*o*) *Clayton* v. *Burtenshaw*, 5 B. & C. 41; 7 D. & R. 800.

does not, consequently, require a stamp; and it is immaterial whether the subject-matter of the sale exists at the time of the making of the contract, or whether it has afterwards to be made, manufactered, or provided (*p*). An agreement to make a complicated machine with wheels and springs, according to a certain specification, is an agreement relating to the sale of goods within the exemption, unless the contract provides for the erection of it in a dwelling-house, or upon the soil and freehold as a fixture, in which case it is a contract for the performance of work and labour and the supply of materials, and not a contract of sale (*q*). An agreement for the sale and purchase of a ship comes within the exemption, as being a contract relating to the sale of goods and chattels (*r*); and the transfer of the ship itself is expressly exempted from all stamp duty (see p. 1360). A memorandum relating to the sale of goods, such as a bill of parcels, is admissible in evidence to establish a sale, and show who was the purchaser of the goods, although it has an unstamped receipt at the bottom of it (*s*). An agreement to participate in the profit and loss of a fishing adventure, or to take a share in the outfit of a ship, is not an agreement for the sale of goods, and is not, consequently, within the exemption (*t*); but an agreement to take a share of certain goods purchased, and participate in the profit and loss of a re-sale, is an agreement relating to the sale of goods within the exemption (*u*).

An agreement relating to the sale of goods comes within the exemption, notwithstanding the introduction into it of collateral matter (*x*). An agreement to cancel a bargain for the purchase of particular goods, and make a new arrangement respecting them, falls within the exemption (*y*); and so also does a warranty contained in a receipt for the price of a horse (*z*), and an agreement to take a share in a horse already purchased (*a*). If, however, the writing is introduced for the purpose of proving an agreement independent of the contract for the sale of goods, it will not be admitted in evidence without being stamped with an agreement stamp. And, if the contract established by

(*p*) *West Mid. Water Co.* v. *Suwerkropp*, M. & M. 408; 4 C. & P. 87; *Gurr* v. *Scudds*, 11 Ex. 190.

(*q*) *Pinner* v. *Arnold*, 2 Cr. M. & R. 616; 5 L.J. Ex. 1.

(*r*) *Meering* v. *Duke*, 2 M. & R. 121; 6 L.J. (O.S.) K.B. 211.

(*s*) *Millen* v. *Dent*, 10 Q.B. 846; 16 L.J. Q.B. 374.

(*t*) *Leigh* v. *Banner*, 1 Esp. 403.

(*u*) *Venning* v. *Leckie*, 13 East, 7.

(*x*) *Tooke* v. *Meering*, Dans. & Ll. 35.

(*y*) *Whitworth* v. *Crockett*, 2 Stark. 431.

(*z*) *Skrine* v. *Elmore*, 2 Campb. 407.

(*a*) *Marson* v. *Short*, 2 Bing. N.C. 118; 4 L.J. C.P. 270.

the writing is an entire contract for something more than a sale of goods, such as an agreement for the sale of chattels and the goodwill of a business (*b*), or for the sale and purchase of a patent article, and a licence to exercise and enjoy the patent right of using such article, it does not fall within the exemption of the statute (*c*).

Stamp duty on guarantees and indemnities—Exemption of guarantees for the payment of goods.—Any memorandum in writing signed by the defendant, undertaking to be answerable for the debt or default of another, is an agreement within the meaning of the Stamp Acts (*d*). But guarantees for the payment of goods sold to a third party are within the exemption of the statute, and need not consequently be stamped to be admissible in evidence (*e*); and so are agreements by brokers to indemnify their principals and employers against loss on the resale of goods purchased by them (*f*), provided the primary object of the writing is a purchase or sale of goods, and the guarantee or indemnity against loss is secondary and subsidiary thereto (*g*). If the primary object of the written undertaking or guarantee, however, be the obtaining of money upon a pledge of goods, it does not come within the exemption, although it may authorize the party making the advance to sell the goods when they come to hand, in satisfaction and discharge of the sum borrowed (*h*). Guarantees not relating exclusively to the sale of goods and chattels must be stamped with an agreement stamp (*i*).

Stamp duty on export bonds and on delivery orders has been abolished by the Finance Act, 1905 (*k*).

Warrants for goods are liable to a duty of 3*d*. (*l*). Any document or writing given by any inland carrier acknowledging the receipt of goods conveyed by such carrier, or a weight note issued together with a duly stamped warrant, and relating solely to the same goods, is exempted from duty.

By sect. 111 (1), the term "warrant for goods" means any document or writing, being evidence of the title of any person

(*b*) *South* v. *Finch*, 3 Bing. N.C. 506.

(*c*) *Chanter* v. *Dickinson*, 5 M. & Gr. 253; 12 L.J. C.P. 147.

(*d*) *Glover* v. *Halkett*, 2 H. & N. 487; 26 L.J. Ex. 416.

(*e*) *Warrington* v. *Furbor*, 8 East, 242; *Martin* v. *Wright*, 6 Q.B. 917; 14 L.J. Q.B. 142; *Sadler* v. *Johnson*, 16 M. & W. 775; 16 L.J. Ex. 178.

(*f*) *Curry* v. *Edensor*, 3 T.R. 524.

(*g*) *Southgate* v. *Bohn*, 16 M. & W. 34; 16 L.J. Ex. 51.

(*h*) *Smith* v. *Cator*, 2 B. & Ald. 778.

(*i*) *Wharton* v. *Walton*, 7 Q.B. 474; 14 L.J. Q.B. 321.

(*k*) 5 Edw. 7, c. 4, s. 5. Sect. 8 (1) and schedule of this Act repeal ss. 69, 70 and 71 of the Stamp Act, 1891.

(*l*) Schedule, tit. "Warrant for goods."

therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of such goods, wares, or merchandise. By sub-sect. (2) the duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued. By sub-sect. (3) every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall incur a fine of 20*l.*

Transfers of government stock do not require a stamp (*m*); and transfers of shares registered in a colonial register are, unless executed in any part of the United Kingdom, exempt from British stamp duty (*n*).

Share warrants (*o*) issued under the provisions of the Companies Act, 1867 (*p*), are liable to a duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share specified in the warrant if the consideration for the transfer were the nominal value of such share.

By the Stamp Act, 1891, s. 107, if a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall incur a fine of 50*l.*

Stock certificates to bearer.—By sect. 108, for the purposes of this Act the expression "stock certificate to bearer" includes every stock certificate to bearer issued after the third day of June one thousand eight hundred and eighty-one, under the provisions of the Local Authorities Loans Act, 1875, or of any other Act authorising the creation of debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known.

By sect. 109 (1), where the holder of a stock certificate to bearer has been entered on the register of the local authority as the owner of the share of stock described in the certificate, the certificate shall be forthwith cancelled so as to be incapable of being re-issued to any person. (2) Every person by

(*m*) *Walker* v. *Bartlett*, 18 C.B. 848; 25 L.J. C.P. 263; see the general exemptions at the end of the first schedule, Stamp Act, 1891.

(*n*) 8 Edw. 7, c. 69, s. 36 (a).

(*o*) See the schedule, tit. "Share warrants," and 62 & 63 Vict. c. 9, s. 4.

(*p*) *Repealed*, see now the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

whom a stock certificate to bearer is issued without being duly stamped shall incur a fine of 50*l.* (*q*).

Orders or authorities for the transfer of mining shares of any mining company conducted on the cost-book system, or any notice to the purser or officer of any such transfer, are charged with a duty of 6*d.* By sect. 110 (1), the duty may be denoted by an adhesive stamp to be cancelled by the person by whom the authority is executed; and by sub-sect. (2) a penalty of 20*l.* is imposed, if the order is not duly stamped.

Scrip certificates or other documents (*r*) (1) entitling any person to become the proprietor of any share of any company or proposed company, or (2) issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company; or denoting or intended to denote the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation, or issued or delivered in the United Kingdom, denoting or intending to denote the right of any person as a subscriber in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company: and letters of allotment or renunciation, or any other document having the effect of a letter of allotment (1) of any share of any company or proposed company, or (2)in respect of any loan raised or proposed to be raised by any such company, or by any municipal body or corporation, or (3) issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial government, state, company, municipal body or corporation, are respectively chargeable with the stamp duty of 1*d.*

By sect. 79 (1), every person who executes, grants, issues, or delivers out any document chargeable with duty as a letter of allotment, letter of renunciation, or scrip certificate, or as scrip, before the same is duly stamped, shall incur a fine of 20*l.* (2) The stamp duty of 1*d.* on a letter of renunciation may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the letter of renunciation is executed.

(*q*) These sections are extended to any instruments to bearer issued by any company or body of persons in the United Kingdom: Finance Act, 1899 (62 & 63 Vict. c. 9), ss. 5, 6.

(*r*) The term "share" under this heading, and under that of "Letter of Allotment and Letter of Renunciation," includes a fractional part of a share, see the Revenue Act, 1909 (9 Edw. 7, c. 43), s. 9.

Contracts for the sale and purchase of land and interests in land, not being under seal, and not operating as an actual transfer of the property or interest agreed to be bought and sold, must be stamped as agreements (*s*); and so also must all contracts for the sale and purchase or acquisition of incorporeal hereditaments (*ante*, p. 634 (*t*)). And contracts for the sale and purchase of the growing produce of fruit-trees, growing grass, growing timber, underwood, or hops, not sold with a view to its immediate severance and removal from the soil as a chattel, and where, consequently, the right to the land for a limited time for the benefit and sustenance of the growing crop passes by the contract, must be stamped with the *ad valorem* duty on conveyances on sales (*u*); but, if the growing produce is sold with a view to its immediate severance and removal as a chattel, the contract is then a contract for the sale and purchase of goods and chattels (*x*), and as such is exempt from stamp duty.

Contracts for the sale of fixtures (*ante*, p. 633), if they amount to an actual transfer of the interest of the fixtures, must be stamped with an *ad valorem* stamp as conveyances (*y*). But, if the contract does not amount to an actual transfer of the right of property in the fixtures, and right of severance, it is properly stamped as an agreement (*z*).

Contracts of hiring and service between "labourers, artificers, manufacturers, or menial servants," and their employers, are, as we have already seen, expressly exempted from all stamp duty (*a*): but all other contracts of hiring and service must be stamped with the ordinary agreement stamp. A contract for the hiring of a clerk is not within the exemption, and must consequently be stamped (*b*).

Contracts for the letting and hiring of taskwork (*ante*, pp. 867, 888), or for the performance of work by the job or task, must, if the remuneration to be paid for the work is of the value of 5*l*. or upwards, be stamped as agreements (*c*), unless the contract can be shown to be a contract for the hire of "labourers,

(*s*) *Rex* v. *Ridgwell*, 6 B. & C. 665; 5 L.J. (O.S.) M.C. 67.

(*t*) *Phillips* v. *Morrison*, 12 M. & W. 740; 13 L.J. Ex. 242; *Waddington* v. *Bristow*, 2 B. & P. 452.

(*u*) *Catlin* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162.

(*x*) *Washbourn* v. *Burrows*, 1 Ex. 107; 16 L.J. Ex. 266.

(*y*) *Horsfall* v. *Key*, 2 Ex. 778; 17 L.J. Ex. 267.

(*z*) *Chanter* v. *Dickinson*, 5 M. & Gr. 253; 12 L.J. C.P. 147; *Wick* v. *Hodgson*, 12 Moore, 213; 5 L.J. (O.S.) C.P. 55.

(*a*) A contract for the hiring of a farm bailiff at a salary, and a certain portion of the clear annual profits, does not require a stamp: *Reg.* v. *Wortley*, 15 Jur. 1187; 21 L.J. M.C. 44.

(*b*) *Dakin* v. *Watts*, 2 Cr. & Dix. Cir. Rep. 225.

(*c*) *Hegarty* v. *Milne*, 14 C.B. 627; 23 L.J. C.P. 151.

artificers, manufacturers, or menial servants," within the exemption. A contract by a builder for the erection of a house, according to certain plans and specifications, for an agreed sum of money (*ante*, p. 881), must be stamped as an agreement. If a contract is entered into for the sale of certain goods and chattels and fixing them up in a dwelling-house, such as a contract for the purchase and sale of coppers, grates, and stoves, bells, locks, &c., and one sum is to be paid for the goods and another for the work of fixing them, the contract, so far as it relates to the sale of the goods, will be exempt from stamp duty; but the provision as to the erection of the articles in the dwelling-house will require a stamp, if the remuneration for the work amounts to 5*l*. The sum to be paid for the work cannot be added to the price of the goods so as to raise the value of the subject-matter of the contract. If one entire sum only is to be paid *in solido*, the contract would probably be considered to be a contract for work and labour and the supply of materials, and would then require a stamp, if the sum to be paid amounted to 5*l*. (*ante*, p. 1362). No contract, made pursuant to the Highway Acts, relating to the making, maintaining, or repairing of highways, is chargeable with any higher duty than 6*d*. (*d*).

Calculation of the value of an agreement.—In calculating the value of the subject-matter of the contract, regard must be had to the consideration or immediate inducement for the undertaking or promise sought to be enforced, and not to the value of the thing *concerning* which the contract has been made; for, if the consideration does not amount to 5*l*. in value, the written memorandum of the promise does not fall within the operation of the Stamp Acts, although the subject-matter of it, or the thing to which it relates may far exceed that value, and the breach of it may consequently give rise to a claim for damages far surpassing 5*l*. Thus, where a wharfinger receives merchandise to be warehoused and shipped under a special agreement, the value of the matter of the agreement is not the value of the merchandise, but the price of the wharfage and charge on shipment which the wharfinger is to receive as the consideration for his promise (*e*). So, where a parcel is delivered to a carrier to be carried under a special contract, the value of the "matter of the contract" is the price of the carriage, and not the value of the parcel (*f*). So, in the case of agreements for leases, the value of the "matter of the agreement" is not the

(*d*) See the Stamp Act, 1891, schedule, tit. "Agreement."

(*e*) *Chadwick* v. *Sills*, R. & M. 15; *Baldwin* v. *Alsager*, 13 M. & W. 365; 14 L.J. Ex. 34.

(*f*) *Latham* v. *Rutley*, R. & M. 13.

value of the land, nor the value of the occupation, but the amount of rent reserved and agreed to be paid (*g*). And, in the case of an agreement to confess a judgment, the value of "the matter of the agreement" is not the amount of the judgment, but the debt and costs to be recovered (*h*). And, where there is an agreement to pay interest on a bill, the value of the subject-matter of the agreement is the amount of interest agreed to be paid, and not the amount of the bill (*i*).

Contracts of uncertain value not measurable by any pecuniary standard, such as a contract of marriage, do not require a stamp (*k*). If, at the time of the making of the agreement, the subject-matter of it does not appear to be of the value of 5*l*., a stamp does not become necessary merely because the value subsequently turns out to be a little more than 5*l*. (*l*).

Bare offers and proposals, not acceded to and accepted in writing, and not amounting to evidence of a concluded contract, are in general admissible in evidence without a stamp; such as a builder's or artificer's estimate of the cost of certain work, and his offer or proposal to do it upon certain terms (*m*); a schoolmaster's printed prospectus of the terms upon which he provides board and instruction for his pupils (*n*); a landlord's unsigned particulars of the terms upon which he lets his land (*o*); letters containing mere offers or proposals of salary or hire, to be paid for work to be done, or services to be rendered afterwards, although they are assented to and acted upon (*p*).

Bare admissions and acknowledgments also, not amounting to written evidence of a contract, and not constituting in themselves the evidence of the contract, are in general admissible in evidence without a stamp: such as an "I O U 200*l*. for value received," or a simple acknowledgment of a loan or a debt not containing upon the face of it an express promise of payment (*q*); or a statement of accounts containing upon the face of it a simple admission or acknowledgment of a certain balance

(*g*) *Doe* v. *Wiggins*, 4 Q.B. 367; 12 L.J. Q.B. 177; *Doe* v. *Amos*, 2 M. & R. 180; 6 L.J. (O.S.) K.B. 226.

(*h*) *Ames* v. *Hill*, 2 B. & P. 150.

(*i*) *Semple* v. *Steinau*, 8 Ex. 622; 22 L.J. Ex. 224; *Pemberton* v. *Vaughan*, 10 Q.B. 87; 16 L.J. Q.B. 161; *Taylor* v. *Steele*, 16 M. & W. 665; 16 L.J. Ex. 177.

(*k*) *Orford* v. *Cole*, 2 Stark. 351.

(*l*) *Liddiard* v. *Gale*, 4 Ex. 816; 19 L.J. Ex. 160; *Cox* v. *Bailey*, 6 Sc. N.R. 798; 6 M. & Gr. 193.

(*m*) *Pennifold* v. *Hamilton*, 2 Stark. 475.

(*n*) *Clay* v. *Crofts*, 20 L.J. Ex. 361; *Edgar* v. *Blick*, 1 Stark. 464.

(*o*) *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; *Ramsbottom* v. *Mortley*, *ib.* 445; *Hawkins* v. *Warre*, 3 B. & C. 690; 5 D. & R. 520.

(*p*) *Hudspeth* v. *Yarnold*, 9 C.B. 625; 19 L.J. C.P. 321.

(*q*) *Israel* v. *Israel*, 1 Campb. 499; *White* v. *North*, 3 Ex. 689; 18 L.J. Ex. 316; *Hyne* v. *Dewdney*, 21 L.J. Q.B. 278; *Melanotte* v. *Teasdale*, 13 M. & W. 216; 13 L.J. Ex. 358.

being due from the defendant to the plaintiff (*r*); or a mere attornment in writing from a tenant to his landlord, unaccompanied by any terms or conditions (*s*); or a proviso inserted in a stamped receipt to the effect that the acceptance of the rent should not operate as a waiver of a previous notice to quit (*t*); or a simple acknowledgment of an advance of money on furniture; or a *cognovit* containing no words or terms of agreement (*u*). But, if there be any terms or conditions for the payment of money by instalments or otherwise, it is an agreement within the statute. If, therefore, to an I O U for 40*l.* be added the words, "to be paid on the 22nd instant," the instrument must be stamped as a promissory note (*x*). An undertaking by an attorney to recover the amount of a bill deposited with him, or to re-deliver the same to the plaintiff, or a mere acknowledgment of a duty which a party takes upon himself to perform, or a mere memorandum of deposit of bills, to get discounted or return on demand, is not "evidence of a contract" within the meaning of the Stamp Acts (*y*).

A mere acknowledgment that a party holds wine or goods as a bailee or depositary is admissible in evidence without a stamp (*z*). And so is a mere acknowledgment of a tenancy upon sufferance, although it contains upon the face of it an agreement to give immediate possession to the landlord (*a*). A draft agreement, having on the back of it, "we approve of the draft," signed by the plaintiff and defendant, was admitted in evidence, for the purpose of proving an admission of the parties (*b*). Any mere admission, indeed, or acknowledgment in writing, amounting simply to a link in the chain of evidence by which a contract or agreement is sought to be established, may be given in evidence without a stamp, such as an advertisement in the newspapers, intended to establish the simple fact of a dissolution of partnership (*c*), or an unsigned statement of the terms upon which lands are let (*d*), or of the mode in which the value of certain articles, growing crops, &c., should be calculated and ascertained (*e*), or a mere written con-

(*r*) *Goodyear* v. *Simpson*, 15 M. & W. 16; 15 L.J. Ex. 191.

(*s*) *Doe* v. *Smith*, 8 Ad. & E. 255; 7 L.J. Q.B. 158.

(*t*) *Doe* v. *Fuller*, Tyr. & Gr. 17.

(*u*) *Huxley* v. *O'Connor*, 8 C. & P. 204; *Ames* v. *Hill*, 2 B. & P. 150; *Reardon* v. *Swabey*, 4 East, 188.

(*x*) *Brooks* v. *Elkins*, 2 M. & W. 74; 6 L.J. Ex. 6.

(*y*) *Langdon* v. *Wilson*, 7 B. & C. 640, n. (b); 6 L.J. (O.S.) K.B. 177; *Mullett* v. *Huchison*, 7 B. & C. 639; 6 L.J. (O.S.) K.B. 176.

(*z*) *Blackwell* v. *M'Naughtan*, 1 Q.B. 127.

(*a*) *Barry* v. *Goodman*, 2 M. & W. 769; 6 L.J. Ex. 188.

(*b*) *Doe* v. *Pedgriph*, 4 C. & P. 312; *Frazer* v. *Bunn*, 8 C. & P. 704.

(*c*) *Jenkins* v. *Blizard*, 1 Stark. 418.

(*d*) *Bolton* (*Lord*) v. *Tomlin*, 5 Ad. & E. 856; 6 L.J. K.B. 45.

(*e*) *Marshall* v. *Powell*, 9 Q.B. 779; 16 L.J. Q.B. 5.

sent to the institution of certain legal proceedings, or a mere consent to the performance of any other act, matter, or thing (*f*).

A mere acknowledgment of the terms upon which a bill of exchange has been deposited (*g*), or an acknowledgment of the receipt of title deeds by way of deposit as a security for the repayment of money, is not an agreement within the meaning of the Stamp Acts, and does not require an agreement stamp. Therefore, where a document stamped as a promissory note contained, beside the ordinary promise to pay, a memorandum of a deposit of counterpart leases as a collateral security for the payment of the amount of the note, it was held that an agreement stamp was not necessary in addition to the promissory note stamp (*h*). But if the admission or acknowledgment is coupled with a promise or undertaking, it becomes then either a promissory note or an agreement, and must be stamped accordingly. A mere attornment in writing does not require a stamp (*i*): but, if it is expressed to be made upon certain terms and conditions: if it proceeds to state the amount of rent and the mode of payment, and to set forth the terms of the tenancy, and is signed and witnessed, it is evidence of an agreement chargeable with duty (*k*). And whenever the writing constitutes in itself the sole evidence of the contract sought to be enforced, it is inadmissible without a stamp, whether it has or has not been signed by the parties against whom it is offered in evidence (*l*).

Acknowledgments of debts in writing, given in evidence for the purpose of barring the Statute of Limitations, are expressly exempted from the operation of the Stamp Acts (*m*). But, if the writing amount to a promissory note, it cannot be received in evidence without a promissory note stamp (*n*).

Bare licences and authorities not amounting in themselves to evidence of a contract may likewise be given in evidence without a stamp, such as an authority to discharge a debt or pay money, or to institute legal proceedings, or to sell goods, or to leave apartments without notice (*o*), or to make a second dis-

(*f*) *Hill* v. *Johnson*, 3 C. & P. 456.

(*g*) *De Porquet* v. *Page*, 15 Q.B. 1073; 20 L.J. Q.B. 28.

(*h*) *Fancourt* v. *Thorne*, 9 Q.B. 312; 15 L.J. Q.B. 344; *Pyle* v. *Partridge*, 15 M. & W. 20; 15 L.J. Ex. 129.

(*i*) *Doe* v. *Edwards*, 5 Ad. & E. 95; 5 L.J. K.B. 238.

(*k*) *Cornish* v. *Searell*, 8 B. & C. 471; 6 L.J. (O.S.) K.B. 254; *Doe* v. *Frankis*, 11 Ad. & E. 792; 9 L.J. Q.B. 177.

(*l*) *Chadwick* v. *Clark*, 1 C.B. 700; 14 L.J. C.P. 233.

(*m*) 9 Geo. 4, c. 14, s. 8; *Morris* v. *Dixon*, 4 Ad. & E. 845; 5 L.J. K.B. 155.

(*n*) *Jones* v. *Ryder*, 4 M. & W. 35; 7 L.J. Ex. 216; *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L.J. Ch. 508.

(*o*) *Parker* v. *Dubois*, 1 M. & W. 30; 5 L.J. Ex. 90; *Humphreys* v. *Briant*, 4 C. & P. 157; *Diplock* v. *Hammond*, 5 De G. M. & G. 320; 23 L.J. Ch. 550; *Bethell* v. *Blencowe*, 3 Sc. N.R. 568—573; 10 L.J. C.P. 243.

tress (*p*), or to continue a distress on the land, the landlord giving time for payment (*q*), or a minute of a resolution of a company authorizing the appointment of a clerk, and fixing the amount of his salary, or authorizing the acceptance of a tender for work to be done upon certain terms (*r*), or an authority or request to provide board and lodging for an illegitimate child (*s*). But, if there is no other evidence of the contract but what is afforded by the written memorandum, then the memorandum must be stamped as an agreement (*t*).

Simple contracts of deposit and pledge.—An agreement for the deposit of goods and chattels, bills of lading, or dock warrants, as a security for the repayment of money advanced, is sufficiently stamped with a common 6*d.* agreement stamp, and does not require, unless it is accompanied with a deposit of title-deeds, the *ad valorem* mortgage stamp (*u*). A mortgage stamp is required only where there is a regular conveyance by way of security for the repayment of money, and not where there has been merely a deposit of goods, or of some documents relating to goods, as a bill of lading or dock warrant (*x*). If the document does not amount to an agreement, but to a mere admission or acknowledgment of the deposit as a security for the payment of the money, no stamp at all is required, unless it contains a promise for the payment of money, in which case it must be stamped as a promissory note (*y*).

Bank notes for money not exceeding 1*l.* require a stamp of 5*d.*; exceeding 1*l.* and not 2*l.*, 10*d.*; exceeding 2*l.* and not 5*l.*, 1*s.* 3*d.*; exceeding 5*l.* and not 10*l.*, 1*s.* 9*d.*; exceeding 10*l.* and not 20*l.*, 2*s.*; exceeding 20*l.* and not 30*l.*, 3*s.*; exceeding 30*l.* and not 50*l.*, 5*s.*; exceeding 50*l.* and not 100*l.*, 8*s.* 6*d.*

By sect. 29, the term "banker" means any person carrying on the business of banking in the United Kingdom. The term "bank note" includes—(a) any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding 100*l.* to the bearer on demand; and (b) any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or

(*p*) *Hill* v. *Ramm*, 6 Sc. N.R. 571; *Pyle* v. *Partridge*, 15 M. & W. 20; 15 L.J. Ex. 129.

(*q*) *Fishwick* v. *Milnes*, 4 Ex. 825; 19 L.J. Ex. 153.

(*r*) *Vaughton* v. *Brine*, 1 Sc. N.R. 258; 9 L.J. C.P. 326; *Lucas* v. *Beach*, 1 Sc. N.R. 350; 1 M. & S. 417.

(*s*) *Beeching* v. *Westbrook*, 8 M. & W. 411; 10 L.J. Ex. 464.

(*t*) *Bowen* v. *Fox*, 2 M. & R. 167; 6 L.J. (O.S.) K.B. 235.

(*u*) See the Stamp Act, 1891, schedule, tit. "Mortgage," and also sect. 86, *ante*, p. 1346.

(*x*) *Harris* v. *Birch*, 9 M. & W. 594; 11 L.J. Ex. 219; *Attenborough, In re*, 11 Exch. 463; 25 L.J. Ex. 22.

(*y*) *Pyle* v. *Partridge*, *supra*; *Fancourt* v. *Thorne*, 9 Q.B. 312; 15 L.J. Q.B. 344.

holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding 100*l.* on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever, such bill or note is drawn or made.

By sect. 30, a bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing.

By sect. 31 (1), if any banker, not being duly licensed or otherwise authorized to issue unstamped bank notes, issues, or permits to be issued, any bank note not being duly stamped, he shall incur a fine of 50*l.*; (2) if any person receives or takes in payment or as a security any bank note, issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of 20*l.*

Bills of exchange and promissory notes.—Bills of exchange payable on demand, or at sight or on presentation, are liable to a duty of 1*d.*, and so are bills of exchange expressed to be payable at a period not exceeding three days after date or sight(*z*). Bills of exchange of any other kind whatsoever (except a bank note) and all promissory notes (except a bank note) drawn, or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom for any sum of money not exceeding 5*l.*, require a stamp of 1*d.*; exceeding 5*l.* and not 10*l.*, 2*d.*; 10*l.* and not 25*l.*, 3*d.*; 25*l.* and not 50*l.*, 6*d.*; 50*l.* and not 75*l.*, 9*d.*; 75*l.* and not 100*l.*, 1*s.*; exceeding 100*l.*, 1*s.* for every 100*l.*, or part of 100*l.* (*a*). A promissory note of any kind, even although payable on demand or at sight, requires to be stamped with an *ad valorem* stamp under the first schedule of the Stamp Act, 1891 (*b*). By the Finance Act, 1899 (*c*), the duty payable on bills of exchange drawn and expressed to be payable out of the United Kingdom, when actually paid or indorsed or negotiated in any manner within the United Kingdom, shall be reduced to 6*d.* where the amount

(*z*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2).

(*a*) The Stamp Act, 1891, schedule, "Bill of Exchange;" *Bradlaugh* v. *De Rin*, L.R. 5 C.P. 473; 39 L.J. C.P. 254.

(*b*) *Oettinger* v. *Cohn*, 77 L.J. K.B. 299; (1908) 1 K.B. 582. *Quære*, whether a promissory note payable on demand or at sight does not require to be stamped with a penny stamp under sect. 32 of the Stamp Act, 1891, as a bill of exchange as well as to be stamped with an *ad valorem* stamp as a promissory note. *Ib.*

(*c*) 62 & 63 Vict. c. 9, s. 10 (1).

exceeds 50*l.* and not 100*l.*, and 6*d.* more for every 100*l.* and fraction of 100*l.*

By sect. 32, the term "bill of exchange" (*d*) for the purposes of this Act includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes—(a) an order for the payment of any sum of money by bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and (b) an order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also any order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf (*e*).

By sect. 33 (1), the term "promissory note" (*f*) includes any document or writing (except a bank note) containing a promise to pay any sum of money (*g*); (2) a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money (*h*).

By sect. 34 (1), the fixed duty of 1*d.* on a bill of exchange payable on demand (*i*), or at sight or on presentation, may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power. (2) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps. The provisions of this

(*d*) See Bills of Exchange Act, 1882, s. 3, *ante*, p. 1242.

(*e*) See sect. 97 (3) of the Bills of Exchange Act, 1882; *London Clearing Bankers* v. *Inland Rev. Com.*, (1896) 1 Q.B. 542; 67 L.J. Q.B. 372.

(*f*) See Bills of Exchange Act, 1882, s. 83, *ante*, p. 1284.

(*g*) See *Smith* v. *Dean*, 69 L.J. Q.B. 331.

(*h*) *Mortgage Insurance Corporation* v. *Inland Rev. Com.*, 21 Q.B.D. 352; 57 L.J. Q.B. 174; *British India Co.* v. *Inland Rev. Com.*, 7 Q.B.D. 165; 50 L.J. Q.B. 517.

(*i*) See Bills of Exchange Act, 1882, s. 10, *ante*, p. 1245.

section apply to bills of exchange expressed to be payable at a period not exceeding three days after date or sight which are chargeable with the duty of 1*d.* under sect. 10 (2) of the Finance Act, 1899 (*k*).

By sect. 35 (1), every person into whose hands any bill of exchange or promissory note, drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays, the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto; (2) provided as follows: (a) if at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person; (b) if at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed; (3) but neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp. Presenting a foreign bill for acceptance was held to be not negotiating it within the meaning of the corresponding section of the former Act (*l*). And the holder of a foreign bill payable on demand might stamp it properly by affixing to it and cancelling a stamp before presenting it for payment (*m*).

By sect. 36, a bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purposes of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom (*n*).

By sect. 37 (1), where a bill of exchange or promissory note has been written on material bearing an impressed stamp of

(*k*) See Revenue Act, 1909 (9 Edw. 7, c. 43), s. 10, and Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2).

(*l*) *Sharples* v. *Bickard*, 2 H. & N. 57; 26 L.J. Ex. 302.

(*m*) *Boyse, In re*, 33 Ch.D. 613; 56 L.J. Ch. 135.

(*n*) See the difference between this definition and the definitions of inland and foreign bills and notes in the Bills of Exchange Act, 1882, ss. 4, 83 (4). See also *Griffin* v. *Weatherly*, L.R. 3 Q.B. 753; 37 L.J. Q.B. 280.

sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of 40*s.* if the bill or note be not then payable according to its tenor, or of 10*l.* if the same be so payable; (2) except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

By sect. 38 (1), every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped (*o*) shall incur a fine of 10*l.*, and the person who takes or receives from any other person any such bill or note not being duly stamped shall not be entitled to recover thereon, or to make the same available for any purpose whatever (*p*). (2) Provided that if any bill of exchange payable on demand or at sight or on presentation is presented for payment unstamped, the person (*q*) to whom it is presented may affix thereto an adhesive stamp of 1*d.*, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed valid and available (*r*). (3) But the foregoing proviso is not to relieve any person from any fine or penalty he may have incurred in relation to such bill (*s*).

By sect. 39, when a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and, upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

(*o*) "Duly stamped" has not the same meaning here as in s. 8.

(*p*) See sect. 14, *ante*, p. 1334. A promissory note insufficiently stamped cannot be admitted in evidence to prove the receipt of the money for which it was given: *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 306; but it may be used for the purpose of refreshing a witness's memory: *Birchall* v. *Bullough*, (1896) 1 Q.B. 325; 65 L.J. Q.B. 252. The section does not affect post-dated cheques: *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715;; 64 L.J. Q.B. 99.

(*q*) The banker is the only person who can affix and cancel the stamp in the manner permitted by this subsection.

(*r*) The provisions of this subsection apply to bills of exchange payable at a period not exceeding three days after date or sight which are chargeable with 1*d.* stamp duty under the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2), see Revenue Act, 1909 (9 Edw. 7, c. 43), s. 10.

(*s*) This section applies to foreign as well as to inland bills and notes.

The stamp duty upon a protest of any bill of exchange or promissory note, where the duty on the bill or note does not exceed 1*s.*, is the same as the duty upon the bill or note, and in every other case the stamp duty is 1*s.* (*t*); and by sect. 90, the duty upon a notarial act and upon the protest by a notary public may be denoted by an adhesive stamp, &c.

Any words in writing, importing a promise to pay a sum certain, are a promissory note within the meaning of the Stamp Acts, and must be stamped accordingly, unless the promise is to pay a sum already secured by a duly stamped promissory note (*u*). But, if the amount is uncertain, or the money is made payable on terms and conditions rendering the contract a special agreement, it should have an agreement stamp (*x*). Bills of exchange cannot be re-issued after they have once been paid without a fresh stamp (*y*); but a party paying an accommodation bill after maturity, on behalf of the acceptor, may bring an action against the drawer without having the bill re-stamped; for there is no re-issue of the bill in such a case. To make a fresh stamp necessary there must be a payment by the party ultimately liable (*z*). A mere authority to pay money does not require a bill of exchange stamp (*a*).

Post-dated cheques.—The date upon the face of a cheque or draft must be taken to be the date of the issue of the instrument; and, if the stamp is conformable therewith, the cheque or draft is admissible in evidence, although it was post-dated; but the maker is liable to a penalty (*b*).

What instruments are bills of exchange within the Stamp Acts.—It was the object of the legislature to treat as bills of exchange, and to subject to stamp duty, all such drafts and orders as, being payable on a contingency, or out of a particular fund, would not otherwise, in strictness of law, have fallen under that denomination (*c*). If no sum whatever is

(*t*) See the schedule, tit. "Protest."

(*u*) *Drury* v. *Macaulay*, 16 M. & W. 146; 16 L.J. Ex. 3; *Ellis* v. *Mason*, 7 Dowl. P.C. 598; *Wheatley* v. *Williams*, 1 M. & W. 533; *Shrivell* v. *Payne*, 8 Dowl. P.C. 441; *Walker* v. *Roberts*, Car. & Marsh. 590; *Shelton* v. *James*, 5 Q.B. 199; 13 L.J. Q.B. 90.

(*x*) *Cholmeley* v. *Darley*, 14 M. & W. 344; 14 L.J. Ex. 328.

(*y*) 55 Geo. 3, c. 184, s. 10.

(*z*) *Thomas* v. *Fenton*, 16 L.J. Q.B. 362; *Lazarus* v. *Cowie*, 3 Q.B. 459; 11 L.J. Q.B. 310; *Jewell* v. *Parr*, 22 L.J. C.P. 253; 13 C.B. 914.

(*a*) *Hamilton* v. *Spottiswoode*, 4 Ex. 210; 18 L.J. Ex. 393.

(*b*) *Williams* v. *Jarrett*, 5 B. & Ad. 32; 2 L.J. K.B. 156; *Whistler* v. *Forster*, 14 C.B. N.S. 248; 32 L.J. C.P. 161; *Austin* v. *Bunyard*, 6 B. & S. 687; 34 L.J. Q.B. 217; *Bull* v. *O'Sullivan*, L.R. 6 Q.B. 209; 40 L.J. Q.B. 141; *Gatty* v. *Fry*, 2 Ex.D. 265; 46 L.J. Ex. 605; *Clarke* v. *Roche*, 3 Q.B.D. 170; 47 L.J. Q.B. 147. See sect. 13, Bills of Exchange Act, *ante*, p. 1345.

(*c*) *Firbank* v. *Bell*, 1 B. & Ald. 36; *Butts* v. *Swan*, 4 Moore, 485; 2 B. & B. 78.

expressed in the order, and the total amount directed to be paid is indefinite, there is nothing to determine the amount of the stamp duty; and the instrument cannot consequently be stamped at all (*d*).

The duties upon bills of exchange and promissory notes are subject to the following exemptions: (1.) Bill or note issued by the Bank of England or the Bank of Ireland. (2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers. (3.) Letter written by a banker in the United Kingdom on any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf. (4.) Letter of credit granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom. (5.) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland. (6.) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds. (7.) Bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy. (8.) Bill drawn (according to a form prescribed by his Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces, or for any other expenditure connected therewith. (9.) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for payment of money out of a public account. (10.) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue. (11.) Coupon or warrant for interest attached to and issued with any security with any agreement or memorandum for the renewal or extension of time for payment of a security (*e*).

Bills of lading (*ante*, pp. 589, 980) of any goods, merchan-

(*d*) *Crowfoot* v. *Gurney*, 2 M. & Sc. 473; 2 L.J. C.P. 21; *Jones* v. *Simpson*, 2 L.J. (O.S.) K.B. 22; 2 B. & C. 318.

(*e*) The Stamp Act, 1891, schedule, tit. "Bills of Exchange. See *Rothschild* v. *Inland Rev. Com.*, (1894) 2 Q.B. 142.

dise, or effects to be exported or carried coastwise, require a 6*d.* stamp.

By sect. 40, they are not to be stamped after execution, and a fine of 50*l.* is imposed upon every person who makes or executes a bill of lading not duly stamped (*f*).

Contracts of insurance.—A policy of sea insurance is liable to a duty of 1*d.*—(1) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured. (2.) In any other case—(a) for or upon any voyage in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured, 1*d.* (*g*); (b) for time in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured, where the insurance shall be made for any time not exceeding six months, 3*d.*; where the insurance shall be made for any time exceeding six months and not exceeding twelve months, 6*d.* (*h*).

By sect. 91, for the purposes of this Act, the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

By sect. 92 (1), for the purposes of this Act the expression "policy of sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other (*i*) risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance. (2) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

(*f*) The Stamp Act, 1891, schedule, tit. "Bills of lading."

(*g*) Finance Act, 1908 (8 Edw. 7, c. 16), s. 5.

(*h*) *Stamp Act*, 1891, schedule 1. See also Financial Act, 1901 (1 Edw. 7, c. 7), s. 11, and Revenue Act, 1903 (3 Edw. 7, c. 46), s. 8.

(*i*) The word *other* was *land* in the former statute, 47 & 48 Vict. c. 62, s. 8.

Section 8 of the Finance Act, 1903 (*k*), provides for the stamping of policies on vessels in course of construction.

By sect. 93 (1), a contract for sea insurance (other than such insurance as is referred to in sect. 506 of the Merchant Shipping Act, 1894), shall not be valid unless the same is expressed in a policy of sea insurance (*kk*).

(2) No policy of sea insurance made for time shall be made for any time exceeding twelve months (*l*).

(3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months (*m*).

By sect. 94, where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

By sect. 95 (1), a policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say, (a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover: (b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only. (2) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l*.

Legal alterations in policies may be made under certain restrictions.—By sect. 96, nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally

(*k*) 3 Edw. 7, c. 8.

(*kk*) *Genforsikrings Aktieselskabet* v. *Da Costa*, (1911) 1 K.B. 137; 80 L.J. K.B. 236.

(*l*) *Charlesworth* v. *Faber*, 5 Com. Cas. 408; *Royal Exchange Assur. Corp.* v. *Sjorforsakrings Aktiebolaget Vega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739. As to policy of sea insurance containing continuation clause, see 1 Edw. 7, c. 7, s. 11.

(*m*) *Home Mar. Ins. Co.* v. *Smith*, (1898) 2 Q.B. 351; 67 L.J. Q.B. 777; *Great Britain SS. Premium Association* v. *White*, 29 Sc. L.R. 104.

insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

Penalty on assuring unless policy duly stamped.—By sect. 97 (1), If any person (a) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or (b) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or (c) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded, he shall for every such offence incur a fine of 100*l.* (2) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of 100*l.*, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer. (3) If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence in addition to any other fine or penalty to which he may be liable incur a fine of 100*l.*

Contracts of insurance against accidents or sickness, or damage to property.—By the Stamp Act, 1891, there is imposed

upon every policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury, or by way of indemnity (*n*) against loss or damage of or to any property, a stamp duty of 1*d.* (*o*).

By sect. 98 (1), for the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident; and the expression "policy of insurance against accident," means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause. (2) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury (*p*). An instrument by which an insurance company, in consideration of a premium, agrees to pay a certain sum in the event of the assured obtaining a certain age—the intention being to make provision for old age—and a smaller sum in the event of his dying before reaching that age, is a "policy of life insurance" within the meaning of sect. 98, sub-s. 1 of the Stamp Act, 1891. Accordingly such an instrument is chargeable with stamp duty as a policy of life insurance, and not under the heading "Mortgage, Bond, Debenture Covenant" (*q*). By the Finance Act, 1895 (*r*), "a policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" is to include a notice or advertisement in a newspaper or other publication which purports to insure such payment. And by the Finance Act, 1899 (*s*), the expression "policy of insurance against acci-

(*n*) See Finance Act, 1907 (7 Edw. 7, c. 13), s. 8 (1).

(*o*) Schedule, tit. "Policy of insurance."

(*p*) As to what is a policy of insurance, see *Mortgage Insurance Co.* v. *Inland Rev. Com.*, 21 Q.B.D. 352; 57 L.J. Q.B. 630; and as to composition of stamp duty upon policies of insurance against accidents and against loss or damage of or to any property, see sect. 116 of the Act as amended by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 13, and the Finance Act, 1907 (7 Edw. 7, c. 13), s. 8 (2).

(*q*) *Prudential Assur. Co.* v. *Inland Rev. Com.*, 73 L.J. K.B. 734; (1904) 2 K.B. 658.

(*r*) 58 Vict. c. 16, s. 13.

(*s*) 62 & 63 Vict. c. 9, s. 11 as

dent" is to include policies of insurance or indemnity against employers' liability when the annual premium does not exceed £2.

By sect. 99 of the Act of 1891, the duty of one penny upon a policy of insurance other than a policy of sea insurance or life insurance may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed.

Contracts of insurance upon any life or lives.—Policies of insurance upon any life or lives, or upon any event or contingency relating to, or depending upon, any life or lives (except accidents) (*t*) are charged, where the sum insured does not exceed 10*l.*, with a stamp duty of 1*d.*; and where it exceeds 10*l.* but not 25*l.*, 3*d.*; and where it exceeds 25*l.* and not 500*l.*, with a stamp duty of 6*d.* for every 50*l.* and every fractional part of 50*l.*; and, where it exceeds 500*l.* and not 1,000*l.*, then for every 100*l.*, and any fractional part of 100*l.*, 1*s.*; and when it exceeds 1,000*l.*, then for every 1,000*l.*, and any fractional part of 1,000*l.*, 10*s.* (*u*).

By sect. 91, the term "insurance" includes assurance, and the term "policy" includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced.

By sect. 100, every person who (1) receives, or takes credit for any premium or consideration for any insurance other than a sea insurance, and does not, within one month after receiving, or taking credit for the premium or consideration, make out and execute a duly stamped policy of insurance; or (2) makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy other than a policy of sea insurance which is not duly stamped, shall incur a fine of 20*l.*

By sect. 118 (1), no assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped. (2) If any payment is made in contravention of this section,

amended by 7 Edw. 7, c. 13, s. 8 (3). See *Lancashire Insurance Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 353; 68 L.J. Q.B. 143.

(*t*) See sect. 98, *ante*, p. 1383.

(*u*) See the schedule, tit. "Policy." The re-insurance between insurance companies of a risk upon a duly stamped policy of life insurance is liable to an *ad valorem* duty. The practice, however, is to limit the charge on such policies to 6*d.* if under hand, or 10*s.* if under seal.

the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to his Majesty from the person by whom the payment is made.

Receipts (*x*) given for or upon the payment of money amounting to 2*l.* or upwards are liable to a stamp duty of 1*d.* The following are the exemptions:—(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for. (2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (3.) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of his Majesty. (4.) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom. (5.) Receipt given by any agent for money imprested to him on account of the pay of the army. (6.) Receipt given by any officer, seaman, marine, or soldier, or his representatives, for or on account of any wages, pay, or pension, due from the Admiralty or army pay office. (7.) Receipt given for any principal money or interest due on an exchequer bill. (8.) The eighth exemption was repealed by the Stamp Act, 1895 (*y*), and the duty on a receipt written upon a bill of exchange or promissory note is now to be charged, but the name of a banker or payee, written on a duly stamped bill or note in the ordinary course of business, is not to be taken as a receipt chargeable with stamp duty. (9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland. (10.) Receipt given for the consideration money for the purchase of any share in any of the government or parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively. (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned (*z*). (12.) Receipt given for any allowance by way of drawback or otherwise upon the exportation of any

(*x*) The Stamp Act, 1891, schedule, tit. "Receipts."

(*y*) 58 Vict. c. 16, s. 9.

(*z*) See *London and Westminster Bank* v. *Inland Rev. Com.*, (1900) 1 Q.B. 166; 69 L.J. Q.B. 102.

goods or merchandise from the United Kingdom. (13.) Receipt given for the return of any duty of customs upon certificates of over entry. (14.) Receipt given by an officer of a County Court for money received by him from a party to any proceeding in the Court. (15.) Receipt given by or on behalf of a clerk to justices for money received in respect of a fine(*a*).

By sect. 101 (1), the term "receipt" includes any note, memorandum, or writing whatsoever whereby any money amounting to 2*l.* or upwards, or any bill of exchange or promissory note for money amounting to 2*l.* or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount either in payment or as a security, or by purchase or otherwise, of 2*l.* or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person (*b*). (2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Counsel's initials or signature placed against the fee marked on a brief or statement of fees, and thus indicating payment thereof by the solicitor instructing him, makes these documents liable to stamp duty as receipts within the meaning of the Stamp Act, 1891 (*c*).

By sect. 102, a receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say, (1) within fourteen days after it has been given, on payment of the duty and a penalty of 5*l.*; (2) after fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of 10*l.*; and shall not in any other case be stamped with an impressed stamp. A receipt executed out of the United Kingdom may be executed upon an adhesive stamp; or, if executed unstamped, it falls under the provisions of sect. 15.

By sect. 103, if any person (1) gives a receipt liable to duty and not duly stamped; or (2) in any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or (3) upon a payment to the amount of 2*l.* or upwards gives a receipt for a sum not amounting to 2*l.*, or separates or divides

(*a*) These two last exemptions were added by the Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 8.

(*b*) See *Att.-Gen.* v. *Carlton Bank*, (1899) 2 Q.B. 158; 68 L.J. Q.B. 788; *Firth* v. *Inland Rev. Com.*, (1904) 2 K.B. 205; 73 L.J. K.B. 632.

(*c*) *General Council of the Bar* v. *Inland Rev. Com.*, (1907) 1 K.B. 462; 76 L.J. K.B. 212.

the amount paid with intent to evade the duty; he shall incur a fine of 10*l*.

If the receipt appears to be an acknowledgment of the receipt of money paid by way of gift and gratuity, and not in discharge of a debt, claim, or demand, it is not within the statute (*d*). A memorandum or acknowledgment of the receipt of money or bills or securities, by way of deposit, does not require a receipt stamp; for the words of the former Stamp Acts (which are very similar to the present Act), "every receipt or discharge given for or upon the payment of money," clearly apply to writings given as a discharge of money antecedently due, and not to an acknowledgment that money has been deposited to be accounted for on demand (*e*). If a receipt for money and an agreement are written on the same piece of paper, the receipt is admissible in evidence if it has a receipt stamp, although there be no agreement stamp (*f*).

(*d*) *Boyle* v. *Brandon*, 13 M. & W. 738; 14 L.J. Ex. 344.

(*e*) *Tomkins* v. *Ashby*, 9 D. & R. 545; 6 B. & C. 542; 5 L.J. (O.S.) K.B. 246; *Levy* v. *Alexander*, 19 L.J. Ex. 113; 4 Ex. 485; and see the exemptions, *ante*, p. 1385.

(*f*) *Grey* v. *Smith*, 1 Campb. 387.

GENERAL INDEX.

ABANDONMENT,
of legal proceedings, sufficient consideration for promise, 11.
of right to remove fixtures, 703.
ornamental and trade fixtures, 700.
of distress, 800.
of possession extinguishing lien, 908.
in cases of marine insurance, 1186.
notice of, 1186.
by whom to be given, 1186, 1188.
form of, 1188.
effect of, 1188.
when insured may abandon, 1190.
unreasonable abandonment, 1194.
See MARINE INSURANCE.
of contracts to marry, 1315.

ABROAD,
contracts made, interpretation of, 58.
limitation of actions on, 219.
stamp duty on, 1338.
debts contracted by bankrupt, effect of discharge on, 199.

ABSTRACT OF TITLE. *See* SALE OF LAND.

ACCEPTANCE
of biddings at auctions, 17, 476.
of offers through post, 17.
by telegram, 18.
made by advertisement, 13, 310.
of part of debt in satisfaction of whole, 151.
of full amount of debt before action, 152.
of money orders, &c., operating by way of novation, 180.
of specialty securities in satisfaction of simple contract debts, 185.
constructive, of goods, 535.
of bills of lading, delivery orders, and dock warrants transferring property in goods, 536.
of goods, what constitutes, 606.
damages for refusal to accept goods, 625.
of bills of exchange, 1261.
qualified acceptance, 1263.
See BILL OF EXCHANGE.

ACCEPTANCE AND ACTUAL RECEIPT
of goods within Statute of Frauds, 28, 532.
articles received for inspection and approval, 534.
goods purchased by bailee, 534.
constructive acceptance and receipt, 535.
delivery by vendor to carrier or wharfinger on behalf of purchaser, 537, 604.
acceptance before actual receipt, 532.

ACCEPTANCE AND ACTUAL RECEIPT—*continued.*
of delivery orders and dock warrants, 536.
part acceptance and actual receipt binding the contract, 537.
effect of acceptance taking contract out of Statute of Frauds, 538.
See DELIVERY ORDER—SALE OF GOODS.

ACCEPTOR
of bill of exchange, liability of, 1264.
failure of consideration, 1164.
days of grace, 1271.
acceptance by agents, 1301, 1303.
by partners, 1303.
by registered companies, 1306.
See BILL OF EXCHANGE.

ACCESSORY AGREEMENT,
specific performance of, where principal agreement cannot be enforced, 294.

ACCIDENT,
railway, presumption of negligence, 1018.
insurance against injury by, 1236.
damages recoverable, 1238.

"ACCIDENTS OF THE SEAS,"
loss by, 1176.

ACCOMMODATION BILLS AND NOTES,
effect of bankruptcy on, 270.
when holder bound to prove he gave value, 1256.
nature of, 1260.
right of action on, 1260.
indorsement of, when overdue, 1260.
presentment of, when excused, 1261, 1263.
See BILL OF EXCHANGE.

ACCORD AND SATISFACTION,
substituted performance of something different from what was stipulated to be done, 183.
discharge by, 183.
accord, executory, 184.
acceptance of specialty, or additional simple contract, securities, 185.
composition deeds and agreements, 186.
transfer of property by way of, 188.
with one of several joint plaintiffs, 188.
See APPROPRIATION OF PAYMENTS—PAYMENT.

ACCOUNTANT,
liability of, for negligence, 889.

ACCOUNT STATED,
nature of, 470.
implied promise in respect of, 470.
none in case of infant or lunatic, 471.
of void claims, 471.
with trustees, effect of, 471, 472.
when *jus tertii* cannot be set up to defeat, 472.
settlement of mutual accounts, 472.
when accounts cannot be re-opened, 472, 473.

ACCOUNTS. *See* APPROPRIATION.
appropriation of payments where several, 165.
settlement of, amounting to payment, 216.
separate, and one running account, 166.
mistakes in, 473.

ACCOUNTS—*continued.*
admission of correctness of, not conclusive, 473.
between principal and agent, 946.
duty of agent to keep, 946.
liability of agent for refusing to account, 947.
statute of limitations where agent in fiduciary position, 947.
See ADJUSTMENT, APPROPRIATION.

ACKNOWLEDGMENT
of seal, to be made before delivery of deed, 19.
See BOND.
by matter of record, 21.

ACKNOWLEDGMENT OF DEBTS
contracted during infancy, 40, 411.
form and requisites of, 211, 212.
conditional, 212.
authentication of, 211.
lost, oral evidence of contents of, 213.
by one of several joint contractors, 213.
executor, 214.
devisee for life, 214.
partner, when evidence against firm, 360.
to whom to be made, 214.
exemption of, from stamp duty, 214.

ACKNOWLEDGMENT OF DEEDS AND SPECIALTIES,
extending period of limitation, 210.

ACT OF BANKRUPTCY. *See* BANKRUPTCY.

ACT OF GOD,
loss by, exemption from liability for, at common law, 986, 987.
meaning of term, 1027.

ACT OF PARLIAMENT,
contract in contravention of policy of, 83.
contracts made illegal by, 88—95, 97, 103—120.
implied contract arising out of, 455.
See ILLEGAL CONTRACTS.

ADHESIVE STAMPS,
use of, 1333.
cancellation of, 1333.

ADJUDICATION IN BANKRUPTCY,
effect of, 268.
effect of annulling, 276.

ADJUSTMENT,
of account to take debt out of Statute of Limitations, 216.
of losses in maritime insurance, 1204, 1205, 1206.
of average loss, where to be made, 1013.
generally, 1204, 1206.

ADMINISTRATION
of justice, contracts obstructing, 81.
of assets, generally, 249, 250.
limitation of liability on covenants in leases, 249.
protection afforded under Judicial Trustees Act, 251.
rights of personal representative as to payment of debts, 252.
defences to actions against personal representatives, 252, 253.
suspending Statute of Limitations, where debtor administers to creditor, 220.
de bonis non, 256.

ADMINISTRATION BONDS,
assignment of, 222.

ADMINISTRATOR. *See* EXECUTOR.

ADMISSIBILITY OF EVIDENCE. *See* EVIDENCE.

ADMISSION,
written evidence of, exemption from stamp duty, 214.
by partner, when evidence against firm, 360.
See ACKNOWLEDGMENT OF DEBT.

ADULTERATED FOOD,
illegal sale of, 111.

ADVANCE FREIGHT,
when recoverable back, 995.
insurable interest in, 1109.

ADVERSE CLAIMANTS,
to chattels bailed, liabilities of bailee, 848.
establishment of title by interpleader, 850.

ADVERTISEMENT,
contract by, what constitutes, 15, 310.
of sale by auction, effect of, 13.

AFFREIGHTMENT,
contracts of, 970.
foreign, law of country regulating, 63.
See CHARTER-PARTY.

AGE OF CONSENT,
what constitutes, to marriage, 1319.

AGENCY,
the contract of, nature of, 942.
corrupt transactions with agents, prevention of, 944.
revocation of authority, 945.
when the authority is irrevocable, 946.
accounting, duty of agent as to, 946.
refusal to account, liability of agent for, 946.
liabilities of brokers, factors, and commission agents, 947.
of forwarding agents, 948.
liability of principals to brokers, factors, and agents, 848.
del credere commissions, nature of, 948.
liability of insurance brokers to their principals, 949.
share and stock brokers, 950.
solicitors, 952.
sheriff's officers, 953.
estate and house agents, 953.
receipt of money and goods on account of principal, 954.
by sub-agents, 955.
payment by one agent to another, 956.
purchases by agent with the money of principal, 956.
frauds by agents on their principals, 957.
payment of commission, 957.
extra work by agents, when payment for recoverable, 958.
rights of shipbrokers to commission, 958.
policy brokers, 959.
travellers for orders, 959.
house and estate agents and auctioneers, 959.
right of agent to be reimbursed on revocation of authority, 960.
lien of factors and brokers, 961.
of packers, 962.

AGENCY—*continued.*
lien of insurance brokers, 962.
of solicitors, 963.
of shipmasters, 966.
of ship's husband, 966.
of shipwrights, 967.
indemnification of agents, 967.
breach of warranty of authority by agent, 968.
damages for breach of warranty, 968.
negligence of bank managers, 969.

AGENT. *See also* AGENCY.
signature by, under Statute of Frauds, 41.
authority of, to make deed, 43.
purchase for undisclosed principal, 132.
payment of interest by, 218.
to, 219.
contracts with, 321.
rights of principals upon, 321.
principals contracting as agents, 322.
concealment of agency, 322.
rights of undisclosed principals, 322, 326.
proof of agency, where contract in writing, 324, 326.
purchases in name of one of several joint adventurers, 324
recovery of money of principal paid away by agent, 325.
rights of principals upon deeds made by agents, 325.
liabilities of undisclosed principals on simple contracts, 322, 326.
authority of agent to sign writings for principal, 41, 43, 327.
special authority, 329.
contracts by infant agents, 330.
subsequent ratification by principal, 330.
limitation of authority, 332.
revocation of authority, 945.
publication of, 333.
misrepresentation and fraudulent concealment by agents, 126, 127, 131, 333.
contract by agent acting in his own interest, 334.
liability of principals on contracts under seal, 334.
warranties by agents, 334.
representations not amounting to warranty, 336.
representations forming no part of contract with principal, 336.
purchases by servant in name of master, 337.
authority of foremen and managers, 338.
of telegraph clerks, 339.
of shipmasters, 339.
limitation of, 339.
of ship's husband, 343.
of stockbrokers, 343.
of shipbrokers, 343.
of counsel, 343.
of solicitors, 344.
rights of agents on simple contracts, 344.
factors, auctioneers, and policy brokers, 345.
repudiation of contract by principal, 346.
pretended assumption of agency, 346.
on contracts under seal, 346.
liabilities of agents on simple contracts, 347, 468.
contracts on behalf of foreign principals, 348.
undisclosed agencies, 348.
oral evidence of, 348.
notoriety of agency, 350.

AGENT—*continued.*
contracts with—*continued.*
liabilities of agents on simple contracts—*continued.*
public officers, 350.
pretended agencies, 351.
irresponsible principals, 353.
government agents, 353.
money received by agent for principal, 354.
money wrongfully and illegally received by agent, 355.
receipt of money by agents to be paid over to stranger, 355.
liabilities of agent on contracts under seal, 315, 356.
exemption of public officers, 356.
execution of deeds by agents not rendering them personally liable, 357.
rights of partners upon contracts with third parties, 357.
See PARTNERSHIP.
of joint-stock companies, 381.
frauds by, 127.
fraudulent concealment by principal, 127.
constructive frauds by, 131.
confidential, 131, 132.
payments through, 159, 161.
payment to agent in ordinary course of business, 159.
payments and settlements between principal and agent, 162, 468.
payment by and to, extending period of limitation, 218, 219.
acceptance of goods by servant, 532.
by forwarding agent, 537.
warranties by, on sale of goods, 554.
demises by, 655.
distress by, 779.
pledges by mercantile agent, 822.
deposit by, with bankers, 853.
indemnification of, by principal, 967.
damages for breach of warranty of authority by, 968.
of charterers, authority of, 980.
authority of servants of railway company, to bind by special contract, 1050.
assurance of life by, 1227.
bills of exchange by, 349, 1301, 1303.
promissory notes by, 1302.
AGISTERS,
of cattle, liabilities of, 862, 866.
AGREEMENT,
to sell goods, 28, 527.
requisites of. *See* CONTRACT—CONSIDERATION.
stamp on, 1360.
exemptions, 1362.
for lease, 22, 43, 651.
stamp on, 1356.
to surrender lease, 22, 716.
stamp on, 1358.
for transfer of shares, 640.
for remuneration of solicitors, 894.
AGRICULTURAL HOLDINGS ACT,
customs under, implied annexed by contract, 69.
agreement in contravention of, as to compensation, 90.
fixtures under, 698.
crops under, 740.
distress for rent under, 774.
exemption of live stock and machinery, 788.

AGRICULTURAL USAGES. *See* CUSTOM.

ALIEN AMI,
contracts with, legality of, 437.
can hold real and personal property, 437.

ALIEN ENEMI,
contracts with, 103, 437.

ALLOTMENT,
of shares, when voidable, 137.
withdrawal of application for shares before, 15.
letters of, title to, 638.

ALTERATION OF CONTRACTS,
release by, 189.
immaterial, 190.
of deeds after execution, 189, 191.
filling up of blanks, 191.
evidence to explain, 191.
cancellation by mistake, 191.
of principal obligation discharging surety, 1092
of marine policies, 1134.
of bills and notes, 1294, 1295.
re-stamping altered contracts, 1335.

ALTERATIONS IN PROPERTY,
authentication of contract to make, 25.
after sale and before transfer, 502.
effect on fire insurance of, increasing risk, 1215.
notice of, 1215.

ALTERNATIVE STIPULATIONS,
nature of, 139.

AMBASSADOR,
privilege of, from actions, 439.
exemption of, from distress, 791.

AMBIGUITY,
latent, 46.
patent, 47.
See INTERPRETATION.

ANCESTOR,
liabilities of heir-at-law upon covenants of, 241.

ANCHORS,
illegal sale of, exceeding certain weight, unless proved, 111.
sale of, warranty of proof implied, 112.

ANIMALS,
carriage of live, under special contract, 1022.

ANNUITY,
assignment of, 239.
specific performance of agreement for, 294.
stamp duty on grant of, 1344.

APARTMENTS. *See* FURNISHED HOUSES.

APPORTIONMENT,
of periodical payments, 170.
of rent and conditions on severance of reversion, 681.
of work, for ascertaining remuneration, 876.

APPRAISEMENT,
after distress, 800, 802.

APPRENTICESHIP,
illegal ante-dating of articles of, 85.
contract of, nature of, 937.
when to be in writing, 43, 937.
may be made with corporation as master, 938.
rights and liabilities of parties to, 938.
liability of master for fraud of apprentice, 335.
of covenantors for misconduct of apprentice, 938.
infant apprentice, not liable on covenant to serve, 405.
on contract to accept professional engagement, 405.
provisions of, to be for benefit of apprentice, 938.
when wages may be agreed to be suspended, 939.
implied stipulation as to place of performance, 939.
premium paid under, not apportionable, 137.
not recoverable on death of master, 137, 940.
dissolution of, 939.
misconduct of apprentice, 939.
in case of infant apprentice, 939.
when master bound to refund portion of premium on, 939.
by order of justices, 940.
damages for loss of apprentice's services, 941.
stamp on, 937 note (*i*), 1358.
decoying apprentice away, implied promise to pay for services, 453.

APPROPRIATION,
of payments, generally, 164.
by debtor, 165.
by creditor, 165.
separate accounts and one entire running account, 166.
of goods, to use of purchaser, 587.
of funds of life assurance companies, 1234.
specific, of securities, 1299.

APPROVAL,
receipt of goods on, not amounting to acceptance, 534.
delivery of goods on, when property passes to buyer, 580.
rule for ascertaining, 580.

APPURTENANCES,
what are, 656.

ARBITRATION,
agreement to submit disputes to, 14, 82.

ARBITRATOR,
effect of award of, 194.
office of, of honorary character, 873.
duty of, to exercise reasonable care and skill, 899.
difference between, and valuer, 899.
occupies a judicial position, 899.

ARCHITECT,
fraud of, agreement not to raise question of, 82.
approval of, payment for work dependent on, 878.
biassed and corrupt decisions of, relief against, 878, 879.
certificate of, 878.
action for wrongfully withholding, 879.
plans of, property in, 879.
no claim for remuneration, when negligent, 890.

ARMY,
sale of commissions in, prohibited by statute, 91, note (*k*).

ART,
oral evidence to explain terms of, 71.

ARTICLES OF ASSOCIATION,
contracts in violation of, 381.

ARTIFICERS,
lien of, 887.
See WORK AND SERVICES.

ASSENT,
of parties to contracts, 14.
conditional, admissibility of oral evidence of, 71.
of husband to wife's contracts, 425.

ASSETS,
administration of, 249.
rights of personal representative in, 252.

ASSIGNEES,
of lessee, liability of, on covenants, 227.

ASSIGNMENT,
in fraud of creditors, 85, 87, 88.
of income of office, 91, 92.
of personal contracts, 221.
of debts and *choses in action* under Judicature Act, 222.
See CHOSE IN ACTION.
effect of subsequent bankruptcy, 269.
of policies of life assurance, 222, 1232.
marine insurance, 222, 1114.
by indorsement or in customary manner, 1114.
of bonds, 222.
of bills of lading, 222.
of exchange, 222.
of future calls, 380.
what is an assignment, 224.
See CHOSE IN ACTION.
notice of assignment, 225.
of chose in action, may be made foundation of new contract, 227.
of covenants, 227.
See COVENANTS RUNNING WITH THE LAND.
of rents, 239.
of annuities, 239.
of term, liability of personal representative after, 248.
of contract to purchase land, 520.
covenant not to assign demised premises, 668.
damages for breach of, 751.
of reversion, 676.
extinguishing right to distrain, 681.
of lease, 668, 669, 749.
of lease after forfeiture, 715.
of securities by creditor to surety as indemnification, 1102.
stamps on,
of mortgage, 1346.
of lease, 1358.
of indentures of apprenticeship, 1358.
See BANKRUPTCY—BILL OF SALE—COVENANTS RUNNING WITH THE LAND—DEATH—NOVATION AND SUBSTITUTION.

ASSIGNMENT FOR BENEFIT OF CREDITORS,
effect of, 187.
See COMPOSITION DEED.

ASSUMPTION,
of agency, liability for, 346.

ASSURANCE. *See* FIRE INSURANCE—LIFE INSURANCE—MARINE INSURANCE.

ATTESTED COPIES,
stamp duty on, 1339.

ATTORNEY. *See* SOLICITORS—AGENT.

ATTORNMENT,
of warehouse-keeper to holder of delivery order, 536.
by mortgagor to mortgagee, 754.
by tenant to mortgagee, 756.

AUCTION,
sale of land by, 17, 476.
advertisement of, effect of, 13.
biddings at, 17, 476.
puffers, 476.
without reserve, 477.
conditions and particulars, 478, 479.
misdescription of thing sold, effect of, 494, 495.
sale of goods by, 632.
at reserved price, 633.

AUCTIONEER,
signature by, as agent, 42.
right of, on sales made by him, 345.
authority of, as agent for both vendor and purchaser, 478.
deposit in the hands of, 509.
liability of, for deposit, 849.
right of, to commission, 959, 960.
See AGENT—STAKEHOLDER.

AUTHENTICATION,
of contracts under seal, 18.
See DEED.
of simple contracts, 22.
when necessary, 22, 23.
by signed writing, 22, 529.
interests in land, 22—28.
of executory contracts for sale of goods, 28, 529.
for sale of fixtures, 28, 633.
for sale of shares, 28, 29.
of promises by executors, 29.
of promises to answer for debt of another, 29, 1080.
of agreements in consideration of marriage, 33.
not to be performed within a year, 34.
requisites of memorandum, 36.
signature, 39.
by agents, 41.
of acknowledgments to bar Statute of Limitations, 211.
of executory promises by deed, 42.
of leases, 42.
of authority of agent to make deeds, 43.
of promises made by infants, 44, 405, 411.
of contracts of service, 917.
of guarantees, 1080.
of contract of marriage, 1312.

AUTHORITY,
of agent to make deeds, 43.
contracts, 327, 329.
revocation of, 945.
when irrevocable, 946.
coupled with an interest, 946.
breach of warranty of, 968.
damages recoverable, 968.
stamp on written evidence of, not required, 1372.

AVERAGE,
general, in cases of carriers by sea, 1008.
in cases of insurance, 1195, 1196.
See GENERAL AVERAGE.

AVOIDANCE OF CONTRACTS. *See* ILLEGAL CONTRACTS.
effect of, where contract immoral, 75.
illegal, 122.
on ground of fraud and unfair dealing, 124.
false representations, 126.
fraudulent concealment, 126.
fraud by means of agents, 127.
fraudulent misrepresentations by directors, 127.
fraudulent misreading of deed, 129.
determination of power, 130.
effect of fraud, 129.
on ground of duress, 131.
of mistake, 133.
of failure of consideration, 136.
rule where failure partial only, 137.
of irregular allotment of shares, 137.
of payment, 167.
made during infancy, 411.
of sales of land, for fraudulent concealment, 525.
of sales of goods, 572.
on ground of fraudulent misrepresentation, 572.
made through third party, 573.
of fraudulent breach of warranty, 574.
of fraudulent use of trade mark, 574.
of fraudulent concealment, 575.
on sale with all faults, 577.
election of purchaser to avoid, 578.
of leases, 707, 749.
provisoes for re-entry, 709, 710.
of contracts for works and services, 874.
of policies of sea insurance, 1157, 1159.
of bills and notes for want of consideration, 1258.
for unauthorised alterations, 1294.
of promises of marriage, 1315.
See ILLEGAL CONTRACTS—FRAUD.

AWARD. *See* ARBITRATION.
effect of, 194.

BAIL BOND,
assignment of, 222.
See BOND.

BAILEES,
of goods, position of, 310.
purchase of goods by, acceptance and receipt where, 534.
loss of goods by theft or negligence of servants of, 864.
detention of chattels by, under claim of lien, 902.

BAILEES—*continued.*
lien of, right of, 902.
not exerciseable, where at variance with terms of bailment, 904.
parties against whom lien may be claimed, 905.
general, definition of, 906.
notice that goods will be held subject to, 906.
by custom of trade, 908.
extinguishment of, by abandonment of possession, 908.
by tender of debt, 910.
statutory power of sale in discharge of, 909.
to wharfingers or warehouse owners, 909.
insurance by, against fire, 1220.

BAILMENT FOR HIRE—(Letting of Chattels).
nature and definition of, 805.
warranty as to seaworthiness of ship, 806.
implied as to furniture let out for immediate use, 806.
as to horse let out for riding, 806.
duties of hirers of chattels, 807.
use of chattels let to hire, 807.
losses from negligence, 807.
losses from piracy, robbery, disease, and accident, 807.
determination of bailment, 808.
loans of money to be used for hire, 808.
moneylenders, 809.
See Moneylenders.
of money in hands of bankers, 852.
warehousing chattels for reward, 864.
negligence of depositary, 865.
loss of chattels by wharfinger, 865.
passengers' luggage in cloak-rooms, 865.
of materials to workmen, 899.
under special contract, 902.
transfer of, 910.
joint and separate rights of action, 913.
re-delivery of materials furnished by employer, 913.
liability for delivery to wrong person, 913.
claims against bailees for damages, 914.
See Bailment without Reward—Carriers — Common Carriers—Warehousemen.

BAILMENT WITHOUT REWARD,
gratuitous loans, 810.
liability of borrower, 810.
care to be taken by borrower, 810.
extent of, for negligence and misconduct, 811, 812.
losses from ordinary casualties, 812.
misuse by borrower, 812.
want of skill, 813.
restoration of thing borrowed, or its equivalent, 813.
loss by robbery, fire or inevitable accident, 813.
liability of lender, 814.
implied obligations and duties of lender, 814.
loans to one of several partners, 359, 814.
to registered companies, 815.
damages in action for not replacing stock, 815.
measure of, 815, 816.
deposit or simple bailment, 778.
definition of, 844.
requisites of, 844.
executory and executed promises, 844.
liabilities of depositary, 844.
negligent keeping, 845.
ordinary casualties, 845.

BAILMENT WITHOUT REWARD—*continued.*
deposit or simple bailment—continued.
liabilities of depositary—*continued.*
carelessness on part of depositor in selecting a person notoriously unfit to be trusted, 845.
theft by servant of depositary, 846.
use and enjoyment by depositary of subject-matter of deposit, 846.
transfer of deposit to stranger, 847.
remedy of depositor, 847.
restoration of deposit, 847.
joint and several deposits, 848.
transfers of subject-matter of bailment, 848.
adverse claimants, 848.
eviction by title paramount, 848.
stakes in hands of stakeholders to abide event of lawful game, 849.
power of depositary to compel rival claimants to establish their title by interpleader, 850.
liabilities of depositary holding possession wrongfully, 850.
liabilities from taking possession of goods by finding, 850.
liabilities of depositor, 850.
lien of depositary, 850.
deposit of money with one of several partners, 850.
liability of firm for loss, 851.
for fraudulent acts of one partner, 851.
deposit of money with bankers, 852.
nature of transaction, 852.
Statute of Limitations when bar to recovery of, 852.
relation between customer and banker, 853.
deposit of bills, notes, and securities in hands of bankers, 853.
lien of bankers on securities, for overdrawn account, 853.
receipt given for bank-notes as cash, effect of, 853.
receipt of cheques by bankers on account of customers, 853.
duty of bankers to honour customers' drafts, 854.
payment of cheques, 854.
joint accounts and joint deposits with bankers, 855.
deposits and accounts with bankers in names of trustees, agents, and receivers, 855.
separate accounts opened by same person in different capacities, 856.
loss of trust money in hands of bankers, 856.
payment of forged cheques, drafts and orders on bankers, 857.
payment by bankers under suspicious circumstances, 857.
duty of bankers as to torn cheques, 857.
forgery facilitated by negligence of customer, 857, 858.
negligence in dealing with cheque amounting to estoppel, 858.
forged indorsements, 858.
cheques paid by mistake, 859.
payment of cheques at branch banks, 859.
position of branch banks, 859.
lien of bankers, 860.
damages for non-payment of cheques by bankers, 860.
mandate or gratuitous commission, 860.
non-feasance and misfeasance, when action lies for, 860.
bailment of money and chattels to be carried gratuitously, 861.
loss or damage from negligence, 861.

BAILMENT WITHOUT REWARD—*continued.*
mandate or gratuitous commission—continued.
bailments of chattels to be mended gratuitously, 861.
employment of unskilful persons, 861.
custody and safekeeping of chattel, liability for, 862.
bailment of money for investment, 862.
bailments of living animals, 862.
negligent management, liability for, 862, 863.
bailments of perishable commodities, 863.
use of subject-matter of mandate, 863.
theft and negligence by servants of bailee, 864.
expenses in connection with commission, implied authority to incur, 864.

BAILORS,
liability of, for negligence, 901.
for fraudulent concealment of dangerous nature of articles bailed, 901.

BANK HOLIDAY,
performance of contract on, postponement of, 142.

BANK NOTE,
payment with stolen, when valid, 156.
good tender, for sums above 5*l.*, 167.
not, when, 167.
deposit of, with banker, 853.
when exempt from stamp duty, 1379.
See BILL OF EXCHANGE.

BANKERS,
contracts with, 309, 391.
payment between bankers and their customers, 164.
deposit of money with, 853.
deposit of bills and securities with, 853.
receipt of cheques by, 853.
general duties and liabilities of, 854.
payment of cheques, 854.
joint accounts and joint deposits, 855.
deposits and accounts in name of trustees, agents, and receivers, 855.
separate accounts in different capacities, 856.
loss of trust money, 856.
payment by, of forged cheques, drafts, and orders, 857, 858.
cheques paid by mistake, 859.
payment of cheques at branch banks, 859.
lien of, 860, 1258.
for overdrawn account, 853.
damages against, for non-payment of cheques, 860.
negligence of, 896.
bank managers, 969.
limitation of actions, for deposit of money with, 852.
See BAILMENT WITHOUT REWARD.

BANKERS' DRAFTS. *See* CHEQUE.

BANKING COMPANIES,
joint-stock, executory contracts for sale of shares in, 639.

BANKING CO-PARTNERSHIPS,
contracts with, 391.
under 7 Geo. IV. c. 46...392.
See COUNTRY BANKERS ACT.

BANKRUPT,
contracts with, 272, 273, 434.
with trustee, 435.
contribution between trustees in, 435.

BANKRUPT—*continued.*
payment to, validity of, 164.
rights of, 272, 274.
See BANKRUPTCY.

BANKRUPTCY. *See* INSOLVENCY.
contracts in contravention of Bankruptcy Acts, 84.
fraud on creditors, 87.
release by composition, 177, 186, 198.
See COMPOSITION.
discharge of bankrupt from debts and causes of action, 195—197.
operation of payment of dividend, 197.
composition with creditors, 198.
effect of discharge on debts contracted abroad, 199.
effect of receiving order, 267.
transfer of executory contracts, to trustee, 269.
equitable interests not vesting in trustee, 269.
money in hands of bankrupt clothed with specific trust, 270.
sale of bankrupt's book-debts, goodwill, &c., 271.
contracts in which bankrupt is interested in right of his wife, 271.
contracts made with bankrupt during, 272.
rights of undischarged bankrupt, 274.
disclaimer by trustee, 274.
liability of trustee upon bankrupt's covenants and executory contracts, 275.
set off in, 275.
effect of annulling adjudication, 276.
specific performance of sale of debts under, 294.
of married woman, effect of, 420.
act of, revoking licence to distrain, 831.
of principal, does not discharge surety, 1104.

BANKRUPTCY ACTS,
contracts in contravention of, 84.
See ILLEGAL CONTRACTS.

BANNS,
publication of, in false name, effect of, 1321.

BARGAIN AND SALE. *See* SALE.

BARON AND FEME. See MARRIED WOMEN.

BARRATRY,
meaning of, 1182.
perils of sea include, 1175.
insurance against, 1183.
deviation amounting to, 1170, 1183.

BARRISTERS,
authority of, in conduct of cause, 343.
honorary character of services of, 873.
negligence of, 895.
stamp duty on receipt for fees, 1386.

BEER,
contracts to buy from one brewer, breach of, 103.

BELLRINGING,
injunction to restrain, in breach of covenant, 301, 302.

BENEFICES,
purchase of, simoniacal contract, 93.
bonds for resigning, void, 94.
illegal charges upon, 94.

BENEFIT BUILDING SOCIETIES,
contracts with, 402.

BETROTHMENT,
contracts of, 1312.
authentication of, 1312.
performance of, 1313.
time of performance, 1313.
excuses for non-performance of, 1313.
conditional, validity of, 1314.
avoidance of, by misrepresentation and deceit, 1314.
by alteration of condition of either party, 1315.
abandonment of, 1315.
damages for breach of, 1315.
See PROMISE OF MARRIAGE.

BETTING. *See* GAMING CONTRACTS.

BETTING-HOUSE KEEPERS,
money deposited as bets with, recovery of, 107.

BIDDINGS AT AUCTIONS. *See* AUCTIONS.
sale by, 17.
when complete, 17.

BILATERAL CONTRACTS,
nature of, 1, 2, 13.
contracts of sale rank as, 474.

BILL OF EXCHANGE,
foreign law governing, 60—63.
evidence to explain, 74.
given to secure money lost at or lent for play, 108.
recovery of money paid upon forged, 136, 137.
payment by, 153.
acceptance of renewed, 154.
actions for debts secured by dishonoured, 155.
renunciation by parol of holder's claim on, 175.
accord and satisfaction by, 183, 184, 186.
part payment by, taking debt out of Statute of Limitations, 216.
made by agent, 349, 1300, 1301, 1302.
partner, in fraud of partnership, 362.
to secure private debt, 363.
railway company, 387.
infant, 412.
married woman, 424.
payment of rent by, suspending right to distrain, 777.
deposit of, with banker, effect of, 853.
negotiable instrument, 1241.
nature of, 1241.
definition of, 1241, 1242.
form of, 1243.
when payable, 1244.
dating of, 1245.
sum payable, 1245.
transfer and negotiability of, 1246, 1247.
inchoate bills, 1249.
period within which to be completed, 1249.
negotiation to party already liable thereon, 1250.
payment in due course, 1250.
restrictive indorsements, 1251.
rights of indorsee under, 1251.
special indorsements, 1251.
partial indorsements, 1252.

BILL OF EXCHANGE—*continued.*
completion of contract by delivery, 1252.
holder in due course, 1255.
intermediate infirmities of title, 1255.
rights of holder, 1256.
when holder bound to prove he gave value for bill, 1256.
what is valuable consideration, 1257.
proof of want of consideration, 1258.
fraudulent transfers and indorsements, 1258
forged indorsements, 793, 1259.
accommodation bill, 1260.
indorsement of bills overdue, 1260.
acceptance of, 1261.
general or qualified acceptances, 1261.
presentment for acceptance, 1261.
when necessary, 1262.
rules as to, 1262.
excuses for non-presentment, 1263.
non-acceptance after customary time, 1263.
qualified acceptances, 1262, 1263.
rights of parties to, 1264.
in case of foreign bill, 1264.
protest as to non-accepted balance, 1264.
notice of, effect of, 1264.
how effected, 1264.
liability of acceptor, 1264.
failure of consideration, 1264.
liability of drawer and indorser, 1266.
giving time for payment, 1267.
presentment for payment, 1268.
non-presentment when excused, 1269.
days of grace, 1271.
calculation of time of, 1171.
notice of dishonour, 1272.
rules as to, 1273.
what amounts to, 1275.
posting the notice, 1275.
foreign bill, 1276.
protest, 1276.
noting, 1276, 1277.
re-exchange, 1276.
proof of, 1278.
excuses for delay in giving, 1278.
dispensation of, 1278.
transfer by delivery without indorsement, 1280.
bills taken up *supra protest,* 1281.
retiring of bills by acceptors at maturity, 1282.
renunciation of bill, 1283.
express waiver, 1283.
rule as to sets, 1283.
promissory notes, 1284.
See PROMISSORY NOTE.
bills and notes for payment of sums under 1*l.*, 1153.
bankers' cheques, 1289.
See CHEQUE.
cancellation of, 1158.
alteration, bills avoiding contract, 1294.
material alterations, 1294, 1295.
immaterial alterations, 1295, 1296.
loss of bills and notes, 1298.
damages in action on, 1298.
for not meeting bill at maturity, 1299
specific appropriation of securities, 1299.
lien of bill-holder on cargo, 1300 note (*n*).

BILL OF EXCHANGE—*continued.*
parties to, capacity and authority of, 1300.
signature essential to liability, 1301.
forged or unauthorised, 1301.
by procuration, operation of, 1301.
by stranger, liability of, as indorser, 1301.
general principles affecting, 1302.
liability of agents accepting bills, 349, 1301, 1302.
acceptance by partners, 362, 1303, 1304.
in fraud of firm, 362.
by partner in his own name, 1304.
by dormant partner, 1305.
by trustees or directors of co-partnerships, 1306.
by corporations, 1306.
by registered companies, 1306.
conversion of, 1308.
lost or stolen negotiable instruments, 1308, 1309.
stamp duty on, 1374, 1378.
what are within Stamp Acts, 1375, 1378.

BILL OF LADING,
assignment of, 222.
acceptance of, of goods on board ship *in transitu,* 536.
delivery under, transfer by, 589.
shipment and carriage of goods under, 589, 980, 1034.
indorsement of, effect of, 590, 591.
liability for freight resulting from acceptance of, 999.
transfer of, 1013, 1014.
stamp on, 1379.
See DEMURRAGE—STOPPAGE IN TRANSITU.

BOARD AND LODGING. *See* LODGING-HOUSE KEEPERS.
rights and liabilities in respect of contracts for, 761.

BONDS,
nature and requisites of, 19, 53.
foreign, determination of legal effect of, 61.
right of executor to sue on, 245.
recovery of money paid upon forged bonds, 466.
assignable, 222.
transfer of, by death, 245.
penal obligations, 285.
to secure faithful services, 1084.
to partnership and associations, 1087.
by partners, 1105.
by one partner in fraud of co-partnership, 362.
to marry, 1311.
replevin, assignment of, 222.
stamp duty on, 1346.
See PENALTIES.

BOOK DEBTS,
of bankrupt, power of trustee to sell, 271.

BOROUGH COUNCILS,
Metropolitan, contracts with, 398.

BORROWING AND LENDING,
for gaming purposes, not recoverable, 108.
nature and effect of contract of, 808, 809, 810.
See BAILMENT WITHOUT REWARD—MONEYLENDERS.

BOTTOMRY BOND,
foreign bond, law governing validity of, 63.
nature and effect of, 834, 1144.
maritime lien created by, 835.

BOTTOMRY BOND—*continued.*
sea risk essential to, 835.
interest chargeable on, 835.
repayment of, depends on safe arrival, 835.
discharge of, by payment or total loss, 835.
constructive total loss is not, 835.
extent of authority of master to bind owner by, 835.
governed by law of the flag, 835, 836.
necessity for, to be shown, 836, 839.
owners, if possible, to be communicated with, 836.
as collateral security for bills of exchange for repairs and necessaries, 837.
doctrine of constructive total loss not applicable to, 837.
priority of bond-holder where ship sold, 837.
when British consul in foreign port can hypothecate by, 837.
judgment *in rem* takes priority of, 838.
priority of maritime lien, in case of several bonds, 838.
hypothecation of freight and cargo by, 838.
abandonment of ship and freight, not allowed, 839.
sed secus by French law, 839.
insurable interest of lender of money on, 1110, 1144.
See also MARITIME LIEN.

BOUGHT AND SOLD NOTES,
nature and effect of, 531.
signature of, by brokers, 42, 531.
discrepancies between, and entry in broker's books, 531.
stamp on, 1351.

BOUNDARIES,
agreements concerning, when an interest in land, 26.
of estate, duty of tenants to preserve, 693.

BREACH,
of contract. *See* CONTRACT.
of covenant. *See* COVENANT.
of promise of marriage. *See* PROMISE OF MARRIAGE.
of warranty. *See* WARRANTY.

BREWERS,
contract by publican to buy beer of one brewer, breach of, 103.

BRIBERY. *See* ILLEGAL CONTRACTS.

BRIDGES,
dangerous, liability of railway company for, 1018, 1066.

BROKERAGE,
marriage contracts, illegality of, 1310.

BROKERS,
rights of undisclosed principal, 323.
not affected by Stock Exchange custom, 323.
authority of, 343.
right of action of, for price of goods sold by them, 345.
of policy brokers on policy, 345.
sales by, 531.
bought and sold notes, 531.
liability of, by custom of trade, 532.
on stock exchange, 641.
practice on Stock Exchange as to sales, 641, 642.
rules as to delivery of stock, 643.

BROKERS—*continued.*
agency of. *See* AGENCY.
rights and liabilities of, as between themselves and their principals, 947, 948.
insurance brokers, 949.
share brokers, 950.
stock brokers, 950.
ship brokers, authority of, 343.
commission of, 958.
policy brokers, commission of, 959.
lien of, 961—963.
See BOUGHT AND SOLD NOTES.

BUGS,
nuisance of, rendering houses uninhabitable, 673.
in case of unfurnished house, 673.
in case of furnished apartments, 760.

BUILDING CONTRACTS,
specific performance. *See* SPECIFIC PERFORMANCE.
nature and effect of, 876.
conditions precedent, 877.
approval of work before payment, 877.
architect's certificate of approval, 878.
See CERTIFICATE OF APPROVAL.
unfinished work taken possession of by employer, effect of, 879.
substantial performance by contractors, 880, 881.
abatement of contract price, effect of, 882.
non-performance by time specified, 883.
penalties for, 883.
penalties to secure performance, 884.
destruction of work before payment, party to bear loss, 884.
deviations from contract, recovery of extras, 885.
prevention of performance, 887, 914.
liabilities of contractor for negligence and want of skill, 889.
work rendered useless by negligence of workmen, 889.
damages for prevention of performance, 914.
See WORK AND SERVICES.

BUILDING SOCIETIES. *See* BENEFIT BUILDING SOCIETIES.

BURGLARY,
insurance against, 1239.

BUSHES,
tenant's right of property in, 707.

BUYING AND SELLING. *See* SALE.

BYGONE SERVICES,
not constituting valid consideration for a promise, 7.
rendered at previous request of promisor, 7, 8.

CALLS,
assignment of future, invalid, 380.
on shareholders, payment of, as between vendor and purchaser, 644.
mandamus to public companies to make, 440.
liability of mortgagee when registered, 841.

CANAL ACT. *See* COMMON CARRIERS.

CANCELLATION,
of contracts, by mistake, 191.
of bills and notes, 191, 1293.
of leases, effect of, 749.
of adhesive stamps, 1335.

CAPTURE,
definition of, 1178.
loss by, 1179, 1180, 1181.
abandonment by insured on, 1193.

CARGO,
hypothecation of, by master, when allowed, 838.
complete, under charter-party, what is, 978.

CARRIAGE OF MERCHANDISE,
contracts for, nature of, 969, 970.
on high seas, 970.
on land, 1015.
See CARRIERS BY WATER—CHARTER-PARTIES—CARRIERS BY LAND—COMMON CARRIER.

CARRIERS,
delivery of goods to, by vendor, 537, 602, 603.
delivery under bill of lading, 536.
deterioration to goods in transit, 605.
stoppage *in transitu,* 612.
See STOPPAGE IN TRANSITU.
carriage of passengers, 1015.
See CARRIERS BY LAND—CARRIERS BY WATER—COMMON CARRIER.

CARRIERS BY LAND,
carriage of passengers and merchandise by, duty of, 1015, 1016.
injuries to passengers and goods, 1015.
railway accident, *primâ facie* evidence of negligence, 1018.
loss of goods or money by the way, 1019.

CARRIERS BY WATER,
contracts made abroad, interpretation of, 63.
contracts for carriage of merchandise, 969.
contracts of affreightment, 970.
charter-parties, 970.
See CHARTER-PARTY.
shipment and carriage of merchandise under bills of lading, 980.
bill of lading, nature of, 980.
exceptions in, 980.
duties of master before signing, 980, 981.
delivery on board, what amounts to, 981.
statements in, when conclusive, 981.
as to condition of goods shipped, 981.
as to quantity shipped, 981.
exoneration of master for misrepresentation, 981.
creating estoppel, as against shipowner, 981.
freight payable on delivery under, 982.
consignee no right to deduct from, for goods not shipped, 982.
countermand of shipment, 982.
re-delivery of goods to consignor, 982.

CARRIERS BY WATER—*continued.*
shipment and carriage—*continued.*
loss of, or damage to, goods by the way, 982.
implied promise to carry safely, 982, 984.
limitation of liability by special contract, 990, 993.
loss by act of God, dangers and accidents of the seas, rivers, and navigation, 986, 987.
losses occasioned by negligence or misconduct, 987.
proof of loss by negligence and not by peril of the sea, 989.
loss by fire, 990.
limitation of liability of shipowner by statute, 990.
losses occasioned by negligence of licensed pilots, 991.
delivery of goods by shipowners, 992.
losses on board lighters conveying goods from ship to shore, 993.
payment of freight or hire, 993.
calculation of freight, 996.
payment *pro ratâ*, 997.
time freight, 997.
shipowner's lien for freight, 998.
payment of freight by consignee, 998.
liability for freight resulting from acceptance of goods under bills of lading, 999.
payments in lieu of freight extinguishing right of lien, 1002.
payment of demurrage on charter-parties and bills of lading, 1003.
primage and average, 1008.
general average and contribution, 1008.
transfer of bills of lading, 1013.
damages for breach of charter-parties, 1014.
restrictions on carriage of dangerous goods, 1014.
under Merchant Shipping Act, 1014.
See COMMON CARRIER—RAILWAY CARRIERS—CHARTER-PARTY.

CARRIERS WITHOUT REWARD.
of money and goods, liability for loss or damage by negligence, 861.

CATTLE,
agistment of, 862.
loss of, by agisters, 866.

CAUSE OF ACTION,
release of, *ex contractû*, 174.
when time of limitation of, begins to run, 205, 206.

CAVEAT EMPTOR,
doctrine of, when applicable in sales of goods, 565, 576.
does not apply where buyer has no opportunity of inspection, 568, 576.

CERTIFICATE OF APPROVAL,
of work by architect, 878.
wrongful withholding of, relief against, 878.
action for, 879.

CERTIFICATE OF STOCK,
pledge of, 842.
stamp on, 1366.
foreign, 1349.

CERTIFIED COPIES,
stamp on, 1339.

CHAIN-CABLES,
illegal sale of, exceeding certain weight, unless proved, 111.
sale of, warranty of proof implied, 112.

CHAMPERTY,
what constitutes, 80.
agreement involving, is void, 80, 81.
agreement by solicitor amounting to, 80.
See MAINTENANCE.

CHARACTER,
servants', no legal obligation on master to give, 941.

CHARITY COMMITTEE,
personal liability of, 395.

CHARTER-PARTY,
foreign, interpretation of, 63.
specific performance of, not decreed, 296.
and bill of lading, as between charterer and shipowner, 591.
nature and effect of, 970.
customary stipulations, 970.
construed by law of place where made, 971.
operating as demise of ship, 341, 616, 971.
as contract to carry, 341, 616, 970.
parties to, 971.
where there is a demise of ship, 616, 972.
where a contract for carriage, 972.
general ship, 972.
master of ship more than mere agent, 973.
performance of, 973.
commencement of voyage, 973, 974.
conditions precedent to shipowner's liability, 973.
naming by charterer of safe port, 973.
loading at ship's risk, 973.
conditions precedent to freighter's liability, 974, 976.
arrival at or departure on named day, 973.
to load in regular turn, 974.
where alternative modes of performance, 974.
ship to be reasonably fit, 974.
steamships carrying cargo, 974, 975.
what constitutes seaworthiness, 975.
representations in, 975.
amounting to description and not warranty, 975.
in respect of tonnage, 975.
warranted as A1...975.
"now at sea," 975.
as to steam power, 975.
as to ship's carrying capacity, 976.
other warranties, 976.
substantial performance of conditions precedent, 976.
time of performance, 976.
reasonable time, 977, 978.
unusual circumstances, 977.
no action where neither party ready, 977.
"usual dispatch of port," 977.
time of essence of contract, 977.
See TIME OF PERFORMANCE.
mode of performance, 978.
distinction between neglect to load and failure to provide cargo, 978.
complete cargo, what constitutes, 978.

CHARTER-PARTY—*continued.*
mode of performance—*continued.*
stowage of cargo by stevedore, 978, 979.
impossibility of performance, 979.
authority of agent of charterer, 980.
countermand of shipment, 982.
re-delivery of goods to consignor, 982.
expenses of re-shipment, 982.
loss or damage of goods by the way, 982.
master generally bound to forward the cargo, 983.
reasonable time allowed for trans-shipment, 983.
where unable to communicate with owner, 983.
must not sell without leave, 983.
duty of master to shipowner, 983.
"danger of the seas"—rats, 984, 988.
implied promise to carry safely, 982, 984.
loss by theft, &c., 984.
limitation of liability by special contract, 985.
for leakage or breakage, 985.
for negligence of pilot, 986.
for loss of passenger's luggage, 986.
for loss by thieves, 986.
for negligence of master and crew, 986.
"act of God and King's enemies, 986.
"dangers of the seas," what are, 987, 989.
collision, 988.
loss by fire, 990.
limitation of shipowner's liability by statute, 990.
not extended to lighters, 993.
negligence and misconduct, 988, 989.
proof and negligence, 989.
licensed pilots, 991.
exemption of shipowner by statute, 991.
delivery of goods by shipowners from ship to shore, 992, 993.
expenses after goods delivered over ship's rail, 993.
loss of goods on board lighters, 991, 993.
payment of freight or hire, 993.
where demise of ship, 993.
where contract of carriage, 994.
goods to be delivered, 994.
work to be performed, 994.
unless special contract, 994.
where part of cargo sold for repairs, 994.
freight paid in advance, 995.
where hire to cease during detention, 995.
unforeseen or inevitable accident, 995.
contract for use of entire ship, 995.
damage by peril of seas, &c., 995.
fault of master and crew, 995.
paying freight for full cargo, 995, 996.
calculation of freight, 996.
payment *pro ratâ*, 997.
time freight, 997.
lien for freight, 998.
payment by consignee, 998.
bills of lading, payment of freight, "as per charter-party," 999, 1000.
charterers to pay a "lump freight," 1001.
payments in lieu of freight, 1002.
extinguishment of lien by, 1002.
time for discharge of cargo, 1002.
payment of demurrage, 1003.
reasonable diligence implied, 1002, 1003.
specified time, 1003.

CHARTER-PARTY—*continued.*
payment of demurrage—*continued.*
unforeseen events, 1003.
crowded docks, bad weather, &c., 1003, 1004.
strike of dock labourers, 1003.
"usual and customary manner," 1005.
custom to unload by lighters, 1005.
"turn to deliver," 1005, 1006.
lay days commence on arrival at usual place of discharge, 1006.
"weather working day," meaning of, 1006.
no demurrage where detained after loading by bad weather, 1006.
lay days are working days, 1006.
substitution of new port of discharge, 1006.
work done on Sundays, 1006.
fraction of day, 1007.
"liability to cease when cargo shipped," 1007.
"as soon as cargo shipped, loading excepted," 1007.
"or as near thereto as she may safely get," 1007.
"all other conditions as per charter-party," effect of, 1008.
primage and average, 1008.
general average and contribution, 1008.
nature of, 1008.
general average loss, what is, 1009.
how distributed, 1009.
freight and earnings, 1009.
on outward and homeward voyage, 1009.
goods on board, 932.
exception of deck cargoes, 1009, 1010.
sale of cargo at port of refuge, 1010.
ship in distress, 1013.
masts, &c., cut away, 1013.
expenses to avoid danger, 1011.
expenses of landing and warehousing cargo, 1011.
depreciation in value of cargo by average act, 1011.
stranded by master's negligence, 1011.
extraordinary expenses incurred by sacrifice, 1011, 1012.
cost of raising submerged ship, 1012.
salvage money, 1012.
average adjustment, 1013.
where to be made, 1013.
damages recoverable for breach of, 1014.
stamp on, 1360.
See BILL OF LADING.

CHARTERER,
liability of, for stores furnished for use of vessel, 341.
authority of agents of, 980.

CHATTELS. *See* GOODS.

CHEMISTS,
sale of medicines by, 115.
right of action for charges, 115.
liability of, for negligence, 889.

CHEQUE,
payment by, effect of, 156.
proof of, 158.
receipt of, by bankers on account of their customers, 853.
payment of, by bankers, 854.
See BAILMENT WITHOUT REWARD—BANKERS.
nature and requisites of, 1289.

CHEQUE—*continued.*
presentment of, for payment, 1289.
revocation of banker's authority, 1291.
crossed cheque, 1291.
duties of banker as to, 1292
cancellation of, 1293, 1294.
stamp on, 1375, 1378.
post-dated, 1378.

CHILDREN. *See* INFANT.

CHOSE IN ACTION,
assignment of, in equity, 221.
bonds and contracts allowed by statute, 222.
under Judicature Act, 222.
moneys due and to become due under contract, 223.
what is, under Judicature Act, 224.
general rule as to, 224.
notice of, under Judicature Act, 225.
when to be given, 226.
to whom to be given, 226.
in writing, necessary under Judicature Act, 226.
parol, good as equitable assignment, 226.
wrong date rendering assignment invalid, 226.
question of validity of, determined by law of place where executed, 227.
may be made foundation of new contract, 227.
husband's right to wife's, at common law, 261.
effect of bankruptcy on, 269.
See BILL OF EXCHANGE—PROMISSORY NOTE.

CHURCHWARDENS. *See* PARISH OFFICERS.

CIVIL DEATH,
forfeiture of rights by, 259.
effect of, on contracts, 259.
imprisonment of husband, operating as, 432.
disabilities of convicts, 438.
of outlaws, 438.

CLOAK ROOM,
passenger's luggage in, liability for loss of, 865.
as a reasonable facility, duty of railway company to provide, 1060.

CLOTHES,
title to, by service, 941.

CLUB COMMITTEES,
contracts with, 395.
liabilities of members of, 395.
non-liability of subscribers, 396.

COALS,
sale of, by weight only, 110.
exceptions, 110.
power of local authority to make by-laws for, 110.

COHABITATION,
liabilities resulting from, 434.
contracts by kept mistresses, 434.

COINAGE,
contracts relating to, or involving, payment in current, discharge of, 109.
illegality of contracts for payment for work otherwise than in, 117.
tender of payment in current, what constitutes, 167.

COLONIAL JUDGMENT,
when conclusive *inter partes,* 194.

COMBINATIONS. *See* TRADE UNIONS.

COMMENCEMENT,
of time of limitation, 205.
of leases, 657.
of current year of tenancy, how regulated, 727.

COMMISSION AGENTS. *See* AGENT.

COMMISSIONERS OF PUBLIC WORKS, &c.,
contracts with, 397.
funds subject to payment of claims, 397.
of salaries of officers, 398.

COMMISSIONS IN THE ARMY,
sale of, formerly lawful, 86.
prohibited now by statute, 91, note (*k*).

COMMITTEES,
authority of members of, 369.
contracts by, of companies formed under Companies Clauses Act, 387.
contracts with, of unregistered joint-stock companies, 393—396.
of clubs, 395.
of charities, 395, 396.
See PROVISIONAL COMMITTEES.

COMMODATUM,
or gratuitous loan, distinction between, and loan at interest, 808.

COMMON CARRIER,
who is to be deemed, 1019, 1020.
nature and extent of duties of, 1021.
as regards goods, 1021.
dogs and living animals, 1022.
diseased animals, 1022.
supply of water and food for animals by railway company, 1023.
dangerous goods, 1023.
representations by railway companies time-tables, 1023.
implied undertaking of railway companies to forward passengers or goods without unnecessary delay, 1024.
negligence of common carriers, 1025.
implied undertaking by railway company to carry passengers safely, 1025.
special agreement to be carried at own risk, 1025.
invitation to alight, 1025.
opening carriage door is, 1025.
calling out name of station, 1026.
over-shooting platform, 1026.
carriage door slammed by porter, 1026.
overcrowding platform, 1026.
door of train negligently left open, 1026.
loss of goods by common carrier, 1026.
by "act of God or king's enemies," non-liability for, 1026.
meaning of "act of God," 1027.
losses for which not responsible, 1027, 1028.
contributory negligence, definition of, 1029.
limitation of liability of common carrier by public notice, 1030.
in case of loss of money, jewelry or other valuables, 1030.

COMMON CARRIER—*continued.*
Common Carriers Act, 1830...1030.
declaration of value by consignor, 1030.
consignor bound by, 1031.
statutory notice of increased rate of charge, 1031.
fixing up of, 1031.
effect of, 1031, 1032.
protection of common carrier by special contract from loss by fire and sea risks, 1033.
stipulation exempting common carriers by water from loss of luggage unless bill of lading signed, 1034.
exemption of carrier, by special contract, from all responsibility for damage to certain classes and descriptions of goods *in transitu*, 1033, 1034.
void limitation of liability, 1035.
loss of passenger's luggage by railway companies, 1036.
charge for luggage by excursion trains, 1037.
application of Act, 1038.
to carriage of goods by land only, 1038.
to passenger's luggage, 1049, 1053.
declaration of value, by whom to be made, 1039.
articles to which the statute extends, 1030, 1040.
losses covered by the statute, 1041.
loss through theft by servants, 1041.
liability of carrier's servants, 1042.
negligence of consignor, 1043.
defective packing, 1043.
Railway and Canal Act, 1854...1043.
liability for neglect or default in carriage of animals or goods, 1043.
limitation of, beyond certain amount unless value declared, 1044.
does not extend to felonious acts of servants, 1044
negligence of carrier does not exempt from, even where special contract, 1044.
carriage of goods, special contracts for, 1045.
unjust and unreasonable conditions for, 1046.
just and reasonable conditions for, what are, 1048.
reasonable facilities for, to be afforded, 1047.
extension of Act to steam vessels of railway company, 1043, 1049.
liability of railway company during sea transit, 1049.
implied authority of railway servants to bind company by special contract, 1050.
commencement and duration of liability, 1050.
loss or damage in warehouses, 1050.
delivery at place of destination, 1051.
of luggage at railway stations, 1052.
acceptance of goods and passengers for carriage beyond limits of ordinary destination, 1053.
acceptance for carriage to particular destination, 1053, 1054.
by named route, 1053.
one railway company agent for another, 1054.
partly by sea and partly by land, 1055.
in ships not belonging to railway company, 1055.
refusal of consignee to receive goods, 1055.
carrier as bailee, 1055.
deposit of goods in safe place, 1056.
payment of fare or hire, 1056.
carrier's lien, 1056, 1057.

COMMON CARRIER—*continued.*
common carrier's charges, 1058.
railway charges, 1058, 1059.
to be reasonable, 1059.
duty of railway and canal companies to afford facilities for carriage, 1047, 1059.
of goods, 1059.
recovery of overcharges, 1061.
of passengers, 1061.
carriage of packed parcels, 1062.
injunction against railway companies to enforce statute, 1063.
passengers' fares, 1065.
right to alight at intermediate station, 1065.
season tickets, conditions as to, 1065.
forfeiture of deposit, 1066.
dangerous railway bridges and embankments, 1066.
liability in respect of, 1066.
common ferrymen, duties and responsibilities of, 1066.
loss of goods by, 1066.
notice of action to railway companies, 1067.
parties to be made plaintiffs in actions against carriers, 1067.
joint bailments to common carriers, 1067.
parties to be made defendants, 1069, 1070.
carriage of goods and passengers over distinct lines of railway, 1070.
damages in actions against common carriers, 1071.
measure of, 1071, 1072.
in respect of delay in delivery, 1074.
in case of personal injuries, 1075.
claim for refusal to carry, 1075.
defences to actions against common carriers, 1076.
evidence at trial of actions, 1076.
of bailment, 1076.
of special contract, 1077.
of *jus tertii* by common carrier, 1078.

COMMON CARRIERS ACT. *See* COMMON CARRIER.

COMPANY. *See* JOINT-STOCK COMPANY.

COMPENSATION,
agreements for, contrary to Agricultural Holdings Act, 90.
receipt signed for, obtained by misrepresentation, not a valid discharge, 129.
in damages for breach of contract, 277—292.
for use and occupation of land, 681, 750.
See DAMAGES.

COMPETENCY
of parties to contracts. *See* PARTIES TO CONTRACTS.

COMPOSITION DEEDS,
with creditors, 84, 87, 177, 186, 198.
private underhand agreements to secure better terms to one creditor than to another, 84.
fraudulent concealment by debtors, 84, 87.
under Bankruptcy Act, release by, 87, 177, 186.
See FRAUD—FRAUDULENT PREFERENCE—FRAUDULENT CONCEALMENT.

COMPOUNDING FELONIES OR MISDEMEANORS,
contracts for, illegality of, 82.
See ILLEGAL CONTRACTS.

COMPULSION OF LAW,
money paid under, not recoverable, 461.

COMPUTATION OF TIME,
meaning of "month," 57.
"from" a certain date, 58.

CONCEALMENT,
fraudulent, of material fact, 126.
by means of agents, 127.
of agency, rights of undisclosed principals, 322.
avoiding sale of lands, 525.
of goods, 575.
of latent defects in leaseholds, 672.
in policy of insurance. *See* FRAUDULENT CONCEALMENT.

CONDITION,
words of, amounting to express covenant, 51, 56.
amounting to warranty, 554.

CONDITIONAL ASSENT,
admissibility of oral evidence of, 71.

CONDITIONAL CONTRACT,
specific performance of, when decreed, 293.

CONDITIONAL LIABILITIES,
limitation of action for, 207.

CONDITIONAL PROMISE OF MARRIAGE,
validity of, 1314.

CONDITIONAL RELEASE,
may be subject to condition subsequent, 177.

CONDITIONAL SALE,
of goods, what constitutes, 555.

CONDITIONAL TENDER,
nature of, 169.

CONDITIONS PRECEDENT,
interpretation of, 53.
distinguished from independent promises, 55.
waiver of, partly performed, 55.
nature of, 142.
demand of performance, when necessary, 143.
waiver of, 144.
dispensation of performance of, 145.
to right to distrain, 776.
to payment for work and services, 876.
in charter-parties, performance of, 976.
in guarantees, to surety's liability, 1083, 1090.
See PERFORMANCE.

CONDITIONS OF SALE,
provisions in, as to absence or insufficiency of stamp, void, 91.
signature of, by auctioneers, on behalf of vendors and purchasers, 478, 479.
cannot be contradicted or altered by verbal declarations of auctioneer in auction-room, 479.
proof of notice of, 479.
effect of misdescription of property in, 494.
of land, not to be misleading, 499.

CONDUCT. *See* ESTOPPEL.

CONFIDENTIAL AGENTS,
disabilities of, 131.

CONFLICT OF LAWS. *See* FOREIGN CONTRACTS.

CONSENT OF PARTIES,
discharge by, 171.
See RELEASE.

CONSIDERATION,
for enforcement of simple contract, 2.
absence of, 2.
trust and confidence, 3.
insufficient, 3, 4, 5.
fraudulent, 5.
sufficient, 5.
good and valuable, 5.
for bill of exchange, 1257.
work and services, 5, 873.
loss or inconvenience, 6.
services to third party at request of promisor, 7.
past, coupled with previous request, 7.
failure of, 8.
partial, general rule as to, 137.
recovery of money back on, 136, 465.
in case of bills of exchange, 1264.
written promises without consideration, 9.
moral obligations, 9.
forbearance of legal or equitable rights, 10.
adequacy of consideration, 12.
in case of guarantees, 12, 1080.
advertisements for tenders, 12.
of sale by auction, 13.
bilateral promises, 2, 13.
mutual promises, 13.
assent of parties, 14.
statement of, on face of guarantee, 1082.

CONSTRUCTION OF CONTRACTS. *See* INTERPRETATION.

CONSTRUCTIVE ACCEPTANCE
of goods, 535.

CONSTRUCTIVE CONTRACTS,
nature of, 446.

CONSTRUCTIVE DELIVERY
of goods, 597.

CONSTRUCTIVE FRAUD,
by trustees and others, 131.

CONSTRUCTIVE NOTICE,
of contents of leases, &c., 229.
doctrine of, not applicable to charter-party, 1008.

CONSTRUCTIVE OCCUPATION
of land, entitling landlord to compensation, 682.

CONSTRUCTIVE POSSESSION
of goods by purchaser, 535.
extinguishing seller's lien, 535.

CONTINGENT LIABILITIES,
limitation of actions for, 207.

CONTINUATION POLICIES,
stamp duty on, 1125, note (*o*), 1131, note (*u*).

CONTINUING BREACHES,
of covenants and agreements, parties entitled to sue, 237.
of real covenants, rights of heirs upon, 242.

CONTINUING GUARANTEES. *See* GUARANTEE.

CONTRACT,
definition of, 1.
unilateral or bilateral, 1, 2, 13.
principal or accessorial, 2.
by matter of record, 2.
by deed, 2, 18.
See DEED.
simple, 2.
See SIMPLE CONTRACT.
consideration for, 2.
absence of, 2.
valuable, 3.
fraudulent, 5.
sufficient, 5.
work and services, 5.
loss or inconvenience, 6.
services to third party, 7.
part, 7.
failure of, 8.
written promises without, 9.
moral obligations, 9.
forbearance to sue, 10.
adequacy of, 12.
assent of parties to, 14.
biddings at auctions, 17.
contracts by post, 17.
by telegram, 18.
by deed, 18.
See DEED.
by matter of record, 21.
authentication of, 22.
See AUTHENTICATION.
interpretation of, 45.
See INTERPRETATION.
discharge of, 138.
See PERFORMANCE—DISCHARGE.
parties to, 308.
strangers to the contract, 308.
with bankers, warehousemen, and wharfingers, 309, 310.
parties entitled to enforce contracts under seal, 311.
trustee and *cestui que trust*, 312.
covenantees omitting to execute deed, 313.
parties liable upon simple contract, 313.
upon deeds, 315.
covenants in feigned names, estoppel, 315.
and obligations by one person on behalf of another, 315.
joint or several promises, 315.
joint or separate interests of covenantees, 316.
tenants in common, rights of, 317.
joint tenants, rights of, 317.
joint or several liabilities, in case of implied contracts, 318.
ex contractu, 319.

CONTRACT—*continued.*
parties to—*continued.*
joint and several purchases, 321.
with agents, 321.
See AGENT.
with partners, 357.
See PARTNERSHIP.
with corporations, 372.
See CORPORATIONS.
with joint-stock companies, 379.
See JOINT-STOCK COMPANIES.
with railway companies, 386.
See RAILWAY COMPANIES.
with associations, 388.
with mining companies, 389.
with insurance companies, 390.
with banking co-partnerships, 391.
with provisional directors, &c., of projected undertakings, 393.
See PROVISIONAL COMMITTEES.
with clubs, 395.
with trustees, &c., of public works, 397.
with public officers, 398.
with metropolitan borough councils, 398.
with parish councils, 399.
with district councils, 399.
with parish officers, 400.
with friendly societies, 400.
with industrial and provident societies, 401.
with benefit building societies, 402.
with freehold land societies, 403.
with loan societies, 404.
with registered trade unions, 404.
with infants, 404.
See INFANTS.
with executors, 414.
See EXECUTORS.
with married women, 418—434.
See MARRIED WOMEN.
with bankrupts, 434.
See BANKRUPTS.
with drunkards, 435.
See DRUNKARDS.
with lunatics, 435.
See LUNATICS.
with aliens, 437.
See ALIENS.
with prisoners of war, 438.
See PRISONERS.
with convicts, 438.
See CONVICTS.
with outlaws, 438.
See OUTLAWS.
with foreign sovereigns, &c., 439.
See FOREIGN GOVERNMENT.
mandamus to, 439—444.
See MANDAMUS.
express, 445.
implied, 446—473.
void, 75—124.
See ILLEGAL CONTRACTS.
discharge of, by release, 171—183.
See RELEASE.
by accord and satisfaction, 183.
See ACCORD AND SATISFACTION.

CONTRACT—*continued.*
discharge of, by alteration, 189—191.
See ALTERATION OF CONTRACTS.
by death, 194.
by bankruptcy, 195, 199.
See BANKRUPTCY.
limitation of actions, 199—220.
See LIMITATION.
transfer of, by assignment of, 221.
See ASSIGNMENT.
by death, 241—261.
See HEIR-AT-LAW—EXECUTORS AND ADMINISTRATORS.
by marriage, 261—267.
See MARRIED WOMEN.
by bankruptcy, 267—276.
See BANKRUPTCY.
remedy for breach of, 277—292.
See DAMAGES.
enforcement of, 292—307, 439—444.
See INJUNCTION—MANDAMUS—SPECIFIC PERFORMANCE.
for sale of lands, 474—526.
See SALE OF LANDS.
sale of goods and chattels, 526—633.
See SALE OF GOODS—WARRANTY.
sale of incorporeal hereditaments, 634.
stocks and shares, 636—650.
See INCORPOREAL HEREDITAMENTS.
demise of lands, 651.
See LANDLORD AND TENANT.
demise of lodgings, &c., 760, 764.
See LANDLORD—LODGING-HOUSE KEEPER—INNKEEPER.
bailment for hire, 805.
See BAILMENT FOR HIRE.
gratuitous bailment, 748, 750, 844.
See BAILMENT WITHOUT REWARD.
mortgage, 817, 841.
See MORTGAGE.
pledge, 817, 820.
See PLEDGE.
deposit, 844.
taskwork, 888.
See WORK AND SERVICES.
hiring and service, 915—941.
See MASTER AND SERVANT.
apprenticeship, 937—939.
See APPRENTICESHIP.
agencies, 942—969.
See AGENCY.
carriage by water, 970—1015.
See CARRIERS BY WATER.
carriage by land, 1015—1019.
See CARRIERS BY LAND.
common carriers, 1019—1078.
See COMMON CARRIER.
suretyship, 1079—1105.
See GUARANTEE.
marine insurance, 1105—1212.
See MARINE INSURANCE.
fire insurance, 1212—1222.
See FIRE INSURANCE.
life insurance, 1222—1239.
See LIFE INSURANCE.
bills of exchange and promissory notes, 1241—1309.
See BILL OF EXCHANGE—PROMISSORY NOTE.

CONTRACT—*continued.*
of and concerning marriage, 1310—1326.
See MARRIAGE—MARRIED WOMEN.
stamps on, 1327—1387.
See STAMP DUTIES.

CONTRACT NOTE,
obligation to execute, 116, 1350.
claim for charges barred, on failure to execute, 1351.
stamp duty on, 1350.
how denoted, 1351.

CONTRIBUTION,
between executors, 417.
between trustees in bankruptcy, 435.
general average, 1008.
See GENERAL AVERAGE.
between co-sureties, 1100.
See GUARANTEE.
release of co-surety, 1097.
death of co-surety, 1099, 1102.

CONTRIBUTORY NEGLIGENCE,
definition of, 1029.
by consignor of goods for carriage, 1029.

CONVERSION,
of bills and promissory notes, 1308.
of lost or stolen bank-notes, 1308.
negotiable instruments, 1308.

CONVICTION,
revesting of property on, 594.

CONVICTS,
disability of, to make contracts, 438.

CONVOY,
warranty as to sailing with, in policies of insurance, 1167.
misrepresentation in, avoiding policy, 1123.
sailing to rendezvous to wait, 1166.
deviation to procure, 1169.
liberty to touch, when under, 1172.

COPARCENERS,
right of action of, 316.

CO-PARTNERSHIP. *See* PARTNERSHIP.

COPIES. *See* ATTESTED COPIES—CERTIFIED COPIES.

CORPORATIONS,
limited partnerships, constitution of, 371.
contracts with, 373.
want of mutuality of obligation, 373.
incapacity of members of corporation, 373.
implied contracts not under seal, 375.
with trading corporations, 378.
contracts with joint-stock companies, 379.
requisites of, 380.
See JOINT-STOCK COMPANIES.
contracts with railway companies, 387.
informal contracts for services by railway companies, 388.
See RAILWAY COMPANIES.

CORPORATIONS—*continued.*
contracts with companies authorized to sue in name of their public officer, 388.
liability of the public officer, 389.
contracts with mining companies, 389.
bills and notes by, 1306.

CORRESPONDENCE,
contract by, what constitutes, 46.

COSTS
in forfeiture of lease, recovery of, from lessee as debt, 716.
of distress, 803.
of previous legal proceedings, when recoverable as damages, 283, 631, 968.

CO-SURETIES. *See* CONTRIBUTION—GUARANTEE.

COUNCILS,
contracts with, county, 397 note (*i*).
metropolitan borough, 398.
parish, 399.
district, 399.

COUNSEL. *See* BARRISTER.

COUNTERFEIT MONEY,
void agreement for payment in, 122.

COUNTERMAND
of delivery orders, 609.
of shipment of goods, 982.

COUNTRY BANKERS ACT, 1826.
banking co-partnership established under, 392.
mode of suing, 392.
judgment against, effect of, 392.
execution against, 392.

COUNTY COUNCILS,
contracts with, 397 note (*i*).

COUNTY COURT JUDGMENT,
effect of, as bar to action on same subject-matter, 192.

COVENANT. *See also* COVENANTS RUNNING WITH LAND.
non-execution by covenantees, effect of, 313.
in feigned name, 315.
by one person on behalf of another, 315.
joint or separate interests of covenantees, 316.
rights of tenants in common on, 317.
joint tenants on, 317.
words amounting to, 50.
words of proviso and condition, construed as express covenant, 51.
by implication of law, 52.
dependent and independent, 53, 55.
conditions precedent, 53.
mutual, 56.
usual, in agreement for lease, 57.
release of, before breach, 171, 174.
general, 176.
not to sue, 177.
for limited time, 178.
assignment of, 227.
continuing breaches of, 237.
rights of heir upon, 241, 242.

COVENANT—*continued.*
liability of personal representative for breach of, 242.
transfer of, annexed to estates *pur autre vie*, 243.
annexed to leasehold estates, 244.
for payment of rent, liability of executor on, 247.
to repair, extent of executor's liability, 248.
assignment of lease, effect on covenants, 248.
injunctions to restrain breach of, 303—306.
implied, what constitutes, 448, 522.
for title to realty, 521.
damages for breach of, 523.
for quiet enjoyment, 665.
damages for breach of, 750.
to pay rent, 667.
not to let or assign over, 668.
damages for breach of, 751.
to repair, 685.
damages for breach of, 751.
restricting user of demised premises, 694.
forfeiture for breach of, 708.
effect of surrender on existing breaches of, 720.
breach of, by equitable assignees, 749.
damages for breach of, 749, 750, 751.
destruction of buildings by fire or tempest, 752.
to consume hay or straw on farm, 752.
to insure life, 1239.
to marry, 1311.
stamp on, 1346, 1353.

COVENANTS RUNNING WITH LAND,
nature of, 227.
privity of estate and privity of contract, 227.
covenants between landlord and tenant, or reversioner and lessee, 227.
covenants real annexed to reversionary estates, 231—234.
assignees of grantees of licence, 234.
requisites of covenant, 234—237.
parties entitled to sue, 237.
continuing breaches, 237.
implied covenants arising from word "demise," 238.
covenants annexed to estate of joint tenants and tenants in common, 238.
assignments of rent and annuities, 239, 240.
difference between rent and annuity, 239.
right of husband on wife's, 261.
limitation of doctrine of, 749.

COVERTURE. *See* MARRIED WOMEN.

CREDIT,
pledging husband's, implied authority of wife, 425.
extent of authority, 425.
sale of goods on, action for, 624.

CREDITOR,
payment according to direction of, discharge of debtor on, 152.
payment to creditor of, by garnishee or under execution, 162.
appropriation of debts by, 165.
appointment of, as executor, effect of, 258.

CREDITORS,
fraud on, 87.
contracts, delaying or hindering, 87, 88.
assignment for benefit of, 187.
See BANKRUPTCY—COMPOSITION DEEDS—FRAUD.

CROPS AND GROWING PRODUCE,
sale of, when contract for, an interest in land, 26.
authentication of, 28.
when distrainable, 785, 802.
tenant's right to, 740.

CUMULATIVE STIPULATIONS,
nature of, 139.

CURRENT COIN,
contracts relating to, or involving payment in money, discharge of, in, 109.
illegality of contracts for payment for work otherwise than in, 117.
tender of payment in, what constitutes, 167.

CUSTOM AND USAGE,
admissibility of oral evidence of, 67.
to identify subject-matter, 68.
impliedly annexed to express terms of written contract, 69.
influence of, upon meaning of words, 70.
in case of marine policies, 1130, 1135.

CUSTOM OF THE COUNTRY,
annexed to contract under Agricultural Holdings Act, 69.
regulating rights and liabilities of outgoing and incoming tenants, 743, 744.

CUSTOMS,
increase of, added to contract price, 541.
contracts to evade payment of, 85.
See ILLEGAL CONTRACTS.

DAMAGES,
for breach of contract, 277.
nominal, 277.
general, 278.
special, 278, 281.
recovery of interest generally, 279.
costs of previous legal proceedings, 283.
pecuniary liabilities swelling amount, 284.
reduction of, rule as to, 284.
excessive, rule as to, 285.
penal obligations, 285.
penalties for breach of contract, 286.
liquidated damages, 287.
penalties under denomination of, 290.
injunction where option to take, 307.
plaintiffs', in actions of tort founded on contract, 290.
breach of contract for sale of realty, 507, 509, 512, 513.
non-performance by purchaser, 512.
non-performance by vendor, 513.
breach of covenants for title, 523.
non-performance of contract for sale of goods by non-acceptance, 625.
measure of damages, 625.
by non-delivery, 626.
measure of damages, 626, 627.
breach of warranty, 629.
measure of damages, 629, 630, 631.
special damages, 281, 631.
re-sale with warranty, 632.
costs of legal proceedings, 632.
for waste, 705.
improvement by tenant no answer to action for, 705.

DAMAGES—*continued.*
for obstructing reversioner entering to inspect waste, 706.
holding over, 732, 733, 754.
breach of contract to grant lease, 749, 750.
in actions for use and occupation, 750.
breach of covenants for quiet enjoyment, 750.
of covenant not to assign, 751.
of covenant to repair, 751.
destruction by fire or tempest, 752.
dilapidations by tenants, 691, 753.
of covenant to consume straw on farm, 753.
keeping distress without selling, 804.
action for not replacing stock, 815.
non-payment of cheques by bankers, 860.
contracts for performance of work, 913.
building contracts, 914.
prevention of performance, 914.
wrongful dismissal, 934, 940.
refusing to employ, 940.
action for loss of services of apprentice, 941.
breach of warranty of authority by agents, 968.
costs of previous legal proceedings, 968.
breach of charter-parties, 1014, 1071.
actions against common carriers, 1071.
measure of damages, 1071.
limitation of amount by statute, 1071, 1072.
for non-delivery of goods, 1072.
for delay in delivery of goods, 1073, 1074.
for personal injuries, 1075.
for refusing to carry, 1075.
breach of contracts of indemnity, 1104.
bankruptcy of principal debtor, 1104.
recovery of interest on money paid by sureties, 1104.
breach of contracts of insurance, 1238.
against railway accidents, 1238.
breach of covenants to insure, 1239.
upon dishonour of bills, 1276, 1298.
for breach of promise of marriage, 1315.

DANGEROUS EMPLOYMENTS,
injuries to servants from, liability of master for, 924, 925.
in case of servants in common employment, 925.

DANGEROUS GOODS,
bailment of, liability of bailor for injury from, 901.
carriage of, right of master or shipowner to refuse, 1014.
carriage of explosives, notice to carrier, 1023.

DANGEROUS MACHINERY,
servant using, liability of master to, 924, 925.

DAYS OF GRACE,
in fire insurance, 1218.
in life insurance, 1229.
on bills of exchange, 1271.
on promissory notes, 1288.

DEATH,
discharge of contracts by, 194.
transfer of interest in contracts by, 241, 242.
See EXECUTORS AND ADMINISTRATORS—HEIR-AT-LAW.
transfer of trust and mortgage estates on, 243.
of executor or administrator, effect of, 256.
civil death, 259, 438.
of one of several joint contractors, 260.

DEATH—*continued.*
of husband, rights of surviving wife, 432.
of wife, husband's rights of survivorship, 433.
of master or servant, terminating contract of service, 930.
of principal releasing surety, 1099.
of surety, 1099.
of co-surety, 1102.

DEBENTURE,
when liable to stamp duty, 1346.

DEBTOR,
appropriation of payments by, 165.
appointment of, as executor or administrator of creditor, 258.
appointment by, of creditor as executor, 258.

DECEIT. *See* FRAUD.

DECK CARGOES,
thrown overboard, excluded generally from general average, 1010, 1129.
custom to exempt underwriters not invalid, 1130.
stowing of goods on deck, in violation of contract with shipper, 1010.
when protected against loss by jettison, 1129.
prohibition of, at certain periods of year, 1129.
See MARINE INSURANCE.

DEED,
nature of contracts by, 18.
requisites of, 19.
signing, 19.
sealing and delivery of, 19, 20.
delivery of, as escrow, 21.
deeds *inter partes* and deeds poll, nature of, 21.
executory promises requiring authentication by, 42.
authority of agent to make, must be under seal, 43.
except in case of joint contractors, 43.
parties entitled to enforce, 311.
not executing deed, 313.
parties liable upon, 315.
covenants in feigned names, 315.
by one person on behalf of another, 315.
of joint and separate interests under deeds, 316.
liability of partners upon, 370.
interpretation of, 45, 58, 60.
estoppel by, 72, 315, 654.
fraudulent misreading of, effect of, 129.
alteration of, effect of, 189, 191.
evidence to explain, 191.
merger of simple contract in, 192.
acknowledgment of, to bar Statute of Limitations, 210.
made by agent, rights of principal on, 325.
liabilities of principal on, 334.
rights of agent on, 346.
liability of agent on, 356.
wife cannot bind husband by, 423.
power of wife to bind herself by, 423.
transfer of shares by, 646.
surrender of interest in tenements or hereditaments by, 716.
stamp duties on, 1339.

DEEDS OF SEPARATION,
validity of, 1324.
effect of subsequent reconciliation on covenants in, 1326.

DEFAULT. *See* PERFORMANCE.

DEFEASANCE,
of contracts, power of, 173.
fraudulent exercise of power of, 177.
See AVOIDANCE OF CONTRACTS.

DEFEASIBLE LEASES,
nature of, 707.
by disclaimer, 709.

DEFEASIBLE SALES,
of goods, 555.

DEFECTS,
concealment of, in sales of realty, 525, 526.
in sales of goods, 575.
See FRAUDULENT CONCEALMENT.

DELAY,
in performance of contracts, 140.
in performance of voyage, 977, 978, 1171.
in performance of railway journey, 1024.
damages against carriers for, in delivery of goods, 1074.
See TIME OF PERFORMANCE.

DEL CREDERE COMMISSION,
definition of, 948.
liability of factor on, 32.
duty of agent to account, 947.

DELIVERY,
of deed, authentication by, 20.
as escrow, 21.
of deposit, to owner on demand, 847.
in case of joint and several owners, 848.
of adverse claimants, 848.

DELIVERY OF BILL,
without indorsement, transfer by, 1280.

DELIVERY OF GOODS,
in part payment, operating as acknowledgment of debt, 216.
actual and constructive, 597.
proof of, 597, 598.
and payment, concurrent conditions, 598.
rules as to, 599.
place of delivery, 599.
where time not fixed, 599.
where goods in possession of third person, 599.
hours of delivery, 600.
expenses of delivery, 600.
of wrong quantity, 600.
by instalments, 602.
to carrier, 604.
effect of, 604.
seller's duty, 604.
for sea transit, 604.
deterioration in transit, 605.
right of buyer to examine goods, 605.
acceptance of goods, what constitutes, 606.
buyer not bound to return rejected goods, 606.
refusal to take, liability of buyer, 606.
damages for refusal to accept, 625.
damages for non-delivery, 626.
measure of damages, 626, 627.

DELIVERY OF GOODS—*continued.*
by carriers by water, 992.
at place of destination, 1051.
at railway station, 1052.
liability of company for passengers' luggage, 1052.
See SALE OF CHATTELS—ACCEPTANCE AND RECEIPT—DELIVERY ORDER—STOPPAGE IN TRANSITU.

DELIVERY ORDER,
transfer of possession of goods through medium of, 310, 583.
mere acceptance of, by purchaser, not actual acceptance of goods, 536.
receipt of, by wharfinger, for goods not in his possession, effect of, 537.
countermand of, before acceptance, 609.
extinguishment of right of countermand, 609, 611, 612.
intervention of rights of sub-purchasers preventing the exercise of right of, 612.
See STOPPAGE IN TRANSITU.
stamp on, abolition of, 1365.

DEMAND,
of performance of contract, when necessary, 143.
waiver of, 144.
time of limitation, when demand is condition precedent, runs from, 208.

DEMISE. *See* LANDLORD AND TENANT.
implied covenants under word, in lease, run with term, 238.
meaning of term, in lease, 238, 449.
for term of years, when operating as an assignment, 951.

DEMURRAGE. *See* CHARTER PARTY.
nature of, 1003.
shipowners' right of action for, 1003.
interpretation of charter-party as to payment of, 1004.
liability for payment of under bills of lading, 1008.

DENOTING STAMP,
in respect of duty paid on another instrument, 1333.

DEPENDENT COVENANTS AND PROMISES. *See* CONDITIONS PRECEDENT.

DEPOSIT. *See* BAILMENT WITHOUT REWARD.
definition of, 844.
requisites of, 844.
money deposited to abide wager, 123.
on illegal consideration, not recoverable, 137.
on sale of lands, recovery of, 509.
forfeiture of, 509.
in hands of auctioneer, 509.
letting of places of, 764.
money deposited with one of several partners, 850.
with bankers, 852.
See BANKERS.
limitation of actions for, 852.
stamp on contracts of, 1373.

DEPOSITARIES. *See* STAKEHOLDERS.

DESCRIPTION,
sale by, implied condition on, 562.

DESERTED DEMISED PREMISES,
recovery of, by landlord, by summary proceedings, 738.

DESERTION,
of husband by wife, 428.
of wife by husband, 428.
authority of wife to pledge husband's credit for necessaries. 428, 429.
order for protection of wife's property and earnings, 431.

DETENTION OF CHATTELS,
order for specific delivery of chattels wrongfully detained, 300.
justification of, by bailee, under claim of lien, 902.

DEVIATIONS,
in building contracts, 880.
See BUILDING CONTRACTS.
from insured voyage, 1168.
See MARINE INSURANCE.

DEVISEES,
rights and liabilities of, 241, 246.
See HEIR-AT-LAW.
acknowledgment of debt by, binding estate, 214.

DILAPIDATIONS,
by tenants, 685.
damages recoverable in respect of, 690, 691, 752.

DIRECTORS,
fraudulent representations by, 127.
of co-partnership, 358.
of trading associations, 369.
of joint-stock companies, contracts with, 379.
of railway companies, contracts with, 386.
bills and notes by, 387.
of companies for carrying on public undertakings, 387.
of projected undertakings, 393.
See PROVISIONAL COMMITTEES.
of life assurance company, 1223.

DISABILITIES,
of trustees and agents for sale, 132.
temporary, extending Statute of Limitations, 203.
of infants, 404—412.
of married women, 418—434.
of drunkards and lunatics, 435.
of aliens, 103, 437, 438.
of convicts and outlaws, 438.
of sovereigns and ambassadors, 439.

DISCHARGE IN BANKRUPTCY,
order of, effect of, 195.

DISCHARGE OF BANKRUPT,
effect of, 195, 196, 197.
on debts contracted abroad, 199.

DISCHARGE OF CONDITIONS OR COVENANTS,
before breach, 174.

DISCHARGE OF CONTRACTS,
by performance, 138.
See PERFORMANCE.
before breach, 171, 174.
by consent, 171.
by parol, 174.
of bill of exchange, 175.

DISCHARGE OF CONTRACTS—*continued.*
by accord and satisfaction, 183.
by acceptance of securities, 185.
by operation of law, 189.
by death, 194.
by bankruptcy, 195.
See RELEASE—ALTERATION—ACCORD AND SATISFACTION—MERGER—JUDGMENT RECOVERED.

DISCHARGE OF SERVANTS. *See* MASTER AND SERVANT.

DISCLAIMER,
by trustee in bankruptcy, 275.
by tenant of landlord's title, 708.
operating as forfeiture, 709.

DISCONTINUANCE OF ACTION,
good consideration for promise, 10.

DISHONOUR,
of cheque, by banker, 854.
notice of, 1272.
to whom to be given, 1272.
rules as to, 1273.
what amounts to, 1275.
posting notice, 1275.
proof of, 1278.
excuses for delay in giving, 1278.
dispensation of, 1278.

DISHONOURED BILLS AND NOTES,
debts secured by, actions for, 155.

DISMISSAL,
of servants for incompetency, 931.
for misconduct, 931.
wrongful dismissal, 934.
damages for, 934, 940.

DISPENSATION,
of conditions precedent, 145.
of performance, 145, 171.
renunciation, amounting to, 171.

DISSOLUTION,
notice of, of co-partnership, 367.

DISTRESS,
on bankrupt, limitation of landlord's right of, 197.
right to distrain, 680.
extinguished by assignment of reversion, 681.
by tender, 781.
under Judicature Act, 1873...775.
Bankruptcy Act, 1883...774.
Agricultural Holdings Act, 1908...774.
Companies Act, 1908...792.
Landlord and Tenant Act, 1851...776.
ejectment, where not sufficient, 737.
hypothecation of chattels, 829.
licence to seize, to secure payment of debt, 829, 830.
for rent in arrear, 772.
rent must be ascertained, 775.
conditions precedent to right, 776.
agreements not to distrain, 776.
acceptance of bill, by way of payment, 777.

DISTRESS—*continued.*
rent payable in advance, 777.
agreement for, not valid as against mortgagee, 780.
when payable, 777.
several demises, 777.
after termination of term, 778.
by agents, 779.
receiver appointed by mortgagee, 780.
by Court of Chancery, 780.
joint tenants, 780.
tenants in common, 781.
executors, 781.
when to be made, 781.
before probate, 781.
tender of rent before, 781.
time, mode, and place of distraining, 781.
things not distrainable, 783.
property of Crown, 783.
things annexed to the freehold, 783.
cattle, sheep, &c., unless no other distress available, 784.
things in actual use, 784, 785.
implements of trade, 784.
perishable articles, growing crops, &c., money, 785.
property of strangers in own possession, 786.
on the premises, with leave of landlord, 786.
statutory exemptions, 786.
wearing apparel, bedding, tools and implements of trade, 786.
limitation of value of goods exempted, 787.
goods of undertenant and lodger, 787.
summary remedy for goods distrained, 788.
live stock taken in for feeding or breeding, 788, 789.
redemption of, by owner, 789.
agricultural machinery not property of tenant, 789.
railway rolling stock at any "works," 789.
where partly property of tenant, 789.
summary order for restoration, if wrongfully distrained, 789.
frames, looms, &c., hired for use in textile manufactories, 789.
gas or water meters, &c., belonging to public companies, 789.
gas stove let for hire by gas company, 789, note (*m*).
goods of foreign ambassadors, 791.
of companies in liquidation, 792.
materials placed on premises to be worked on by tenant, 790.
goods not within exemption, 790.
property of guests at common inn, 791.
goods in custody of law, 791.
under writ of execution, 791.
growing crops, 791.
landlord's right to rent in arrear, 791.
things distrainable, 792.
chattels of traders, in possession of tenant, 792.
exceptions, 785, 786, 793.
chattels mortgaged by tenant, 793.
under licence to distrain, 794, 830.
licence not assignable, 794.
goods fraudulently removed, 794.
what is fraudulent removal, 795.
double value, action for, on, 795.
what amounts to distress, generally, 796.
in case of warehousemen, 796.

DISTRESS—*continued.*
what amounts to,
in case of lodging-house keeper, 796.
for more rent than due, 796.
when unlawful, 796.
repeated distress for same rent, 797.
when lawful, 797.
where bill for rent dishonoured, 797.
impounding goods, 797.
See IMPOUNDING GOODS.
abandonment of distress, 800.
statutory power of sale, 800.
appraisement, 800.
tender of rent before sale, 801.
action for selling after tender, 801.
where distress for more rent than due, 801.
parties to whom to tender, 801.
growing crops and things removed, 802.
period within which goods may be replevied, 802.
notice of distress, necessary before sale, 801, 802.
when to be given, 802.
inventory of goods to be made, 802.
damages for selling goods not in inventory, 802.
sale to be for best price, 802, 803.
costs and expenses, scale of, 803.
treble charges recoverable for excessive costs and charges levied, 803.
copy of, to be given by broker, 803.
effect of non-compliance with statutes authorising sales, 804.
keeping distress without selling, 804.
lien of landlord for rent on goods distrained, 804.
sale necessary to give purchaser title to goods, 805.
landlord cannot purchase goods distrained, 805.

DISTRICT COUNCILS,
contracts with urban, 399.
to carry out Public Health Acts, 399.
requisites of, 399.

DIVIDEND WARRANTS,
transfer of, 1289.

DIVIDENDS,
in bankruptcy, effect of payment of, 197.

DIVISIBLE CONTRACTS,
part good, part bad, effect of, 120.
See ILLEGAL CONTRACTS.

DOCK WARRANTS,
acceptance of, by purchaser, effect of, 536.
stamp on, 1365.
See DELIVERY ORDER.

DOCUMENTS OF TITLE,
pledges of, by mercantile agents, 823.
See PLEDGE.

DOMESTIC SERVANTS,
general hiring of, for year, 919.
subject to month's notice or month's wages, 919, 931.
termination of service, at end of first month by fortnight's notice, 919.
proof of custom necessary, 919.
by death of master or servant, 930.
rights and liabilities of, 921.
common employment of, 926.

DOMESTIC SERVANTS—*continued.*
duties of, 929.
dismissal of, for misconduct or disobedience, 931.
sufficient grounds for, 932.
insufficient grounds for, 933.
damages for wrongful, 934, 940.
disability of, from sickness, dissolving contract, 933.
wages of, presumption of payment of, 936.
character, no legal obligation on master to give, 941.
decoying away, liability for, 453.
See MASTER AND SERVANT.

DORMANT PARTNER,
liability of, 363.
private agreement, exempting from liability, effect of, 364.
retirement of, extent of liability on, 369.
notice of, when necessary, 369.

DOUBLE RENT AND DOUBLE YEARLY VALUE,
for holding over, 733, 734.

DRAFT,
stamp on, 1375.
See CHEQUE.

DRAWER,
of bill of exchange, liability of, 1266.

DRUGGISTS. *See* CHEMISTS.

DRUGS,
sale of, regulation of, by statute, 111.
See POISON.

DRUNKARDS,
contracts with, voidable, 435.

DUPLICATES. *See* PAWNBROKERS.

DURATION OF LEASES,
for years, 657, 658.
from year to year, 659.
tenancy at will, 661.
by sufferance, 663.

DURESS,
contracts made under, voidable, 133, 413.

DUTY,
created by contract, neglect of, giving cause of action, 290.
of parent to provide for children, 413.
of seller and buyer, on sale of goods, 596.
customs duty on goods warehoused to be added to price, 544.

EARNEST AND PART PAYMENT,
nature and effect of, in contracts of sale of goods, 528.

EJECTMENT,
of tenants, recovery of possession, 735.
licence to eject, right of lessor under, 736.
under provisoes for re-entry, 736.
where no sufficient distress, 737.
recovery of possession of deserted premises, 738.
recovery of possession of houses and small tenements, 739.
by summary proceedings, 739.
in county court, 739, 740.

EMBANKMENT,
dangerous, liability of railway company for, 1066.

EMBARGO,
meaning of, 1180.
abandonment of ship after, 1189.
shipowners no right to freight earned after, 1189.
giving right of abandonment, 1193.

EMBLEMENTS,
agreements as to, not an interest in land, 27.
meaning of, on sale of goods, 527, note (*s*).
tenant's right to, under custom of country, 743.

EMPLOYER,
contracts in fraud of, invalidity of, 86.
See ILLEGAL CONTRACTS.
rights and liabilities of, and workman, 874.
defeasible contracts between, and workman, 874.
time of performance, 875.
duty of, to exercise caution in choosing *employé*, 898.
Employers' Liability Act, 927, 928.
contract to abandon rights under, 78.
Workmen's Compensation Act, 928.
contract to give up rights under, 929.
See WORK AND SERVICES—MASTER AND SERVANT.

ENCROACHMENT,
on waste by tenant, rights of landlord, 748.
when Statute of Limitations runs against landlord, 748.

ENEMIES. *See* FOREIGN ENEMIES.

EQUITABLE ESTATES
and interests, transfer of, 292, 482.

EQUITABLE ESTOPPEL,
principle of, when applicable to contracts for sale of land, 498.

EQUITABLE INTERESTS,
of bankrupt, when passing to trustee, 269.

ERASURES
in contracts. *See* ALTERATION.

ESCROW,
delivery of deed as, 21.

ESTATE AGENTS,
duties and responsibilities of, 953.
right of, to commission, 959, 960.
on revocation of authority, 960.

ESTOPPEL,
by deed, 72.
confined to parties to contract, 72.
in pais, 72.
in case of covenants in feigned names, 315.
equitable, 498.
in sale of goods, by words or conduct, 592.
lease by, 654.
surrender of lease by, 717.

EVICTION,
of purchaser of realty from want of title in vendor, 520.
See TITLE.
of tenants, extinction of rent by, 674, 675.
by railway companies, under statutory powers, 676.
of bailee by title paramount, 848.

EVIDENCE,
inadmissibility of oral evidence to add to, alter, or contradict written contract, 45, 46, 48, 64, 551.
admissibility of, of surrounding circumstances to explain intention, 46.
in case of latent ambiguity, 46.
patent ambiguity, 47.
oral testimony in aid of insufficient written evidence of contract, 67.
oral evidence of custom and usage, 69, 1128.
annexation of agricultural and mercantile customs, 69.
customary meaning of particular words, 70.
terms of art, 71.
trade acceptations, 71.
oral evidence of conditional assent, 71.
estoppel by deed, 72.
in pais, 72.
mistaken or untrue averments, 73.
discharge of contracts in writing before breach, by oral agreement, 171.
oral renunciation of claims on bills, 175.
oral evidence to explain alterations in contract, 191.
of agency, 324, 326, 348.
of warranty, 551.
of false and fraudulent representation, 551.
that party relied on it, 552.
of delivery of goods, 597, 598.
of terms of tenancy, 653.
of subject-matter of demise, 656.
of notice to quit, 730, 731.
of bailment, in action for loss of goods, 1076.
of special contract of carriage, 1077.
of *jus tertii* by carrier, 1078.
admissibility in, of unstamped documents, 1237.

EXCESSIVE DAMAGES,
rule as to, 285.
catching bargain, 285.

EXCHANGE OF OFFICES,
when legal, 86.

EXCHEQUER BONDS,
assignment of, 222.

EXCISE LAWS,
contracts in contravention of, 85, 110, 120.

EXCURSION TRAIN,
luggage taken by, implied promise by passenger to pay for, 1037.

EXECUTION,
on partnership property, for separate debt of partner, 361.
purchaser of goods with notice of, 596.

EXECUTOR *DE SON TORT*,
liability of, 254.

EXECUTORS AND ADMINISTRATORS,
contracts with, 414.
interest of, 415.
liabilities of, on their own contracts, 416.
for acts of each other, 417.
authentication of promises by, under Statute of Frauds, 29.

EXECUTORS AND ADMINISTRATORS—*continued.*
payment to one of several, 163, 164.
acknowledgment of debts by, 213, 214.
part payment by one of several, 218.
Land Transfer Act, 1897, position of, under, 241.
right of action of, for breach of covenant, 242.
transfer of trust and mortgage estates on death, 243.
covenants annexed to estates, *pur autre vie*, 243.
covenants annexed to leasehold estates and interests, 244.
bonds and personal covenants and simple contracts, 244.
executory contracts of deceased person, 245.
liability of real estate for debts of deceased, 246.
liabilities of, on covenants for payment of rent, 247.
covenants to repair, 248.
after assignment of term, 242, 248.
upon personal contracts, 249.
administration of assets, 249.
limitation of liability on covenants, 249.
application of assets in payment of debts, 250.
specialty and simple contract debts, 250.
protection under Judicial Trustees Act, 251.
order of payment of creditors, 252.
retention of debt due from deceased, 252.
compromise of action by creditor, 252.
defences in actions, 252, 253.
dilapidations, simple contract debt due from late incumbent, 253.
liability on executory contracts of deceased, 253.
joint liability of, 254.
executor *de son tort*, 254.
feme covert executrix, 255.
effect of appointment of, 255.
death of, 256.
continuation of chain of representation, 256.
administration *de bonis non*, 256.
survivorship of liability, 257.
appointment of debtor as executor or administrator, 258.
of creditor as executor, 258.
civil death, effect of, on rights of action as executor, 259.
felons, choses of action pass to administrator, 260.
joint and several contracts, 260.
survivorship of joint contractors, 260.
distress by, by statute, 781.
liability of, for negligence, in respect of assets, 845.

EXECUTORY ACCORD,
no bar to action, 184.

EXECUTORY CONTRACTS,
authentication of, required by deed, 42.
for sale of goods, 28, 528.
transfer of, by death, 245, 253.
with bankrupts, pass to trustee, 269.
for sale of shares, how effected, 639.

EXPECTANT HEIRS,
extortionate contracts with, 412.

EXPLOSIVES,
sale of, statutory provisions as to, 111.
carriage of, right of carriers by sea to refuse, 1014.
liability of consignor for damage caused, 1023.

EXPORT BONDS,
stamp duty on, abolition of, 1365.

EXPULSION OF WIFE,
by husband, what amounts to, 430.
liability of husband for necessaries, 430.

EXTORTION,
extortionate contracts with expectant heirs, 412.
money obtained by, recovery of, 463.

EXTRAS,
liability for, on deviations from building contracts, 886.
extra work by agent by order of principal, 958.

FACTORIES,
letting of standing place in, amounting to demise, 764.

FACTORS,
contracts made with, rights of, on, 32, 345.
amounting to guarantee, within Statute of Frauds, 32.
liability of, on *del credere* commissions, 32.
liabilities of, to their principals, 947, 948.
pledges by, 822.
provisions of Factors Acts, as to, 822.
mercantile agent, under, 823.
validity of pledge by, 822.
title of pledgee, when good, 823.
possession by, what constitutes, 822.
consent of owner to, 823.
rights acquired by exchange of goods or documents, 823.
agreements through clerk of, 823.
provisions as to, in case of consignees, 823.
disposition by seller remaining in possession, 824.
buyer obtaining possession, 824.
transfer of documents of title, effect of, on seller's lien, 825.
mode of transferring documents of title, 825.
lien of, extent of, 961, 962.
See AGENT—PLEDGE.

FAILURE OF CONSIDERATION,
effect of, on contract, 8.
recovery of money paid upon, 136, 632.
partial, general rule as to recovery of money, 137.
for bill of exchange, 1264.

FALSE PRETENCES,
money obtained by agents by, recovery of, 355.
See FRAUDULENT MISREPRESENTATION.

FALSE REPRESENTATION. *See* FRAUD.
rescission of contract on ground of, 126.

FAULTS,
sale of realty with all, 526.
of chattels with all, 577.
See FRAUD.

FEE FARM RENTS,
limitation of suits for, 193.

FELLOWSHIP,
assignment of income of, 91.

FELONS,
disabilities of, 259.
under Forfeiture Act, 260.

FEME COVERT. *See* MARRIED WOMEN.

FENCES,
repair of, no implied contract by lessor for, 693.

FERRYMAN,
duties of, as common carrier, 1066.
liability of, for non-delivery of goods, 1066.

FIDELITY BOND,
for faithful service, 1087.

FIGURES,
in contracts, controlled by words, 48

FINDING
of goods, duty of finder, 850.
of negotiable securities, 1308.

FIRE,
loss or destruction by, affording no answer to action for non-payment of rent, 674.
when tenant is excused, 762.
amounting to waste, 704.
to non-performance of covenant, 752.
limitation of liability of shipowners for loss by, 990.
loss by, in maritime insurance, 1177.
insurance by bailees against, 1220.

FIRE INSURANCE,
specific performance of contract of, 294.
contracts of fire insurance, 1212.
parties entitled to benefit of insurance, 1213.
things covered by policy, 1214.
warranties, statements and conditions, &c., amounting to, 1214.
alteration of premises increasing risk, 1215.
notice of alterations, 1215.
misdescription of insured premises, 1216.
fraudulent concealment of facts materially affecting risk, 1216.
risks covered by policy, 1216.
fires caused by negligence, 1218.
extraordinary risks, 1218.
notice of loss, 1218.
partial losses, 1218.
forfeiture of policy, 1218.
non-payment of premium, 1219.
days of grace, 1219.
divers insurances on same property, 1219.
insurances by warehousemen and bailees of customer's goods, 1220.
inability of insured to sue when no damage sustained, 1221.
rights of insurer and insured as against wrong-doers causing loss, 1221.
laying out insurance money in rebuilding, 1221.

FIRMS. *See* PARTNERSHIP.

FITNESS,
implied warranty or condition as to, on sale of goods, 564.
when goods sold to be used for specific purpose, 566.

FIXTURES,
meaning of term, generally, 695.
contracts for sale of, 633.
authentication of, 28, 633.
landlord's fixtures, what are, 696.
tenant's right to, on leaving, 696.
tenant's fixtures, what are, 696.
agricultural tenant's fixtures, removable by statute, 697.
under Landlord and Tenant Act, 697.
under Agricultural Holdings Act, 698.
under Small Holdings Act, 699.
ornamental, 699.
domestic and trade, 699.
by local custom and usage, 700.
abandonment of right, 700, 703.
inability to remove after expiration of term, 701.
mortgagee's right to, after surrender of lease, 702.
distraint on, 783.
See DISTRESS.
mortgage of, 839.
right to, as between mortgagor and mortgagee, 840.
stamp duty on sale of, 1368.

FOOD,
sale of adulterated, statutory provision as to, 111.

FORBEARANCE,
of legal proceedings, good consideration for promise, 10.
See CONSIDERATION.

FORCIBLE ENTRY,
by landlord for purpose of ejecting tenant, 735.
in case of small tenements, 739.
licence to eject tenant in case of non-payment of rent, 736.

FORECLOSURE,
of right of redemption of pledge, 826.
pledgee's power of sale, 826.

FOREIGN CONTRACTS,
made in one country and enforced in another, 58.
interpretation of, 58, 60.
bonds, bills, and notes, interpretation of, 60.
foreign purchases, 63.
foreign affreightments, 63.
what detremines *locus contractûs*, 63.
when enforceable in this country, 122.
void foreign contracts, 122.
debts contracted abroad, effect of discharge in bankruptcy on, 199.
limitations of actions upon, 219.
specific performance of, general rule as to, 307.
protest and noting of foreign bills, 1276.
re-exchange, 1276.
stamp on, 1338.

FOREIGN ENEMIES,
illegality of contracts with, 103, 437.
unless made pursuant to licence to trade, 103, 437.

FOREIGN FRIENDS,
contracts with, legality of, 437.

FOREIGN GOVERNMENT,
privilege of agent of, from being sued, 439.
Statute of Limitations does not run against agent, 439.

FOREIGN JUDGMENTS,
implied contracts in respect of, 454.
recovered, effect of, 194.
when conclusive *inter partes,* 194.

FOREIGN MONEY,
payment in, 470.

FOREIGN PRINCIPALS,
contracts on behalf of, liability of agent on, 348.

FOREIGN SCRIP,
transfer of, 1289.
stamp on, 1349.

FOREMEN,
authority of, to bind employer, 338.

FORFEITURE,
of deposits on sale of lands, 509.
of lease, 708.
provisoes for re-entry on, 709.
effect of, on lessee's liability on covenants, 712.
waiver of, 713.
lessor's right of election, 713.
relief against, 714.
See RELIEF AGAINST FORFEITURE.
where no notice to remedy breach given, 714.
for breach of covenant to insure or pay rent, 714, 715.
assignment after, 715.
of pledges, 862.
of policies of fire insurance, 1218.
of policies of life insurance, 1229.
waiver of, 1231.

FORFEITURE ACT, 1870,
disabilities of felons under, 260.

FORGED SECURITIES,
recovery of money paid for, 137.

FORGED TRANSFERS,
registration of, 648.
effect of registration of, 648.
liability of company for, 649.
power of company to compensate registered purchasers, 649, note (*e*).

FORGERY
of cheques, drafts, and orders, 857, 1259.
forged indorsements, 858, 1259.
recovery of money paid for forged bills, notes, or securities, 137, 466.

FORNICATION. *See* ILLEGAL CONTRACTS.
contracts tending to promote, void, 76.

FORWARDING AGENTS,
as distinguished from agents for custody, 537.
not bound to see quality of goods corresponds with contract, 948.

FRAUD,
by agent, misrepresentations avoiding contract, 333.
money obtained by agent by, 355.
See AGENT.
contracts in fraud of masters and employers, 86.
See ILLEGAL CONTRACTS.
fraudulent gifts, trust deeds, and settlements made by debtor, 84, 87.

FRAUD—*continued.*
on creditors, 87.
enabling deceived party to avoid contract, 124.
by agents on third parties, 127.
by directors of companies, 127.
fraudulent misreading of deed, 129.
effect of, 129.
determination of power to avoid contract on ground of, 130.
constructive fraud, 131.
by trustees, agents, &c., 131, 132.
by partner, on his co-partners, 362.
recovery of money obtained by, on sale of land, 526.
on sale of goods, 572.
fraudulent releases, Court will set aside, 177.
puffers at sales by auction of land, 476.
of goods, 632.
avoiding contract for sale of realty, 525.
See SALE OF LAND.
for sale of goods, 572.
See SALE OF GOODS.
by agents on their principals, 957.
on sureties, 1098.
on parties to marriage contract, 1321, 1322.

FRAUDS BY SERVANTS AND AGENTS,
rendering master or principal responsible, 127.

FRAUDS (STATUTE OF),
See AUTHENTICATION.
contracts relating to sale of lands or interest in lands, 22.
as affecting leases, 22.
part performance takes case out of, 23.
furnished houses and lodgings, 24.
sale of milk-walk, 25.
agreements to alter and repair buildings, 25.
services in connection with transfer of land, 25, 26.
agreements concerning landmarks, 26.
agreements for growing crops, grass, timber, &c., 26.
executory contracts for sale of goods, 28.
See SALE OF GOODS.
fixtures, 28, 633.
shares, not within the statute, 29.
promises by executors and administrators, 3, 29.
promises to answer for debt, default, or miscarriage of another, 29.
operation of statute on, 30, 31.
collateral undertakings, 31, 32.
agreements in consideration of marriage, 33, 1312.
agreements not to be performed within year, 34.
part performance does not take case out of statute, 34.
performance of contract depending on uncertain event, 35.
contract not enforceable by reason of statute not void, 36.
requisites of memorandum, 36.
on sale of goods, 37.
agreement for service, 38.
agreement for lease, 38.
promise to answer for debt, default, &c., of another, 38.
signature, 39.
by agents, 41.
unconscientious use of, 42.

FRAUDULENT CONCEALMENT,
by debtor compounding with creditor, 87, 88.
by agents, 127, 333.

FRAUDULENT CONCEALMENT—*continued.*
by principal, by means of his own agent, 127.
avoiding contracts, 126.
for sale of lands, 525.
of chattels, 575.
of dangerous character of article bailed, 901.
liability of bailor for injury from, 901.
in marine insurance cases, 1122, 1123.
in fire insurance, 1216.
in life insurance, 1226.
by agents, 1227.
avoiding treaty of marriage, 1314.
or contract of betrothment, 1314.

FRAUDULENT MISAPPROPRIATION,
by one partner, of money deposited with firm, 851.

FRAUDULENT MISREPRESENTATION,
by agents, 127, 333.
avoiding contracts, 126.
by directors of joint-stock companies, 127.
on sale of lands, 525.
of chattels, 572.
avoiding sale, 572.
made through third party, 573.
by insurers, 1122, 1216, 1226.
in contracts to marry, 1314.

FRAUDULENT PREFERENCE. *See* COMPOSITION DEEDS—FRAUD.

FRAUDULENT RELEASE,
to defeat action, Court will set aside, 177.

FRAUDULENT REMOVAL,
to avoid distress, seizure of goods after, 794.

FREEHOLD LAND SOCIETIES.
distinction between, and benefit building societies, 403.
contracts with, 403.

FREIGHT,
See CHARTER-PARTY.
payment of, under charter-party, 993.
calculation of, 996.
payment *pro ratâ*, 997.
time freight, 997.
shipowners' lien for freight, 998.
payment of freight by consignee, 998.
in respect of sub-freight, 998.
payment of freight under bills of lading, 999.

FREIGHT POLICIES,
insurable interest in freight, 1108, 1109.
in advance freight, 1109, 1111, 1142.
meaning of freight in marine insurance, 1141.
when risk attaches, 1141.
rights of insurer as to freight on abandonment, 1189.
See MARINE INSURANCE.

FRIENDLY SOCIETIES,
contracts with, 401.
loans of money to, 401.
salaries of officers of, 403.

FRUIT,
sale of, 26.
See CROPS.

FUNDS,
sale and transfer of stock in the, 649.
specific performance of, when decreed, 649.

FURNISHED HOUSES AND APARTMENTS,
letting and hiring of, 24, 760.
when infested with bugs and nuisances, 673, 761.
liabilities of hirers of, 761, 762.
notice to quit, 763.
stamp duty, 1357.
See LODGING-HOUSE KEEPER—NOTICE TO QUIT.

FURNITURE,
letting and hiring of, implied warranty as to, 806.

FUTURE GOODS,
meaning of, in contract for sale, 539.

GAMBLING,
in the funds, 106.

GAME,
illegal contracts as to ground game, 89.
sale of, without licence, 110.
penalty for, 110.

GAMING CONTRACTS,
illegality of, 103.
effect of avoidance of, 122.
lawful and unlawful games, 107, 849.
securities for money won at play or lent for gaming, when void, 108.
money knowingly lent for gaming, not recoverable, 108.
money in hands of depositaries, when recoverable, 123.
by infants, 412.
gaming policies of insurance, 1109, 1223.

GARNISHEE,
payment by, valid discharge as against judgment debtor, 162.

GAS,
stop-cocks, liability of tenant as to, 705.
pipes, liability of tenant for damage from, 705.
supply of, duty of gas company in respect of, 705.
meters, exemption of, from distress, 789.
stoves, let for hire by gas company, exemption of, from distress, 789, note (*m*).
wilful breach of contract to supply, 936.
penalty for, 936.

GENERAL AND PARTICULAR AVERAGE,
as used in contracts of insurance, 1196.
average and total losses, 1199.

GENERAL AVERAGE AND CONTRIBUTION,
nature of, 1008, 1196—1199.
liability of shipowner, and owners of goods shipped on board for payment of, 1008, 1196—1199.

GOODS,
authentication of contracts for sale of, 28, 528.
See SALE OF GOODS.
part payment by delivery, 216.

GOODS—*continued.*
bargained and sold, 622.
sold and delivered, 623.
sold on credit, 624.
letting of chattels, 805.
See BAILMENT.
mortgage of, 817.
See PLEDGE.
imperfect hypothecation of, 829.
See HYPOTHECATION.

"GOODS SPECIE AND EFFECTS,"
what is included in term, in marine insurance, 1127.

GOODWILL,
sale of bankrupt's, authority of trustee, 271.
specific performance of sale of, 294.
stamp duty on sale of, 1345.

GOVERNMENT AGENTS,
contracts with, non-liability of agents, 353.

GOVERNMENT (FOREIGN),
privilege of, from actions, 439.

GOVERNMENT STOCK,
transfers of, exemption from stamp duty, 1366.

GRACE,
days of. *See* DAYS OF GRACE.

GRANT,
meaning of word, 448, 522.
of incorporeal hereditaments, must be by deed, 634.
See INCORPOREAL HEREDITAMENTS.

GRASS,
contract for sale of, when an interest in land, 26.

GRATUITOUS BAILMENTS. *See* BAILMENT WITHOUT REWARD.

GRATUITOUS COMMISSION. *See* BAILMENT WITHOUT REWARD.

GRATUITOUS PROMISES,
nature and effect of, 2—5.
revocation of, 16.

GRATUITOUS SERVICES,
nature of, 873.

GROUND GAME,
illegal contracts as to, 89.

GROUND RENT,
payment of, by tenant under compulsion by superior landlord, 677.
deduction thereof by tenant from rent, 676, 677.

GROWING CROPS. *See* CROPS.

GUARANTEE,
consideration for, 12.
adequacy of, 12, 13.
contracts in the nature of, 30.
nature and effect of, 1079.
authentication of, 29, 30, 1080.
under Statute of Frauds, 1080, 1081.
primary and secondary liabilities, 1081.

GUARANTEE—*continued.*
statement of consideration on face of, 1082.
incomplete contract of, 1083.
fidelity bonds, 1084.
construction of recitals of, 1084.
where office for life, 1084.
where duration of employment uncertain, 1084.
change in employment, 1084.
notice of, 1084.
where office is annual office, 1085.
duration and extent of surety's liability, 1085.
release of surety, 1085.
by change in employment of principal, 1086.
by statutory change in duties of public office, 1086.
where surety deprived of his remedy against principal, 1087.
bonds under seal to partnerships and associations, 1087.
release by change in constitution of firm, 1087.
limitation of liability of surety, 1088.
in case of floating balance, 1088.
continuing liabilities, 1088.
construction of contracts under seal, 1089.
not under seal, 1089.
revocation of contract not under seal, 1089.
application of Statute of Limitations to, 1089, 1094.
guarantees not importing continuing liability, 1090.
conditions precedent to liability of surety, 1083, 1090.
duty of person guaranteed, 1091.
duty of employer to inform surety of employee's dishonest acts, 1092.
alteration of principal obligation discharging surety, 1092.
extension of time of payment, 1093.
when surety not discharged by, 1094.
by acceptance of collateral security by creditor, 1094.
by assenting to alteration of principal obligation, 1094.
Statute of Limitations, when pleadable as a defence, 1094.
suretyship where relation does not appear upon face of contract, 1095.
release of principal debt, effect of, 1096.
discharge of surety, 1017.
release of principal obligation, reserving remedies against surety, 1096.
what amounts to an absolute release, 1097.
release of one of several co-sureties, 1097.
payment by principal debtor, effect of, 1097.
fraud on sureties, 1098.
discharge of surety by death of principal, 1099.
death of surety, notice of by executor to creditor, 1099.
indemnification of sureties, 1100.
implied promise by principal to indemnify surety, 1100.
payment of debt constitutes surety simple contract creditor of principal, 1100.
compromise of action by surety, after notice to principal, 1100.
right of principal to defend action brought against surety, 1100.
contribution between co-sureties, 1100.
principal creditor not entitled to benefit of collateral securities given to surety, 1102.
death of co-surety, does not determine liability of survivor, 1102.

GUARANTEE—*continued.*
indemnification of sureties—*continued.*
assignment of judgments and securities for surety's indemnification, 1102.
judgment against principal not binding sureties, 1103.
breach of contracts of indemnity, 1104.
bankruptcy of principal debtor, 1104.
recovery of interest on money paid by sureties, 1104.
guarantees by one of several partners in name of firm, 1105.
stamp on, 1265.

GUARDIANS OF THE POOR. *See* PARISH OFFICERS.

GUEST. *See* INNKEEPER.

HAY AND STRAW,
covenants to consume on land, 746.
breach of, by sale off land, 740.
action for value under Sale of Farming Stock Act, 746.
mode of estimating value, 746, 747.
measure of damages for, 753.

HEIR-AT-LAW,
transfer of real estate under Land Transfer Act, 1897...241.
descent of real and personal covenants entered into with ancestor, 241.
right of action of, in respect of continuing breaches of real covenants, 242.
transfer of trust and mortgage estates on death, 243.
transfer of covenants annexed to estates *pur autre vie*, 243.
liabilities of, upon covenants running with the land, 247.
See COVENANTS RUNNING WITH THE LAND.

HEIRS,
extortionate contracts with expectant, 412.

HEREDITAMENTS,
sale of corporeal. *See* SALE OF LANDS.
sale of incorporeal. *See* INCORPOREAL HEREDITAMENTS.

HIGHWAY ACTS,
contracts by rural district councillors allowed under, 117.

HIRING AND SERVICE. *See* MASTER AND SERVANT.

HIRING OF GOODS. *See* BAILMENT FOR HIRE.
purchase by hirer, acceptance and receipt of goods on, 534.

HOLDING OUT,
as partner, liability of person, 364.

HOLDING OVER,
after expiration of lease, effect of, 732.
in case of sub-tenant, 732.
in case of one joint-tenant, 732.
effect of payment of rent, 732, 733.
double yearly value for, liability for, 733.
action for, 733.
by whom maintainable, 733.
after notice to tenant to quit, 733, 734.
holding over must be wilful and contumacious, 733.
effect of waiver of notice to quit, 734.
double rent for, 734.
damages recoverable for, 754.

HONORARY SERVICES
by barristers, &c., 873.

HORSES,
sale of, 546—549.
See WARRANTY.
in market overt, restrictions on, 594.
letting and hiring of, 805—809.
warranty of fitness, 806.
duties of hirer, 807.
borrowing and lending of, 810—814.
care to be exercised, 811.
loss from ordinary casualties, 812.
misuser by borrower, 812.
want of skill, 813.
See BAILMENT WITHOUT REWARD.

HOUSE AGENTS,
duties and responsibilities of, 953.
right of, to commission, 959.
when their authority has been revoked, 960.

HOUSES,
demise of uninhabitable, 673.
recovery of possession of, and small tenements, 739.

HUSBAND. *See* MARRIED WOMEN.

HYPOTHECATION,
nature and effect of, 818.
imperfect hypothecation of goods and chattels, 829.
licence to seize for non-payment of debt, 829.
revocation of licence by act of bankruptcy, 831.
hypothecation of ships, 831.
maritime lien, 834.
See MARITIME LIEN.
bottomry, 834.
See BOTTOMRY BOND.
power of shipmaster to hypothecate, 835.
lien on vessels causing damage, 837.
priority of maritime liens, 838.
of cargo and merchandise, 838.
illegal pledge of certificate of registry of ship, 839.
mortgage of fixtures, 839.
mortgage of shares and stock, 841.

ILLEGAL CONTRACTS,
distinction between void and voidable, 75.
by registered joint-stock companies, 385.
(1) *Void contracts,*
immoral contracts, 75.
contracts tending to promote fornication and prostitution, 76.
contracts against public policy, generally, 77, 78.
providing for future separation of husband and wife, 78.
deeds of separation, when enforceable, 78.
in restraint of marriage, 78, 1310.
maintenance, 79.
champerty, 80.
obstructing or interfering with administration of public justice, 81—83.
in contravention of policy of Act of Parliament, 83.
of Bankruptcy Acts, 84.
for evasion of licensing, and excise Acts, 85.
ante-dating of apprenticeship articles, 85.
lease for use of premises contrary to statute, 85.
parish indemnities, agreements with overseers, when not void, 85, 86.

ILLEGAL CONTRACTS—*continued.*
void contracts—continued.
contracts against public policy—*continued.*
sale of letters of recommendation and public offices of trust, 86.
in fraud of masters and employers, 86.
of creditors, 87.
contracts made illegal by statutes, 88.
illegal partnerships, 89.
as to ground game, 89.
as to compensation under Agricultural Holdings Act, 90.
as to payment of tithe rent-charge, 90.
as to stamp duty, 90.
sale of offices, 91.
sale of or charge on pensions, 92.
simoniacal contracts, 93.
resigning and charging benefices, 94.
contracts in restraint of industry and trade, 95, 97—102.
trade unions, 96.
contracts restraining exercise of trade or profession in particular localities, 97.
contracts creating monopolies, 102.
contracts with foreign enemies, 103.
gaming contracts and wagers, 103—107.
lotteries, 107.
betting-house keepers, 107.
lawful games, 107.
notes, bills, and mortgages given to secure money won at, or lent for play, 108.
money knowingly lent for gaming, 108.
sale by illegal weights and measures, 108.
coinage, 109.
illegal sale of coals, 110.
of game, 110.
of spirituous liquors, 110.
of poison, 111.
of adulterated food, 111.
of explosive substances, 111.
of chain-cables and anchors, 111.
smuggling, 112.
sale of exciseable articles, 112.
Sunday sales and trading, 113.
contracts for prohibited services, 114.
unauthorised medical practitioners, 115.
unstamped contract notes, 116.
unauthorised sea insurance transactions, 116.
uncertificated solicitors, 117.
contracts by rural district councillors, 117.
illegality of contracts for payment of work otherwise than in current coin, 117.
the truck system, 117—120.
divisible contracts, part being good and part bad, 120.
indivisible, illegal, and void contracts, 121.
void foreign contracts, 122.
effect of avoidance, 122.
money in hands of depositaries and stakeholders, 123.
(2) *Voidable contracts,*
avoidance of contracts on ground of fraud and unfair dealing, 124—126.
false representations, 126.
fraudulent concealment, 126.
fraud by means of agents, 127.
fraudulent misrepresentations by directors of companies, 127—129.

ILLEGAL CONTRACTS—*continued.*
voidable contracts—continued.
avoidance of contracts—*continued.*
fraudulent mis-reading of deed, 129.
effect of fraud, 129.
determination of power of avoidance, 130.
constructive fraud by trustees, agents, &c., 131.
duress, agreements made under, 133.
by young persons, 413.
mistake, contracts made under, 133.
rectification of, 134.
failure of consideration, 136.
partial failure, 137.
recovery of money paid for forged bonds, forged shares, and void securities, 137.
money received under, 137.
implied promise to refund, 467.
illegal pledge of certificate of registry of ship, 839.
marriage brokerage contracts, 1310.
illegal marriages, 1319.

ILLEGITIMATE CHILD,
promise to pay money for maintenance of, 6, 7.
promise by mother to release father of, on present money payment, 76.
promise to give up, 78.

IMBECILITY. *See* LUNATICS.

IMMORAL CONTRACTS. *See* ILLEGAL CONTRACTS.

IMPLIED CONTRACTS,
nature and effect of, 446.
implied covenants, 448.
implied promises, 449.
joint interests in implied contracts, 318.
liability of agents on, 348—357.
See AGENTS.
with firms in partnership, 358.
with corporations, 374.
between vendor and purchaser of goods, 559.
See WARRANTY.
annexed to contracts for sale of shares, 644.
of carriers to carry safely, 984.
part execution of special contract, 453.
for sale of goods, 454.
of indemnity, 454.
with respect to foreign judgments, 454.
implied contracts by statute, 455.
in respect of money paid for another, 455—462.
See MONEY PAID.
money received, 460—470.
See MONEY HAD AND RECEIVED.
account stated, 470—473.
See ACCOUNT STATED.

IMPLIED COVENANTS,
as between landlord and tenant, 52, 448.
annexed to estates or interests in land, 238.

IMPLIED PROMISES,
effect of, 449.
in respect of money paid for another, 455.
resulting from executory contracts of sale, 559.
resulting from services, 873, 874.
to do work well, 889.

IMPLIED REQUESTS,
action on, to pay money, 8, 456.

IMPLIED STIPULATIONS,
effect of, 56.

IMPLIED WARRANTY. *See* WARRANTY.
by letters of furnished houses and lodgings, 760.
of title by pledgor, 821.
in marine insurance, 1161, 1162.
See MARINE INSURANCE.
in fire insurance, 1214.
See FIRE INSURANCE.
in life insurance, 1226.
See LIFE INSURANCE.

IMPOSITION,
money obtained by, recovery of, 463.

IMPOSSIBILITY,
of performance of contracts, 147.
in case of carriers, 979.
See PERFORMANCE.

IMPOUNDING GOODS,
impounded goods cannot be re-taken by tenant, 778.
on premises to secure distress, legal by statute, 797.
what constitutes, 797, 798.
duty of distrainor to find proper pound, 798, 799.
to feed cattle in pound, 799.
improper use of goods by distrainor, actionable, 799.
re-capture of goods by distrainor, where pound broken, 799.
where distrainor must impound on premises, 799.
procedure thereon, 799.
sale of impounded goods, 799.
return of goods on payment of rent and charges, 800.

IMPRISONMENT OF HUSBAND,
effect of, on marital rights, 432.

INCLOSURE OF WASTE LAND,
by tenant, rights of landlord, 748.
when Statute of Limitation begins to run against landlord, 748.

INCOME TAX,
deduction of, from rent, 677.

INCOMING PARTNERS,
liabilities of, novation, 365.

INCOMING TENANTS. *See* OUTGOING TENANTS.

INCOMPETENCY,
of parties to contracts. *See* PARTIES TO CONTRACTS.
of workmen, 889.
dismissal of skilled servant for, 931.

INCORPOREAL HEREDITAMENTS,
grants and assignments of, authentication of, 634—650.
sale of patent right, 636.
shares in limited company, 636.
shares in mining company, 636.
mode of establishing title to, 637.
partners in mining company hold as trustees, 637.
mode of selling, 637.
cesser of vendor's liability, 637.

INCORPOREAL HEREDITAMENTS—*continued.*
sale of patent right—*continued.*
shares and letters of allotment, 638.
title to, 638.
registration of, 638.
certificate *primâ facie* evidence of title, 638.
transfer of shares of deceased member, 639.
registration of transferee of, 639.
executory contracts for sale of shares, how effected, 639
practice as to, 639.
in case of banking company, 639.
when property in shares passes, 639.
equitable ownership, transfer of, 640.
dividends on shares, to whom payable, 640.
petition for winding up company, effect of, 640.
agreements for transfer of shares, 640.
specific performance of, when decreed, 640, 649.
mode of performance, 641—644.
time of performance, 644.
implied undertakings, 644, 645.
payment of calls, 644.
rights of scripholders, 645.
transfer deeds, 646.
share certificates, 647.
registration of forged transfers, 648.
mortgage of incorporeals, generally, 841.

INDEMNIFICATION,
of master by servant, for servant's negligence, 930.
of agent by principal, 967.
of surety by principal, 1100.
by co-sureties, 1100.
by assignment of judgments and securities, 1102.
breach of contracts of, 1104.

INDEMNITY,
parish, legality of, 85.
implied contracts of, 454.

INDEPENDENT COVENANTS AND PROMISES,
liability in respect of, 55.

INDIA BONDS,
assignment of, 222.

INDIVISIBLE CONTRACTS. *See* ILLEGAL CONTRACTS.
illegality of, 121.
contract for performance of illegal act, 121.
founded on legal and illegal consideration, 121.
fraud on creditors, 122.
immorality, 122.
agreements void under Statute of Frauds, 122.
agreements for payment in counterfeit money, 122

INDORSEMENT,
of bills of exchange and promissory notes, 1241.
transfer by, 1252, 1253.
restraining negotiability of bill or note, 1246, 1251.
intermediate infirmities of title, 1255.
fraudulent indorsements, 1258.
forged, 1259.
responsibilities of bankers as to, 858.
indorsement of overdue bills and notes, 1260.
liability of indorser, 1266.
delivery without, transfer by, 1280.
by agents, 349.
by partners, 363.

INDORSEMENT—*continued.*
of bill of lading, 590.
of delivery order, 611.
of assignment of marine policy, 1114.

INDUSTRIAL AND PROVIDENT SOCIETIES,
contracts with, statutory provisions regulating, 401.
See FRIENDLY SOCIETIES.

INFANT,
confirmation of promises by, 44, 405, 411.
officer of corporation, incapacity to contract, 373.
contracts with, generally, 404.
by infant agents, 330.
ratification by principal, 330.
under Infants' Relief Act, 404.
guaranteeing, 32.
not enforceable, 405, 406.
rights of, under Statute of Limitations, 203.
ex contractu, 407.
contracts binding on, 407.
test as to, 404, 405, 406.
power to grant leases, 407, 408.
necessary repairs to dwelling-house, 408.
custom of gavelkind to sell land, 408.
for necessaries, 404, 408.
liability of parent, 408.
what are necessaries, 408.
onus of proof on plaintiff, 408, note (*e*).
what are not necessaries, 409.
what may or may not be necessaries according to circumstances, 410.
reasonable price payable for goods supplied, 528.
purchase of estates and shares in companies, 411.
avoidance of contracts made by, 411.
in respect of bills of exchange, 412.
loans void in law, 412.
ratification of promises by, 44, 405, 411.
extortionate contracts with expectant heirs, 412.
undue influence, avoiding contract with, 413.
obligation of parent to provide for, 413.

INJUNCTION,
to compel performance or restrain breach of contract, 300.
of covenants to expend hay and manure on farm, 301.
not to let, 301.
not to carry on certain trades, 301.
to perform duties of directors, 302.
positive and negative agreements, 302, 303.
agreements to sing, 302.
of charter-party, 303.
to grant easements, 303.
not to build, plant, or inclose, 303.
to compel parties to abide by their own statements and representations, 306.
in case of foreign contracts, 307.
where option to take liquidated damages, 307.
to restrain waste, 706.
against railway company under Railway and Canal Act, 1063.

INNKEEPER,
common, who is, 764.
distinction between, and lodging-house keeper, 765.
duty of, to receive guest, 765.
liability to damages for breach of duty, 765.
extent of obligation, 766.

INNKEEPER—*continued.*
duty of—*continued.*
protection of guest from loss of goods, 766.
by robbery, 767.
limitation of liability by statute, 769.
who is a guest or traveller, 769.
ceases when guest no longer a traveller, 770.
question of fact, 765, 770.
lien of, to what goods it attaches, 771.
goods held in nature of a pledge, 771.
when lost or destroyed, 771, 772.
distress for rent, goods of guest at inn exempt from, 791

INSANITY. *See* LUNATICS.

INSOLVENCY,
of purchaser of goods, rights of unpaid seller on, 608.
right of vendor to countermand delivery order and stop goods, 609.
See DELIVERY ORDER—STOPPAGE IN TRANSITU.

INSTALMENTS,
delivery of goods by, remedies for breach of contract for, 173, 602.

INSURABLE INTEREST,
in contracts of marine insurance, 1108—1114.
life insurance, 1223—1226.

INSURANCE,
contracts of, nature of, generally, 1105, 1106.
mutual, what constitutes, 1106.
under Marine Insurance Act, 1106.
modification of, 1106.
policies of, nature of, 1107.
reference to slip in legal proceedings, 1107.
See BURGLARY—FIRE INSURANCE—LIFE INSURANCE—MARINE INSURANCE.

INSURANCE BROKERS,
right of, to commission, 116, 959.
payment to, by underwriter in money, 161.
liabilities of, to their principals, 949.
lien of, 962.
See AGENCY.

INSURANCE COMPANIES,
contracts with, liability of funds for, 390, 391.
novation in case of, 182.
winding up of, 1235.

INSURE,
breach of covenant to, 1239.

INTENTION OF PARTIES,
in sale of goods, 579.
how ascertained, 579.

INTEREST,
payment of, taking debt out of operation of Statute of Limitations, 215.
operating as admission of debt, 217.
by one of several joint debtors and co-contractors, 218.
by strangers and agents, 219.
in actions upon contracts, recovery of, as damages, 279, 632.
notice of claim of, 280.
on money paid by sureties, recovery of, 1104.

INTEREST IN LAND. *See* FRAUDS (STATUTE OF).

"INTEREST OR NO INTEREST." *See* MARINE INSURANCE.

INTERLINEATIONS,
to correct mistake, or add new term to written contract, 189.
evidence to explain, 191.
See ALTERATION.

INTERPLEADER,
between rival claimants to property held by depositaries and stakeholders, 850.

INTERPRETATION,
of contracts, 45.
evidence of surrounding circumstances, 46.
latent ambiguity, 46.
patent ambiguity, 47.
figures and words at length, 48.
repugnant and void limitations of liability, 48.
limitation of liability to particular fund, 49.
words amounting to a covenant, 50.
words of proviso and condition, 51.
covenants by implication of law, 52.
bonds and obligations, 53.
dependent and independent covenants, 53.
conditions precedent, 53.
waiver of conditions precedent, 55.
independent covenants and promises, 55.
covenants founded on mutuality of obligation and liability, 56.
implied stipulations, 56.
usual covenants, 57.
computation of time, 57.
contracts made in one country and enforced in another, *See* FOREIGN CONTRACTS.
evidence to explain. *See* EVIDENCE.
of warranties, on sale of goods, 553.
admissibility of oral evidence. *See* ORAL EVIDENCE—CUSTOM.

INVESTMENT,
bailment of money for, 862.

INVITATION TO ALIGHT FROM TRAINS,
without warning of danger, amounting to negligence, 1025.

I O U,
primâ facie evidence of account stated, 470.
of promise to pay, 471

IRRESPONSIBLE PRINCIPALS,
agents of, non-liability of, 353.

JETTISON,
loss by, a peril of the sea, 987.
average adjustment for, 1013.
of goods stowed on deck, when excluded from general average, 1010.
insurance against, 1177.
See GENERAL AVERAGE AND CONTRIBUTION.

JOB. *See* TASKWORK.

JOINT BAILMENTS,
of goods and chattels to bailees, 848.
rights of action of joint owners, against bailees, 913.
of money to stakeholders, 849,
to bankers, 855.
to common carriers, 1069,

JOINT CONTRACTORS,
rights of, 315.
joint and separate rights of action, 315, 848, 913.
tenants in common and joint tenants, 317.
joint assignees of estates with covenants annexed, 238.
See PARTIES TO CONTRACTS.
joint interests in implied contracts, 318.
liabilities of, 319.
of executors and administrators on their own contracts, 416.
for acts of each other, 417.
of infant executor, 418.
See EXECUTORS.
rights and liabilities of joint contractors *inter se*, 318, 456.
See CONTRIBUTION.
release of, 175.
accord and satisfaction with one of several, 188.
acknowledgment by one of several, 213.
part payment by one of several, 218.
survivorship of, 260.

JOINT CONTRACTS. *See* PARTNERSHIP.
with executors, 254.
joint retainer or employment, 315.
joint services, 315.
joint and separate interests of covenantees, 316.
joint and separate interests in implied contracts, 318.
joint and several liabilities *ex contractu*, 319.
joint and several premises, 320.
joint and several purchases, 321, 324.
joint bailments of goods or money, 848, 913.
joint account with bankers, 855.

JOINT-STOCK BANKING CO-PARTNERSHIPS,
contracts with, 391.
established under Country Bankers Act, 392.
See BANKING—CO-PARTNERSHIP—CONTRIBUTORIES.

JOINT-STOCK COMPANY,
fraudulent misrepresentation by directors of, 127.
contracts with, 379.
provisional contracts with, 381.
requisites of contracts with, 380.
contracts by agents of, 381.
in violation of provisions of articles of association, 381.
debentures and floating charges, 383.
liability of company and its officers, 384.
effect of winding-up order, 385.
contracts with co-partnerships and associations authorised to sue and be sued in name of secretary, treasurer, or public officer, 388.
liability of public officer, 389.
liabilities of managers and shareholders of mining companies, 389.
proof of parties being shareholders, 390.
contracts with insurance companies, 391.
contracts with banking co-partnership, 392.
established under County Bankers Act, 392.
liabilities of provisional directors and committeemen, 393.
powers and responsibilities of provisional committeemen, 394.
contracts with committees of clubs, 395.
distress on goods of, 792.
exemption from, where company in liquidation, 792.
loans to, 815.

JOINT-STOCK COMPANY—*continued.*
mortgage of shares in, 841.
bills and notes by, 1306.
See PROVISIONAL COMMITTEES—RAILWAY COMPANIES.

JOINT TENANTS,
rights of, 317.
tenants in common, 317.
on covenants running with land, 238.
use and occupation by one of several, 684.
surrender and acceptance of surrender by, 719.
distress by, 780.

JUDGMENT RECOVERED,
effect of, 192.
county court judgment, 192.
foreign and colonial judgments, 194.
against principal not binding surety, 1103.

JUDICIAL SEPARATION,
effect of decree for, 431.
liability of husband for necessaries, where alimony ordered, 431.
rights of creditors before decree, preservation of, 431.

JUDICIAL TRUSTEES ACT, 1896,
protection of trustees for breach of trust, 251.
remuneration of judicial trustees under, 958, note (*f*).

JUS TERTII,
on account stated, 472.
between landlord and tenant, 739.
pawnor and pawnee, 821, 828, 906.
bailor and bailee, 848, 850, 911, 912.
banker and customer, 855.
principal and agent, 954.
common carrier and consignee, proof of, 1078.

JUSTICE,
illegality of contracts tending to obstruct administration of, 81.

KING'S ENEMIES,
loss by, exemption of carrier by water from, 987.
exemption of common carrier from, 1026.

LAND. *See* SALE OF LANDS.
authentication of contracts affecting, 22—27.
limitation of actions for money charged on, 199.

LANDLORD AND TENANT,
authentication of leases, 22, 42.
interpretation and construction of leases, 70, 72.
See LEASE.
covenants running with land, 227, 229, 668, 749.
See COVENANTS RUNNING WITH LAND.
transfer of covenant by death, 241, 243.
effect of assignment on covenants, 248.
specific performance of agreement to grant lease, 294.
of contracts to renew leases, 294.
of contracts to erect buildings, 295.
leases, 651.
agreements for leases, 22, 42, 651.
present demises, 652.
proof of terms of holding, 653.

LANDLORD AND TENANT—*continued.*
leases—*continued.*
lease by estoppel, 654.
as against lessee, 654.
as against lessor, 654.
demises by agents, 655.
ascertainment and identification of subject-matter of demise, 656.
things appurtenant, 656.
what passes by lease, 657.
commencement and duration of, 657.
leases from year to year, 659.
half-yearly, quarterly, monthly, and weekly hirings, 661.
tenancy at will, 661.
tenancy by sufferance, 663.
leases under powers, 664.
rights and liabilities of lessor and lessee, 664.
covenants for quiet enjoyment, 665.
for payment of rent, 667.
not to "let, set, or demise," 668—670.
non-execution of lease by lessee, 670.
non-execution of lease by lessor, 671.
concealment of latent defects, 672.
demises of poisoned herbage, 673.
of houses unfit for habitation, 673.
warranty of reasonable fitness for habitation under Working Classes Act, 673, 674.
rooms infested with bugs, 673.
payment of rent, 674.
exception of damage by fire, 674.
extinction and suspension of rent by eviction, 674, 675.
eviction by railway companies under statutory powers, 676.
assignment of reversion, 676.
payment of ground rent by tenant, 676.
deduction thereof from tenant's rent, 676.
deduction of income-tax, land-tax, sewers rate, and other outgoings from rent, 677—680.
right to distrain for rent, 680, 772.
See DISTRESS FOR RENT.
extinguishment of right to distrain by assignment of reversion, 681.
apportionment of rent, 681.
action for use and occupation, 681, 750.
constructive occupation, 682.
use and occupation by one of several joint tenants, or tenants in common, 684.
covenants and agreements to repair, 685.
liability of tenant for damage to demised premises, 689.
waste, permissive, by tenant for years, 689.
commissive, by tenant for term of years, 690.
by tenant from year to year, 692.
timber trees, right of landlord to enter and cut, 691.
duty of tenant to preserve landlord's landmarks and boundaries, 691.
repair of fences, no implied agreement by landlord as to, 691.
restrictive covenants as to user of premises, 305, 694.
fixtures. *See* FIXTURES.
licence to commit waste, 704.
right of reversioners to enter to inspect waste, 704.
injuries from fire, 704.
damages for, 705.
improvement by tenant no answer to action, 705.

LANDLORD AND TENANT—*continued.*
waste—*continued.*
damages—*continued.*
breach of duty to rebuild, measure of damages, 705.
covenant not to commit waste, measure of damages, 706.
injunction to restrain waste, 706.
acquiescence in commission of waste, effect of, 707.
right of property in trees and bushes, 707.
defeasible leases, 707.
forfeiture of leases, 708—716.
disclaimer and forfeiture, 708.
proviso for re-entry, 709.
effect of re-entry on lessee's liability on his covenants, 712.
waiver of forfeiture, 713.
lessor's right of election, 713.
relief against forfeiture, 714.
breach of covenants or conditions respecting insurance or payment of rent, 714.
assignment after forfeiture, 715.
costs, 716.
surrender, 716.
deeds and agreements of surrender, 716.
surrenders by act and operation of law, 717.
substitution of new tenant in place of original tenant, 718.
surrender and acceptance of surrender by joint tenants, 719.
non-extinguishment by surrender of derivative estates, 720.
effect of, on existing breaches of covenant, 720.
notice to quit, when necessary, 720.
how notice may be given, and by whom, 721, 722.
form and effect of notice, 723.
alternative and peremptory notices, 723.
length of notice, 724.
time of quitting specified in notice, 725.
application of notice to current term of hiring, 726.
commencement of current year of tenancy, 727.
calculation of current year from one of usual feast days, 728.
admissions by tenant of commencement of term, 728.
different periods of entry, 729.
service of notice to quit, 730.
service of notice through post-office, 731.
acceptance of informal notice, 731.
proof of notice, 731.
waiver of notice to quit, 731.
proof and effect of holding over, 732.
double yearly value for holding over, 733.
double rent for holding over, 734.
determination of tenancies by railway notices, 735.
recovery of possession, 735.
licence to eject, 736.
under provisoes for re-entry, 736.
where there is no sufficient distress, 737.
where demised premises are deserted, 738.
of houses and small tenements, 739.
rights of outgoing and incoming tenants, 740.
away-going crops, allowances for tillage, manure, &c., 740
sale of hay, straw, or manure off land, 746.
non-payment of tithe rent-charge by outgoing tenant, 747.
inclosure of waste land by tenants, 748.

LANDLORD AND TENANT—*continued.*
leases obtained by misrepresentation, 748.
cancellation of lease, effect of, 749.
assignment of tenancy, effect of, 749.
equitable assignees, breach of covenants by, 689.
damages for breach of contract to grant lease, 749, 750.
in action for use and occupation, 750.
for breach of covenant for quiet enjoyment, 750.
on eviction damages assessable once for all, 751.
not to assign, 751.
to repair, 751.
destruction of buildings by fire or tempest, 752.
to consume hay and straw on farm, 753.
for holding over, 754.
recovery of rent when mortgagor becomes tenant to mortgagee, 754.
when mortgaged premises in possession of lessees, 755.
when lease by mortgagor and mortgagee after mortgage, 757.
notice of mortgage to lessee, 759.
contracts for letting and hiring of furnished houses and lodgings, 760.
implied warranties on part of lessors of furnished apartments, 760.
rights and liabilities of lodging-house keepers and lodgers, 761.
destruction of buildings by fire, excuse of performance, 762.
proof of duration of term of hiring, 762.
notice to quit, 763.
letting and hiring places of stowage and deposit, 764.
room or standing places in factories, 764.
lodgings in common inns, 764.
who is a common innkeeper, 764.
duties of innkeepers, 765.
to receive guest, 765.
extent of obligation, 766.
to protect guest from loss of goods, 766.
from robbery and theft, 766, 767.
limitation of liability by statute, 769.
who is a guest and traveller, 769, 770.
when innkeeper's duty to guest ceases, 770.
innkeeper's lien, when it attaches, 771.
when it is lost, 772.
damages for breach of covenant to insure, 1239.
stamp on leases, 1355.

LANDMARKS,
agreements concerning, when an interest in land, 26.
preservation of, by tenants, 693.

LAND TAX,
deduction of, from rent, 677, 678.

LAND TRANSFER ACTS,
devolution of realty on death of owner, 241.
liability of real estate for debts of deceased, 247.
registration of title under, 483.

LATENT AMBIGUITY,
what is a, 46.
oral evidence to explain, 46.

LATENT DEFECTS,
concealment of, on letting of realty, 672.
in sale of goods, 576.

LAY-DAYS,
what days understood by term, 1006, 1007.

LEASE,
authentication of, 22, 42.
void unless by deed, 43.
discrepancy between, and counterpart, 66.
construction of particular words in, 70.
recital in, lessee estopped by, 72.
stamp duty on, 1355.
See LANDLORD AND TENANT.

LEASEHOLD ESTATES,
title to, 489, 490.

LEGACY,
payment of creditor by, 157.

LESSEE AND LESSOR. *See* LANDLORD AND TENANT.

LETTERS OF ALLOTMENT,
title to, on sale of, 638.
stamp duty on, 1367.
See SHARES.

LETTERS OF CREDIT,
stamp on, exemption of, 1379.

LETTERS OF RECOMMENDATION,
sale of, void as against public policy, 86.

LETTERS PATENT,
no warranty of indefeasibility of patent on sale of, 696.

LETTING AND HIRING,
of land, 651—772.
See LANDLORD AND TENANT.
of chattels, 805—816.
See BAILMENT FOR HIRE.

LEX LOCI CONTRACTUS,
interpretation of contracts according to, 58.
what determines *locus contractûs*, 63.

LEX LOCI SOLUTIONIS,
what determines, 61.

LIABILITY. *See* LIMITATION OF LIABILITY.

LICENCE,
to trade with foreign enemies in time of war, 103.
by parol, does not release covenants, 174.
assignees of grantees of, extent of liability, 234.
to enjoy profits on soil, 634, 635.
to seize chattels not assignable, 635, 831.
parol, to enjoy easement, when determined, 635.
of pleasure, 635.
distinct from licence of profit, 636.
conditional, on sale of patent right, 736.
to commit waste, effect of, 704.
to landlords to eject tenants for non-performance of covenants, 736.
to distrain and sell chattels, 794.
to seize chattels for non-payment of debt, 829.
revocation of, by act of bankruptcy, 831.
marriage by, in false name, 1321.
stamp duty, exemption from, 1372.

LICENSING ACTS,
contracts contravening policy of, 85, 110, 112.
See ILLEGAL CONTRACTS.
LIEN,
of unpaid seller for price of goods sold, 607, 608.
where goods sold without stipulation as to credit, 608.
on credit, but term has expired, 608.
part delivery, right of lien on remainder, 611.
termination of, 611.
by delivery to carrier for transmission to buyer, 611.
when buyer or his agent obtains lawful possession, 611.
by waiver, 611.
extinction of, by buyer being in constructive possession, 536.
of innkeepers, 771.
See INNKEEPERS.
maritime, 834.
See MARITIME LIEN.
on vessels causing damage by collision, 837.
on stock and shares, 842.
of depositary, 850.
of bankers, 860.
of mandatary, 864.
of workmen and artificers, 887.
of bailees. *See* BAILEES.
right of lien, 902.
claim at variance with contract of bailment, 904.
against whom it may be claimed, 905.
general lien, 906.
by custom of trade, 908.
notice of, 907.
extinguishment of, by abandonment of possession, 908.
by tender of debt, 910.
statutory power of sale in discharge of, 909.
transfer of bailment, 910.
of factors and brokers, 961.
of insurance brokers, 962, 1156, 1157.
of packers, 962.
of solicitors, 963.
See SOLICITORS.
of ship-masters, 966.
of ship's husband, 966.
of shipwrights, 967.
of shipowners for freight, 998.
extinguishment of, by payments in lieu of freight, 1002.
of common carriers, 1056, 1057.
on cargo given to meet bills, 1300, note (*n*).

LIFE INSURANCE,
contracts of, 1222.
with *de facto* directors, 1223.
interest of assured, 1223.
gaming or wagering policies prohibited, 1223.
requisites of policy, 1223.
nature of interest, 1223.
parties who have an insurable interest, 1223, 1224.
amount recoverable limited to interest, 1225.
warranties, statements amounting to, 1226.
conditions, 1226.
fraudulent misrepresentation and concealment of material facts, 1226.
untrue statements by agent of insured, 1227, 1228.
by agent of insurer, 1227.

LIFE INSURANCE—*continued.*
contracts of—*continued.*
indisputable policies, 1228.
risks covered by policies, 1228.
forfeiture of policies, 1229.
non-payment of premium, 1229.
days of grace, 1230.
non-inception of risk, 1231.
return of premium, 1231.
waiver of forfeiture, 1231.
assignment of life policies, 222, 1232.
notice of, 1233.
contract for sale of policy, rescission of, 1233.
right of party interested in policy to recover insurance money, 1233.
industrial life assurance company, statutory provisions as to, 1234.
settlement of disputes, 1234.
separation of funds of assurance company, 1234.
winding-up of assurance companies, 1235.
novation by policy holders, 182.
insurance against injury by accident, 1236.
meaning of term "accident," 1236, 1237.
against railway accidents, 1238.
damages recoverable, 1238.
breach of covenants to insure, 1239.
damages, measure of, 1239.
loss of policy, 1239.
payment of sum insured into Court, 1239.
stamp on policies of, 1384.
on assignment of policies of, 1384.

LIFE TENANT,
acknowledgment by, binding estate as against remaindermen, 214.

LIGHTERS,
losses on board of, conveying goods to shore, 992, 993.
liability for, under marine policy, 1149, 1150, 1202.

LIMITATION OF ACTIONS,
Statutes of Limitation, 199.
fee-farm rents and money charged on land, 199.
rights of mortgagees, 200, 201.
rent and specialty and simple contract debts, 202.
what are specialty debts, 203.
exception in favour of persons labouring under temporary disabilities, 203.
infants and lunatics, 203.
married women, 204.
commencement of time of limitation, 205.
contingent and conditional liabilities, 207.
unknown and undiscovered breaches of contract, 209.
acknowledgments of deeds and specialties extending limitation, 210.
acknowledgments of simple contract debts, 211.
form and requisites of acknowledgment, 211.
lost acknowledgments, oral evidence of contents of, 213.
by one of several joint contractors, 213.
by executor or devisee for life, 214.
to whom acknowledgment to be made, 214.
exemption of promise or acknowledgment from stamp duty, 214.
payment of interest on principal debt, 215.
part payment of principal debt, 215.
by bill or note, 216.

LIMITATION OF ACTIONS—*continued.*
part payment of principal debt—*continued.*
by performance of service or by delivery of goods, 216.
by adjustment and settlement of accounts, 216.
payment of interest on principal debt, 215.
effect of, 217.
by one of several joint debtors or co-contractors, 218.
by strangers and agents, 218.
to strangers and agents, 219.
in respect of contracts made abroad, 219.
suspension of statute, 220.
no limitation in cases of express trust, 220.
deposit of money with bankers, 852.

LIMITATION OF AUTHORITY,
of agents, 332.

LIMITATION OF LIABILITY,
repugnant and void limitations of liability, 48.
to particular fund, 49.
of innkeepers, by statute, 769.
of carriers by water, by special contract, 985.
by statute, 990.
of common carriers, by public notices under Carriers Act, 1030.
carriage of valuables, &c., 1030.
statutory notice of increased charges, 1031.
by special contract against fire and sea risks, 1033.
for damage to certain classes, &c., of goods, 1033.
notices of, to what risks applicable, 1034.
void limitations by common carriers, 1035.
of surety, 1088.
primary and secondary liabilities, 1081.
extent of liability, 1085, 1088.
continuing liability, 1088, 1090.

LIMITED PARTNERSHIP,
illegal, dissolution of, 89.
definition and constitution of, 371.
registration of, 371.
modification of general law in case of, 371.
law as to private partnerships, where not excluded, applies to, 372.
winding-up of, application of Companies Act, 1908, to, 372.

LIQUIDATED DAMAGES,
penal obligations, 285.
penalties for breach of contract, 286.
penalties under denomination of, 290.
injunction where option to take, 307.

LIQUIDATION. *See* BANKRUPTCY.

LIQUIDATOR,
contracts with, of company being wound up, 385.

LIVERY,
title to, by hiring and service, 941.

LOAN,
for gaming, when not recoverable, 108.
to infant, void in law, 412.
to married woman, wife no implied authority to borrow, 424.
gratuitous, 810, 811.
of realty, 812.
at interest, 808, 809.
to one of several partners, 359, 814.
to registered companies, 815.
See BAILMENT—BANKERS.

LOAN SOCIETIES. *See* FRIENDLY SOCIETIES.
contracts with, statutory provision regulating, 404.

LODGER,
goods of, not distrainable, 762.
summary remedy for recovery, where goods seized, 787, 788.
landlord cannot follow, removed to avoid distress, 795.

LODGING-HOUSE KEEPER,
authentication of contracts with, 24.
letting lodgings for prostitution, 77.
rights and liabilities of lodging-house keepers and lodgers, 761.
implied warranties of, 760.
that lodgings are reasonably fit for habitation, 760, 761.
proof of duration of term of hiring, 762.
weekly, monthly, quarterly, half-yearly, and yearly hirings, 763.
notice to quit, 763.
See LANDLORD AND TENANT—NOTICE TO QUIT.

LOSS,
of acknowledgment of debt, 213.
of title-deeds, after delivery of abstract, 494.
of bills and notes, 1298.
indemnification of drawer, 1298.
defence of, on indemnity being given, 1298.
transfer of title by finder, in case of, 1308.

LOSS OF GOODS. *See* RISK.
on voyage, liability of carrier for, 982, 983.

LOSS OR INCONVENIENCE,
good consideration for contract, 6.

"LOST OR NOT LOST." *See* MARINE INSURANCE.

LOST PROPERTY,
duty of finder of, as to its preservation, 850.
right to recover expenses for preserving and restoring, 868.

LOTTERY. *See* ILLEGAL CONTRACTS.
illegal contract in respect to, 107.

LUGGAGE,
duty of common carrier of passengers to carry, 1023, 1029.
void limitations of liability, 1035.
loss of, by cabman, 1019.
personal, carriage of, by railway companies, 1036.
what constitutes, 1036, 1037.
loss of, liability of railway companies for, 1036.
in cloak-room, receipt of, by railway companies as warehousemen, 865, 1035.
lien of companies for charges, 866.
conditions limiting liability, 866.
notice of, 866.
liability for acts and omissions of railway porters, 1037.
non-liability of company where merchandise disguised as, 1038.
liability when travelling with passenger, 1038.
non-liability when under passenger's control, 1038.
received as servant's, but is master's, 1038.
charge for, by excursion train, 1037.
delivery of, to passengers at railway station, 1052.
application of Railway Traffic Act to, 1053.
See COMMON CARRIER.

LUNATICS,
Statutes of Limitation running against, 203.
contracts with, when void, 435, 436.
when found lunatic by inquisition, 436.
no defence to action by person dealing in good faith, 436.
burden of proof, 436.
implied contract for necessaries supplied to wife, 436.
authority of wife to pledge husband's credit, 437.
when voidable, 437.
implied contract for expenses of protecting person and estate, 437.

MAINTENANCE,
what constitutes, 79.
action of, 79.
defences available in, 79, 80.

MANAGERS,
authority of, extent of, 338.
of mining companies, liabilities of, 389.
See PROVISIONAL COMMITTEES.

MANAGING COMMITTEE. *See* PROVISIONAL COMMITTEES.

MANDAMUS,
to parties to contracts, 439.
to public companies to make calls, 440.
to local authorities, &c., to discharge pecuniary obligations, 440.
action in which claim for, maintainable, 441.
not maintainable, 443.
declaration in action for, 443.

MANDATE,
or gratuitous commission, 860.
executory promises to undertake gratuitous office or trust, 860.
acceptance of trust by entering on the employment, 860.
non-feasance and misfeasance, 860.
acceptance of money or goods to be carried gratuitously, 861.
liability for loss or damage from negligence, 861.
acceptance of goods to be repaired or mended gratuitously, 861.
liability for employment of unskilled persons, 861, 889.
acceptance of money for investment, 862.
acceptance of living animals to be nourished and taken care of, 862.
perishable commodities to be preserved and kept, 863.
use of subject-matter of, by mandatary, 863.
theft and negligence by servants of mandatary, 864.
re-payment of expenses necessarily incurred by mandatary in execution of his commission, 864.

MANUFACTURE,
warranty as to, of goods, 569, 570.
when contract to, must be authenticated as contract of sale, 28, 528.
or making up of materials, contracts for, 585, 586.
negligent or unskilful work, 889.
liability for damage resulting from, 889.

MANUFACTURE—*continued.*
safe keeping and re-delivery of materials, 899.
liability of bailee for theft of servants, 900.
See BAILMENT—WORK AND SERVICES.

MANUFACTURERS,
supply of goods by sample by, warranty of merchantable quality, 568, 569.

MANURE,
allowances for, on quitting holding, 740.
sale of, off farm, in breach of covenant, 746.
measure of damages for, 753.

MARINE INSURANCE,
nature of contracts of insurance in general, 1105, 1106.
of mutual insurance, 1106.
of policies of insurance, 1107.
of slip or memorandum of terms, 1107.
reference to slip in legal proceedings, 1107, 1125.
definition of, 1107,
mixed sea and land risks, 1107.
maritime venture and maritime perils, 1108.
insurable interest, definition of, 1108.
wagering or gaming policies, invalidity of, 1109.
what are, 1109, 1110.
interest or no interest, 1110.
without further proof than policy itself, 1110.
without benefit of salvage to insurer, 1110.
liability of brokers effecting, to penalty, 1110.
interest of any nature is insurable, 1110.
persons who have, 1110.
when it must attach, 1111.
insurer must have, at time of loss, 1111.
"lost or not lost" clause, effect of, 1111.
assignment of interest after loss, 1112.
quantum of interest, 1112.
of mortgagor in mortgaged subject-matter, 1112.
of mortgagee, 1112.
effecting assurance for benefit of self and others, 1112.
extent of interest of owner of insurable property, 1112.
assignment of interest, effect of, 1113.
exception in case of transmission by operation of law, 1113.
assignment of marine policy, 1114.
when and how policy is assignable, 1114.
by indorsement or other customary manner, 1114.
rights of assignee on, passing beneficial interest, 1114.
assured with no interest cannot assign, 1115.
insurable value, ascertainment of, 1115.
measure of value, 1115.
in insurance on ship, 1115.
in case of a steamship, 1115.
of ship engaged in special trade, 1115.
in insurance on freight, 1115.
on goods or merchandise, 1115.
on any other subject-matter, 1115.
disclosure and representations, 1116.
insurance is *uberrimæ fidei*, 1116.

MARINE INSURANCE—*continued.*
disclosure by assured, 1116.
circumstances which must be disclosed, 1116, 1118.
which need not be disclosed, 1116, 1119, 1122.
duty of assured's agent to disclose material circumstances, 1117.
disclosure by agent effecting insurance, 1121.
duty of agent to disclose material circumstances, 1121.
representations pending negotiation of contract, 1122.
avoidance of contract by insurer for untrue, 1122.
when material, 1122.
of fact, 1122.
of expectation or belief, 1122.
withdrawal or correction of, 1122.
materiality of, a question of fact, 1122.
misrepresentation and concealment, distinction between, 1122, 1123.
affording ground for rescission of contract, 1123.
fraudulent misrepresentations, what are, 1123.
oral evidence of, admissible to control liability, 1123.
when contract deemed to be concluded, 1124.
reference to slip or other customary memorandum to show, 1124.
where slip has been initialled, 1124.
policy of, 1124,
contract must be embodied in, 1124.
when it may be executed and issued, 1124.
provisions of Stamp Act as to, 1124, 1125.
reference to slip in legal proceedings, 1107, 1125.
what it must specify, 1125.
must be signed by or on behalf of insurer, 1126.
signature by seal of corporation, 1126.
by or on behalf of several insurers, effect of, 1126.
designation of subject-matter, 1126.
usage regulating, may be regarded, 1126.
non-disclosure of policy being a re-insurance, 1127.
on ship only, 1127.
on "ship's tackle and furniture," 1127.
on "goods, specie, and effects," 1127.
usage of trade to explain term, 1127.
mere mistake in ship's name, when discharging underwriters, 1127.
oral evidence to explain customary meaning of trade terms, 1128.
general insurance on goods and merchandise, 1128.
meaning of term "goods," 1128.
when it covers "substituted cargoes," 1129.
on deck cargoes, 1129.
when protected against loss by jettison, 1129.
not generally subject to general average contribution, 1129.
custom exempting underwriters not invalid, 1130.
custom and usage, as to risks covered by, 1127, 1130.
in case of intermediate voyages, 1130.
voyage and time policies, 1131.
definition of, 1131.
continuation clauses, effect of Finance and Stamp Acts, 1131.
valued policy, 1132.
value fixed, when conclusive, 1132.
unvalued or open policy, 1132.

MARINE INSURANCE—*continued.*
policy of—*continued.*
floating policy by ship or ships, 1132.
definition of, 1132.
declaration of value by indorsement or in other customary manner, 1133.
order in which to be made, 1133.
in case of goods, 1133.
where made after loss or arrival, 1133.
form of, 1133, 1134.
ordinary voyage policy, 1134.
alterations in, when allowed, 1134.
provisions of Stamp Act as to, 1135.
construction of, 1133, 1135.
rules for, 1135.
effect of usage on construction, 1135, 1136.
where policy partly in print and partly in writing, 1136.
commencement of risk, 1137.
implied condition as to, 1140.
"lost or not lost," 1137.
"at and from," 1137, 1138, 1140.
"port" or "ports," 1138.
"place" or "places," 1138.
"port of discharge," 1138.
insurance on freight, 1141.
"at and from," when risk attaches, 1141.
meaning of "freight" in insurance law, 1141.
on advanced freight, 1142.
on outward and homeward voyage, 1143.
extent of insurer's liability, 1143.
insurance on passage money, 1143.
on profits, 1143.
See PROFITS.
on bottomry loans, 1144.
See BOTTOMRY BOND.
on respondentia loans, 1144.
nature of loan, 1144.
must be specifically described in policy, 1145.
commencement of risk on goods, 1145.
form of clause in Lloyd's policy, 1145.
"from the loading thereof," 1145.
at a particular place, when risk attaches, 1146.
duration and termination of risk, 1148.
on goods, 1148.
until "safely landed," meaning of, 1148, 1149.
in case of transhipment, 1150.
voyage policy, 1150.
on ship, 1151.
until arrival at "final" or "last" port of discharge, 1151.
in case of transhipment of goods, 1152.
with liberty to touch and stay at any ports whatsoever, 1152.
on outward voyage, 1152.
arrival at port of destination, 1153.
mooring in safety, 1153.
what constitutes, 1155.
risks in landing goods, 1153.
premium payable on, 1155.
reasonable, where premium to be arranged, 1155.
where additional premium to be arranged, 1156.
when payable, 1156.

MARINE INSURANCE—*continued.*
premium payable on—*continued.*
when payable—*continued.*
duties of assured or his agent and insurer, 1156.
where policy effected through broker, 1156.
liability of broker to underwriter, 1156.
lien of broker on policy for premium, 1156.
effect of receipt on policy for premium, 1157.
return of, enforcement of, 1157.
by agreement, 1157.
for failure of consideration, 1157.
where consideration apportionable, 1157.
where policy void from commencement of risk, 1157, 1159.
where subject-matter never imperilled, 1157.
where no insurable interest, 1157.
in case of over-insurance under unvalued policy, 1158.
by double insurance, 1158, 1159.
where there are separate voyages and several risks, 1158.
where policy on goods to be laden on particular ship, 1158.
on freight, 1158.
where several policies effected, 1158.
double insurance, or over-insurance, definition of, 1160.
rights of assured on, 1160.
contribution between insurers, 1160, 1161.
under-insurance, effect of, 1161.
warranty, 1161.
express or implied, 1161.
nature of, 1161.
breach of, when excused, 1161.
implied, of seaworthiness, 1162.
conditions precedent to recovery under, 1162.
presumptions of unseaworthiness, 1163.
as to commencement of risk, 1164.
in case of voyage policies, 1165.
as to legality of adventure, 1165.
not implied as to seaworthiness of goods, 1165.
as to nationality of ship, 1165.
express, meaning of term, 1165, 1166.
"well" and "in good safety," 1166.
time of sailing, 1166.
to sail or depart with convoy, 1167.
of neutrality of ship or goods, 1167.
implied conditions, 1167, 1168.
deviation from voyage insured, 1168.
amounting to barratry, 1183.
alteration of port of departure, 1168.
sailing for different destination, 1168.
change of voyage, 1168.
what constitutes deviation, 1169, 1172.
when excused, 1170.
delay in voyage amounting to deviation, 1171.
on voyages to several ports and places, 1172.
where order designated in policy, 1172.
where policy is to unnamed ports in given area, 1172.
licences to touch at different ports and places, 1172.
loss and abandonment, 1173.
included and excluded losses, 1173.
loss by perils of the sea, 1174.
meaning of term "perils of the sea," 1174.

MARINE INSURANCE—*continued.*
loss and abandonment—*continued.*
loss by perils of the sea—*continued.*
negligence and misconduct of master and mariners, 1174.
sea risks covered by policy, 1176.
losses from old age, decay, and other causes, 1176.
perils of fire and jettison, 1177.
loss by capture and seizure, 1177.
arrests, restraints, and detainments of kings, princes, and people, 1180.
loss by pirates, rovers, and thieves, 1182.
peril of barratry of master and crew, 1182, 1183.
perils, losses, and misfortunes generally, 1183.
meaning of term "all other perils," 1183, 1184.
total and partial losses, 1184.
constructive and actual total losses, distinction between, 1184.
actual total loss, nature of, 1184.
notice of abandonment unnecessary, 1185.
presumption of, in case of missing ship, 1185.
constructive total loss, nature of, 1185.
where assured deprived of possession of ship, 1185.
in case of damage to ship, 1185.
to goods, 1185.
effect of, 1185.
notice of abandonment, 1186.
by whom to be given, 1186, 1188.
when required, 1186, 1187.
when unnecessary, 1187.
in case of re-insurance, 1187.
form of, 1188.
effect of, 1188.
insurance on freight, 1189.
when insured may abandon, 1190.
total losses, 1190, 1191.
in case of policy on voyage, 1192.
on freight, 1192.
on goods, 1193.
capture and re-capture, 1193, 1194.
embargo, 1193.
spes recuperandi, 1193.
unreasonable abandonment, 1194.
partial loss, 1194.
what constitutes, 1194, 1195.
exception of partial losses, 1194, 1195.
general and particular average, 1196.
policies warranted free from average, 1196.
meaning of term average, 1196.
particular average, meaning of, 1196.
recovery of salvage charges, 1196, note (*u*).
particular charges, what are, 1196.
not included in particular average, 1196.
distinction between, and general average, 1197.
general average loss, 1197.
what constitutes, 1197.
includes general average expenditure, 1197.
general average contribution towards, 1197.
contribution for general average expenditure, 1197.
for general average sacrifice, 1197.
when insurer not liable for general average loss or contribution, 1197.

MARINE INSURANCE—*continued.*
general and particular average—*continued.*
general average loss—*continued.*
liability of insurer, where ship, freight, or cargo owned by same insurer, 1197.
measure of indemnity for losses, 1197.
definition of, 1203, 1204.
in case of partial losses, 1197.
qualification of liability clause, 1198.
"average unless general," 1198.
"free from average under *5l.* per cent.," 1198, 1199.
"free from average," 1198.
"average," meaning of, in mercantile phraseology, 1198.
"warranted free from particular average," 1198, 1199.
losses recoverable under warranty, 1198, 1199.
charges and expenses excluded under warranty, 1199.
effect of warranty, 1199.
insurance on separate bales or packages, 1199.
average and total losses, 1199.
"free from average" under specified percentage, 1200.
exceptions of general average losses, 1201.
in case of stranding of ship, 1202.
suing and labouring clause, 1203.
form of, 1203.
extends to property to which underwriters entitled by abandonment, 1203.
losses and expenses not recoverable under, 1203.
duty of assured to avert or minimise loss, 1203.
extent of liability of insurer, 1203.
limitation of liability to amount of subscription, 1204.
on valued policy, 1204.
on ship, 1205.
on unvalued policy, 1204.
on open policy on freight, 1204.
on ship or goods, 1205.
on fraudulent over-value of policy, 1204.
on several valued policies, 1205.
on partial loss of ship, 1205.
cost of repairs, 1205.
depreciation of ship, 1206.
deductions for new materials, 1206.
signed adjustments, when conclusive, 1206.
loss of freight, 1207.
when assured entitled to recover for, 1207.
partial loss of freight, 1207.
rule as to amount recoverable, 1208.
partial loss of goods, merchandise, &c., 1208.
standard of value and measure of depreciation, 1208.
where goods, &c., totally lost on valued policy, 1208.
on unvalued policy, 1208.
where goods delivered in damaged condition, 1208.
mode of calculating and adjusting loss, 1208, 1209.
apportionment of valuation, 1210.

MARINE INSURANCE—*continued.*
general and particular average—*continued.*
measure of indemnity for losses—*continued.*
general average contributions, 1210.
extent of liability, 1210.
in case of salvage charges, 1210.
liabilities to third parties, 1211.
general provisions as to measure of indemnity, 1211.
successive losses, liability of insurer for, 1211.
rights of insurer on payment, 1211.
right of subrogation, 1211.
on double insurance, 1212.
on under-insurance, 1161.
stamp on policy of, 1380.

MARITIME INTEREST,
chargeable on loan by bottomry bond, 835.

MARITIME LIEN,
conferred by bottomry bond, 835, 1144.
nature of, 835.
authority of master to create, 835, 836.
none in respect of repairs and supplies, 836.
not extinguished by sale of ship as unseaworthy, 837.
for damage caused by collision, 837.
how enforced, 837.
when lost, 837.
priority of liens, 838.
insurable interest of lender on, 1110.
See BOTTOMRY BOND.

MARKET OVERT,
sale in, what constitutes, 593.
title acquired by, 593.
sale by sample, not a, 593.
of horses, subject to statutory formalities, 594.
of stolen goods, 594.
conviction of thief, 594.
revesting of property, 594, 595.

MARKETABLE SECURITIES,
stamp on, 1349.

MARRIAGE,
authentication of agreements in consideration of, 33, 1312.
effect of, on wife's contracts, 261.
contracts in restraint of, void, 78, 1310.
reputed, liabilities resulting from, 433.
brokerage contracts, 1310.
bonds and covenants to marry, 1311.
contracts of betrothment, 1312.
authentication of contract, 34, 1312.
time of performance, 1313.
excuses for non-performance, 1313.
conditional promises of marriage, 1314.
fraudulent concealment of material circumstances, 1314.
misrepresentation and deceit, 1314.
accidents and mishaps altering condition of either of parties, 1315.
abandonment of contract, 1315.
breach of promise of marriage, 1315.
damages for, 1315.
promises of portions and settlements, 1316.
contracts in fraud of settlements and promises of marriage portions, 1317.
marriage settlements, 1318.

MARRIAGE—*continued.*
the marriage contract, 1318.
nature and requisites of, 1318.
age of consent, 1319.
presumption of marriage, 1319.
void marriages, 1319.
of deceased wife's sister, 1320.
publication of banns in false name, 1321.
celebration of, in false name, 1321.
by licence in false name, 1321.
before registrar, 1322.
fraudulent celebration of sham marriage, 1322.
release by marriage, 1323.
separation deeds, legality of, 78, 1324, 1325.
subsequent reconciliation, effect of, on, 1326.

MARRIAGE BROKERAGE
contracts, 1310.

MARRIAGE CONTRACTS. *See* MARRIAGE—MARRIED WOMEN.

MARRIAGE SETTLEMENTS. *See* SETTLEMENTS.

MARRIED WOMEN,
contracts for separation of husband and wife, 78, 1324.
Statutes of Limitations running against, 203, 204.
when possessed of separate property, 204.
payment of interest by, 218.
payment of interest to husbands of, 219.
as executrix or administratrix, 255.
rights of husband on wife's ante-nuptial contracts, 261.
by statute, 262.
liability of husband on wife's ante-nuptial contracts, 263.
by statute, 264.
liability of surviving husband, 265.
liability of surviving wife, 267.
contracts in which bankrupt is interested in right of his wife, 271.
bankruptcy of, 272.
rights of husband on wife's contracts during coverture, 418.
rights and liabilities of wife on contracts during coverture, 420.
inability of wife to bind herself or husband by deed, 423.
authority of wife to sign for husband, 424.
loans to, 424.
sale of goods to, 425.
pledging husband's credit, 425, 426.
proof of assent of husband to wife's contracts, 426.
non-liability of husband on wife's contracts after separation, 427.
desertion of husband by wife, 428.
desertion of wife by husband, 428,
authority to pledge husband's credit for necessaries, 428, 429.
expulsion of wife by husband, what amounts to, 430.
liability of husband for wife's necessaries during separation by consent, 430.
effect of decree for judicial separation, 431.
order for protection of deserted wife's property, 431, 432.
imprisonment of husband, effect of, 432.
death of husband, rights and liabilities of wife, 267, 432.
death of wife, husband's rights by survivorship, 265, 433.
reputed marriage, liabilities from, 433.
insanity of husband, effect of, 436.
See MARRIAGE.

MASTER AND SERVANT,
contracts in fraud of masters void, 86.
liabilities of master on contracts made by servant as his agent, 337.
authority of servant to pledge master's credit, 337, 338.
implied promise to pay servant for services rendered, 452.
to pay master where servant decoyed away, 453.
requisites of contracts of hiring and service, 915.
who is a servant, 916.
duty of servant, 917.
authentication of contracts between, 917.
yearly hirings, 918.
defeasible, domestic service, 919.
month's warning or month's wages, 919.
damages for wrongful dismissal, 934.
monthly or weekly hiring, 920.
service at will, 921.
liabilities of master, 921.
duties of servant, 917, 921, 929.
liability of master for personal negligence, 923.
dangerous employments, where danger known to servant, 924.
servant using dangerous machinery, 925.
defective tackle in mines, 925.
negligence of fellow-servant, 926.
Employers' Liability Act, 927.
Workmen's Compensation Act, 928.
personal injury, meaning of, under, 929.
contracting out of, prohibited, 929.
indemnification of master by servant for negligence, 930.
termination of contract, 930.
by consent or by death of either party, 930.
warning, notice to leave, 931.
dismissal of servant for incompetency, 931.
for misconduct, 931.
disability from sickness in case of household servant, 933.
wrongful dismissal, 933.
payment of wages *pro ratâ*, 934.
damages for, 934, 940.
amount of wages recoverable, 919, 935.
deductions not allowed, 935.
wages payable in current coin in certain trades, 117, 935.
presumption of payment of wages, 936.
jurisdiction of justices and County Courts in case of disputes, 936.
breach of contract causing injury to others, 936.
penalty for, 936.
seamen's wages, summary remedy for, 936.
damages for refusing to employ, 940.
right of servant to clothes by hiring and service, 941.
contracts of apprenticeship, 937—940.
See APPRENTICESHIP—HIRING AND SERVICE—WORK AND SERVICES.

MASTER OF SHIP. *See* SHIPMASTER.

MAXIMS,
ambiguitas verborum latens verificatione suppletur, 47.
caveat emptor, 336, 559, 562, 565, 568, 573, 576.
delegatus non potest delegare, 329, 424.
de minimis non curat lex, 573.
ex dolo non oritur contractus, 551.
ex nudo pacto non oritur actio, 2.
id certum est quod certum reddi potest, 775.
in pari delicto potior est conditio possidentis, 122, 902.
omne accessorium sequitur suum principale, 699, 885.

MAXIMS—*continued.*
omnis ratihabitio retrotrahitur, et mandato priori æquiparatur, 8, 331.
qui dolo desiit possidere pro possidente damnatur, 207.
qui non prohibet quod prohibere potest, assentire videtur, 426.
respondeat superior, 335, 355.
volenti non fit injuria, 925.

MEASURE AND VALUE,
payment by, where total deviation from building contract, 886.

MEASURE OF DAMAGES. *See* DAMAGES.

MEDICAL PRACTITIONER. *See* SURGEON.

MEMORANDUM IN WRITING. *See* FRAUDS (STATUTE OF).

MENIAL SERVANTS,
who are, 919.
termination of hiring by customary notice, 919.
month's warning or month's wages, 919.

MERCANTILE AGENT,
within Factors Acts. *See* FACTORS.

MERCANTILE INSTRUMENTS. *See* BILL OF EXCHANGE—BILL OF LADING—DOCK WARRANTS—CHEQUE—PROMISSORY NOTE.

MERCHANTABLE QUALITY,
implied warranty of, 568.

MERGER,
of simple contracts in deeds and specialties, 192.

METROPOLITAN BOROUGH COUNCILS,
contracts with, 398.
for works and materials, when to be under seal, 399.

MILK WALK,
contract for sale of, an interest in land, 25.

MINING COMPANIES,
contracts with managers and shareholders of, 389.
who is a shareholder, 390.
title to shares in, 637.
mode of establishing, 637.
partners in company hold as trustees, 637.
mode of selling shares, 637.
cesser of vendor's liability, 637.
See SHARES.

MISDESCRIPTION. *See* MISREPRESENTATION.

MISFEAZANCE,
liability of mandataries for, 860.

MISREADING,
fraudulent, of a deed, 129.

MISREPRESENTATION,
by agents, 127, 333.
by directors of companies, 127.
amounting to fraud, in case of sale of lands, 495—502.
sale of chattels, 551.
See WARRANTY.
lease obtained by, 748.
in marine assurance, 1123.
in fire assurance, 1216.

MISREPRESENTATION—*continued.*
in life assurance, 1226.
in contracts of marriage, 1314.
See FRAUDULENT MISREPRESENTATION—FRAUDULENT CONCEALMENT.

MISTAKE,
in written contract not under seal, 73.
effect of, as estoppel, 74.
contract made under, 133.
rectification of, 134.
cancellation of contract by, 191.
payment to agents under, 355.
money paid by, when recoverable, 456, 462.
in account stated, 473.
cheque paid by, when banker liable for, 859.
over-insurance by, 1158, 1160.
adjustments signed by underwriters by, 1206.

MISTRESSES,
contracts with, liability of reputed husbands on, 434.

MODE OF PERFORMANCE,
of contract, generally, 138.
of charter-party, 978.

MONEY,
lost by carrier by the way, 1019.
by contributory negligence of consignor, 1029.

MONEY HAD AND RECEIVED,
money of principal paid away by agent by mistake, 325.
money received by agent for principal, 354.
money wrongfully received by agent, 355.
implied promise to pay over money received for use of another, 460.
in respect of money which ought not in conscience or equity to be retained, 460.
payments made by mistake, 460.
of fact, 460.
in absence of fraud, 461.
of law, 460.
when not recoverable, 462.
by trustees or agents, 462.
on settlement of accounts, 463, 473.
period from which Statute of Limitations runs, 463.
where both parties under mistake, 463.
money improperly received and wrongfully detained, 463.
by oppression, imposition, extortion, or fraud, 461, 463, 465.
under compulsion of law, 461.
actions in respect of, 464.
money received without consideration or on consideration which has failed, 465.
actions in respect of, 465.
under illegal contract, 467.
money received by agents, 468.
receipt of foreign money, effect of, 470.
for purchase of property to which vendor has no title, 520, 521.

MONEY-LENDERS,
definition of, 809.
registration of, necessary, 809.
illegality of contracts with, if unregistered, 809.

MONEY-LENDERS—*continued.*
harsh and unconscionable bargains by, 809, 810.
jurisdiction of Court to relieve borrower, 810.
what constitutes, 810.

MONEY LENT. *See* BORROWING—LOAN.

MONEY ORDERS,
stamp duty on, 1375.
See BILL OF EXCHANGE—CHEQUE.

MONEY PAID,
recovery of, for forged securities, 136, 137.
implied promise in respect of, for another, 455.
implied request to pay money, action to recover, 456.
by mistake, 456, 462.

MONOPOLIES,
contracts creating, illegality of, 102.
See ILLEGAL CONTRACTS.

MONTH,
meaning of, in legal documents, 57.

MONTH'S WARNING OR MONTH'S WAGES,
servant, when entitled to, 919.

MONTHLY LETTINGS,
presumption of, 661.

MORAL OBLIGATION,
arising from past benefit, when not a good consideration, 7.
when it will support an express promise, 9, 10.

MORTGAGE,
given to secure money lost at play, invalidity of, 108.
limitation of actions affecting rights of mortgagees, 200.
See LIMITATION OF ACTIONS.
transfer by death, provisions as to, on, 243.
specific performance of contract to execute, 295.
right of mortgagee to remove fixtures, 702.
when mortgagor becomes tenant to mortgagee, 754.
when mortgaged premises are in possession and occupation of lessees, 755.
leases by mortgagor after making of mortgage, 757.
notice of, to lessee, 759.
nature of, 817.
of goods and chattels, 818.
by bailor, 849.
distress on goods mortgaged by tenant, 793.
rights of mortgagee, 793, 794.
amounting to bill of sale, 818, 819.
by joint stock companies, 818.
repayment of debt on demand, 819.
by day named, 819.
fraudulent dealing with goods by mortgagor, 819.
remedy of mortgagee, 819.
conversion of mortgaged goods, rights of mortgagee, 819.
mortgagor in possession as reputed owner, effect of, 820.
pledges of goods and chattels, 820.
See PLEDGE.
of ships and shares of vessels, 831.
of fixtures, 839.
how made, 839.
what passes by, 839.

MORTGAGE—*continued.*
of fixtures—*continued.*
sale on default, 839.
duty of mortgagee to account, 839.
equity of redemption barred by foreclosure, 840.
right to fixtures as between mortgagor and mortgagee, 840.
of stock and shares, 841.
registration of, 841.
liability of mortgagee for calls, 841.
equitable mortgage, how effected, 841.
fraudulent transfer by mortgagee, when ineffectual, 841.
void by reason of reputed ownership, 841.
lien upon shares and stocks, 842.
equitable title, how perfected, 842.
stamp on, 1346.
See HYPOTHECATION—PLEDGE.

MUNICIPAL CORPORATION. *See* CORPORATIONS.

MUTUAL ACCOUNTS. *See* ACCOUNT STATED.
settlement of, 472.
when accounts cannot be reopened, 472, 473.

MUTUAL COVENANTS,
nature of, 53.
when not binding on parties, 56.

MUTUAL CREDIT CLAUSE,
in bankruptcy, object of, 275.

MUTUAL PROMISES,
nature of, 1, 13.

MUTUALITY,
of contract, 1, 2, 13, 14.
in regard to corporations, 373.
of relief to both parties in cases of specific performance, 293, 294.

MUTUUM,
or loan for use and consumption, 813.

NECESSARIES,
for infants, 408—410.
See INFANTS.
for married women, 428, 430.
See MARRIED WOMEN.

NEGATIVE COVENANTS,
enforcement of observance of, by injunction, 300, 302, 303.
See INJUNCTION.

NEGLIGENCE,
in performance of contract, parties to be plaintiffs in actions for, 290.
of hirer of chattels, 807.
of borrower, 810, 812.
of lender in not making known defects, 814.
of executors, 845.
of depositary, 845, 846, 865.
of depositor, 845, 846.
of customers, 857.
of bankers, 857, 896, 969.

NEGLIGENCE—*continued.*
of public officers, 897.
of mandatary, 865.
of warehousemen, 864, 865.
of workmen, 889.
of surgeons, &c., 890, 897.
of solicitor, 890—895.
See SOLICITOR.
of barristers, 895.
of surveyors or valuers, 896.
of arbitrator, 899.
of bailee's servant, 901.
of bailor, 901.
of fellow-servant, 926.
of bank managers, 969.
of carriers by water, 987—993.
at sea, 988, 989, 1174.
of licensed pilots, 991.
of carriers by land, 1015—1018.
railway accident, *primâ facie* evidence of, 1018.
of common carrier, 1025—1029.
contributory, in case of carriers, 1029.
of consignor, loss of goods occasioned by, 1043.
causing fire, 1218.

NEGOTIABLE INSTRUMENTS,
what are, 1241.
See BILL OF EXCHANGE—PROMISSORY NOTE.

NEUTRALITY,
warranty of, in policies of marine assurance, 1167.

NOMINAL DAMAGES,
recovery of, 277.
See DAMAGES.

NON-ACCEPTANCE. *See* ACCEPTANCE.
of goods sold, damages for, 625.

NON-DELIVERY . *See* DELIVERY OF GOODS.
of goods sold, damages recoverable for, 626.

NON-FEAZANCE,
non-liability of mandataries for, 860.

NON-PAYMENT,
of purchase-money for land after execution of conveyance, 524.
of price of goods sold, remedies of seller for, 622.
of premium in fire assurance, 1218.

NOTE. *See* PROMISSORY NOTE—BILL OF EXCHANGE.

NOTICE,
of dissolution of partnership, 367.
of retirement of partners, 367.
of stoppage *in transitu,* 618.
to banker, of trust, 856.
under Carriers Act, of increased charges, 1031.
to insurer, of loss by fire, 1218.

NOTICE OF ABANDONMENT. *See* ABANDONMENT.

NOTICE OF ACTION,
to railway companies, not necessary generally before actions *ex contractu,* 1067.

NOTICE OF ASSIGNMENT,
of chose in action, 225, 226.

NOTICE OF COVENANTS,
constructive, 229.

NOTICE OF DISHONOUR. *See* BILL OF EXCHANGE.
to whom to be given, 1273.
rules as to, 1273.
what amounts to, 1275.
posting of, 1275.
proof of, 1278.
excuses for delay in giving, 1278.
dispensation of, 1278.

NOTICE OF DISTRESS,
not necessary at common law, 801, 802.

NOTICE TO QUIT,
when necessary, 720.
how and by whom to be given, 721.
under Agricultural Holdings Act, 721.
by agents, 722.
by joint owner, 722.
form and effect of, 723.
alternative and peremptory notices, 723.
length of, 724.
under Agricultural Holdings Act, 725.
time of quitting specified in notice, 725.
application of, to current term, 726.
commencement of current year, 727.
calculation of current year, 728.
admission by tenant of commencement of term, 728.
where there are different periods of entry, 729.
service of, 730.
through post office, 731.
acceptance of informal notice, 731.
proof of, 731.
waiver of, 731.
railway notices, determination of tenancies by, 735.
in case of lodgings and furnished apartments, 763.

NOTING,
of foreign bills, 1276.

NOVATION AND SUBSTITUTION,
nature and effect of, 179.
substitution of new for original contract, 179, 180.
release by, 179.
drafts and orders operating by way of, 180—182.
in case of life assurance companies, 182.
partnerships, 365.
substituted performance of something different, 183.
by assignment of chose in action, 227.

NUDUM PACTUM,
nature and definition of, 2, 3, 4, 7, 9, 11.

OBLIGATION. *See* BOND.
moral, consideration sufficient to support, 9, 10.
of parent towards child, 9.
in respect of infant's contracts, 10.

OCCUPATION OF LAND. *See* USE AND OCCUPATION.
compensation for, 681.
constructive, meaning and effect of, 682

OFFERS,
of reward for information, 6.
of sale, withdrawal of, 17.
publication of, by advertisement, 15, 310.
acceptance of, 14, 15, 17.
through post, 17.
by telegram, 18.
must be unconditional, 16.
conditional, 17.
biddings at auctions, mere, 17, 476.
contract dates from, 17.
to pay not amounting to tender, 169.
of marriage, 1312.
and proposals not requiring stamp, 1370.
See PROMISE OF MARRIAGE.

OFFICES,
sale of, illegality of, 86, 95.
See ILLEGAL CONTRACTS.

OPPRESSION. *See* DURESS—EXTORTION.
money obtained by, right to recover, 463, 464.

ORAL CONTRACTS,
for tenancy, enforcement of, 294.
sale of land, 479.

ORAL DISCHARGE,
of contract, dispensing with performance, 171.
of note or bill, of no effect, 175.

ORAL EVIDENCE. *See* EVIDENCE.

ORDER OF DISCHARGE,
in bankruptcy, effect of, 195.

ORDERS FOR MONEY,
in favour of creditors, operating as novation of debt, 180.
See MONEY ORDERS.

OUTGOINGS,
deduction of, by tenant, from rent, 677, 679, 680.

OUTGOING TENANT,
rights of, 740—746.
away-going crops, tillages, manures, &c., 740.
sale of straw off the land, 746.
removal of fixtures. *See* FIXTURES.
non-payment of tithe rent-charge by, 747.

OUTLAWS,
disabilities of, 259, 438.
See CIVIL DEATH.

OVERSEERS. *See* PARISH OFFICERS.

OWNERSHIP,
transfer of, in case of contract for sale of land, 481, 482.
of goods, 579.

PACKED PARCELS,
carriage of, increased charge by railway company for, 1062.
defective packing, when carrier liable for deterioration from, 1027.

PACKERS,
lien of, 862.

PAIS,
estoppel in. *See* ESTOPPEL.

PARENT,
contract by, to give up control of children, illegality of, 77.
obligation of, to provide for children, 413.
liability of, for medical advice and medicines ordered for his children, by servant, 338.
for clothes and goods delivered at his residence by order of his children, 408.
consent of, to marriage of minors, 1319.

PARISH COUNCILS,
contracts with, how made, 399.

PARISH INDEMNITIES,
legality of, for charges in respect of illegitimate children, 85.
of apprentices gaining settlements, 86.

PARISH OFFICERS,
authority of, to enter into contracts, 400.
contracts with, 400.
liabilities of, upon contracts made by them on behalf of parish, 400.

PAROL DISCHARGE,
of contracts before breach, 171, 174.

PAROL EVIDENCE. *See* EVIDENCE.

PAROL LICENCE,
no discharge of covenant, 174.
when pleadable by way of defence, 174.

PART ACCEPTANCE,
and receipt of goods sold, 28, 537.

PART DELIVERY,
of goods, exercise of seller's right of lien on remainder, 611.

PARTIAL LOSS,
exception of, in policies of marine insurance, 1194.
in policies of fire insurance, 1218.
notice of, 1218.

PARTICULAR AVERAGE,
definition of, 1196.

PARTICULAR CHARGES,
recoverable under sue and labour clause, 1196.

PARTIES TO CONTRACTS,
parties entitled to sue on covenants, 237.
in actions of tort founded on contract, 290.
parties entitled to enforce simple contracts, 308.
strangers to contract, 308.
contracts with bankers, warehousemen, and wharfingers, 309, 310.
parties entitled to enforce contracts under seal, 311.
trustee and *cestui que trust,* 312.
covenantees not executing deed, 313.
parties liable upon simple contracts, 313.
parties liable upon deeds, 315.
covenants in feigned names, 315.
by one person on behalf of another, 315.
agreements and promises, whether joint or several, 315.
joint or separate interests of covenantees, 316.
rights of tenants in common, 317.

PARTIES TO CONTRACTS—*continued.*
rights of joint tenants, 317.
joint or separate interests in implied contracts, 318.
joint or several liabilities *ex contractu,* 319.
joint and several promises, 320.
joint and several purchases, 321.
with agents, 321.
See AGENT.
servants, 337.
foremen, 338.
managers, 338.
telegraph clerks, 339.
shipmasters, 339—342.
ship's husband, 343.
brokers, 343.
ship brokers, 343.
counsel, 343.
solicitors, 344.
public officers, 350, 356, 389.
Government agents, 353.
partners, 357.
See PARTNERSHIP.
corporations, 373.
See CORPORATIONS.
joint stock companies, 379, 380.
railway companies, 386, 388.
See RAILWAY COMPANIES.
co-partnerships and associations suing by public officer, 388.
mining companies, 389.
insurance companies, 390.
See INSURANCE COMPANIES.
banking co-partnerships, 391.
provisional directors and committees, 393.
club committees, members of, 395.
trustees of public works, 397.
metropolitan borough councils, 398.
parish councils, 399.
district councils, 399.
parish officers, 400.
friendly societies, 400.
industrial societies, 401.
benefit building societies, 402.
freehold land societies, 403.
loan societies, 404.
registered trades unions, 404.
infants, 404.
See INFANT.
expectant heirs, extortionate contracts with, 412.
parents, 413.
executors, 414.
See EXECUTORS.
husband and wife, 418.
See MARRIED WOMEN.
bankrupt, 434.
See BANKRUPTCY.
drunkards, 435.
See DRUNKARDS.
lunatics, 436.
alien friends, 437.
alien enemies, 437, 438.
prisoners of war, 438.
convicts, 438.
outlaws, 438.
parties privileged from actions and suits, 439.

PARTITION OF LANDS,
specific performance of agreement for, 294.

PARTNERSHIP,
illegal, dissolution of, 89, 367.
limited. *See* LIMITED PARTNERSHIP.
rights of partners upon contracts with third parties, 357.
implied contracts with firms, 358.
trust services by partners, 358.
contracts with trustees or directors of co-partnerships, 358.
liabilities of partners, 359.
power of partner to bind firm, 359.
admission by one partner, effect of, 360.
notice to one partner, effect of, 360.
liability of, created for particular purpose, 360.
inchoate and incomplete, nature of, 361.
execution for separate debt of one partner, 361.
dealings of one partner in fraud of co-partnership, 362.
transactions out of ordinary course of business, 362.
authority of one partner to sign bills and notes in name of firm to secure private debt, 363.
liabilities of dormant and secret partners, 363.
private agreements exempting dormant partners from liability, 364.
liabilities of nominal partners, 364.
persons suffering themselves to be held out to world as partners, 364.
liabilities of incoming and retiring partners, 365.
new firm created by novation, 366, 367.
notice of retirement of partners, 367, 368.
assignment of share in, 367.
dissolution of, how effected, 367.
rights of persons dealing with firm against ostensible partners, 367.
notice of, how effected, 367, 368.
rights of partners on, 368.
continuing authority for winding-up purposes, 368.
as to partnership property, 368.
retirement of dormant partners, 369.
notice of, when necessary, 369.
directors of trading associations, 369.
liability of shareholders or partners, 369.
authority of committeemen, 369.
liabilities of partners upon deeds, 370.
act or instrument on behalf of firm, 370.
authorised to sue and be sued in name of officer, 388.
specific performance of contract for, when decreed, 295.
loans of money to one of several partners, 814.
deposit of money with one of several partners, 850, 851.
bonds and guarantees by sureties to, 1087.
guarantees by one of several partners in name of co-partnership, 1105.
bills of exchange and promissory notes by partners, 362, 363, 1301, 1306.
See BANKING CO-PARTNERSHIP — CORPORATIONS — JOINT-STOCK COMPANY—MINING COMPANIES.

PART PAYMENT,
of principal debt preventing operation of Statute of Limitations, 215.
by bill or note, 216.

PART PAYMENT—*continued.*
of principal debt—*continued.*
by render of service, or by delivery of goods, 216.
by adjustment and settlement of accounts, 216.
to strangers and agents, 218.
by strangers and agents, 219.
See INTEREST.
by one of several joint debtors or co-contractors, 218.
for goods sold, effect of, 539.

PART PERFORMANCE,
taking case out of Statute of Frauds, 23, 481.
specific performance of oral agreements in case of, 294.
of special contract, 453.
of contract for sale of land, 480, 481.
in case of sale of goods, by acceptance, 532, 538.
by tenant being let into possession, 651, 652.
by sub-lessee, effect of, 652.
See PERFORMANCE.

PASSENGERS. *See* COMMON CARRIER.
by coach or rail, injuries to, 1015.
railway companies, apart from statute, not common carriers of, 1020.
to be forwarded without delay, 1024.
contracts for carriage of, 1035.
luggage, duty of common carrier to carry, 1023, 1036.
by excursion trains, charge for, 1037.
in cloak rooms, liability for loss of, 865, 1035.
loss of, 1036.
delivery of, at railway stations, 1037.
carriage over other railways, company to be sued for injuries to, 1070.
damages for railway accidents, 1015, 1019, 1070, 1075.
accident *primâ facie* evidence of negligence, 1018.
fares, 1065.
right to alight at intermediate station, 1065.
season tickets, forfeiture of deposit on, 1065, 1066.

PATENT AGENT,
liability of, for negligence, 889.

PATENT AMBIGUITY,
cannot be explained by parol evidence, 47, 48.

PATENT DEFECTS,
in goods sold, proof of, 549, 552.

PATENT RIGHT,
specific performance of contract for sale of, 294, 636.
no warranty of indefeasibility of right on sale of, 562, 636.

PATENTED ARTICLE,
conditional licence on sale of, effect of, 636.

PAWNBROKERS,
statutory rights and liabilities of, 828.
loans above 10*l.* not within statute, 828.
who are to be deemed pawnbrokers, 828.
unredeemed pledges, sale of, 829.
pledge sold for less than loan, 829.
tender before sale, effect of, 829.
warranties on sales of, 829.
no implied warranty of title, 829.
indemnity given by statute does not affect owner's rights, 829.

PAYMENT,
and acceptance of part of admitted simple contract debt, 151.
and acceptance of full amount before action, 152.
according to direction of creditor, 152.
by bill or note, 154.
acceptance of renewed bills, 156.
dishonoured bills, actions for debts secured by, 155.
by cheque, 156.
by stolen bank note, 156.
by delivery of goods, 157.
by legacy, 157.
by stranger, 157.
proof of, 157.
receipt, effect of giving, 158.
presumption of, 158.
to agent in ordinary course of business, 159, 160.
by mistake of fact, 355.
by agent, 161.
to creditor of creditor, 162.
by principal to his own agent, 162.
to joint creditors, trustees, &c., 163.
to bankrupt, 164.
to one of several joint creditors, 164.
appropriation of, 164.
by debtor, 165.
by creditor, 165.
separate accounts and one entire running account, 166.
avoidance of, 167.
tender of, 167.
offers not amounting to, 169.
conditional tenders, 169.
apportionment of periodical payments, 170.
of dividend in bankruptcy, operation of, 197.
part payment extending period of limitation, 215.
See PART PAYMENT.
of interest on debt, effect of, 217.
with delivery of goods, concurrent condition, 598.
action for. *See* PRICE—SALE OF GOODS.
of cheques by bankers, duty of bankers to honour customer's drafts, 854.
at branch banks, 859.
of cheques by mistake, when money recoverable by banker, 859.
of wages, 935.
See TRUCK ACT.
presumption of, 936.
by one agent to another agent of same principal, 956.
by commission, 957.
of agents for extra work, 958.
of ship-brokers, 958.
of policy brokers, 959.
of travellers for orders, 959.
of house and estate agents, 959, 960.
of auctioneers, 960.

PAYMENT BY BILL OR NOTE,
effect of, 153.
payment by approved bill, 154.
acceptance of renewed bills, 154.

PAYMENT INTO COURT,
of purchase-money on sale of land, 519.
by stakeholders, under Trustee Act, 850.

PECUNIARY LIABILITIES,
recovery of, when swelling amount of damages, 284.

PENAL OBLIGATIONS. *See* BONDS.

PENALTIES,
penal obligations, 285.
for breach of contract, 286.
for non-performance of covenants and agreements, 286.
liquidated damages, difference between, and, 287.
penalties under denomination of liquidated damages, 287.
for non-performance of building contracts, 883.

PENSIONS,
illegal sale of, or charge on, 92.

PERFORMANCE. *See* INJUNCTION—SPECIFIC PERFORMANCE.
of contracts, 138.
mode of performance, 138.
cumulative and alternative stipulations, 139.
time of performance, 140.
See TIME OF PERFORMANCE.
conditions precedent to performance, 142.
demand of performance, when necessary, 143.
waiver of demand of performance, 144.
dispensation of performance of, 145.
tender of performance, 146.
prevention of performance, 146.
impossibility of performance, 147.
substitution of performance. *See* ACCORD AND SATISFACTION.
by payment. *See* PAYMENT.
by part payment. *See* PART PAYMENT.
waiver of, amounting to release, 171.
by novation and substitution, 179.
by substituted performance of something different, 183.
payments taking case out of Statute of Limitations, 215.
specific. *See* SPECIFIC PERFORMANCE.
injunction to compel. *See* INJUNCTION.
mandamus to compel. *See* MANDAMUS.
of contracts for sale of land. *See* SALE OF LAND.
for sale of goods by delivery, 597.
See SALE OF GOODS.
of sales of shares, 641.
mode of performance, 641, 642.
time of performance, 644.
of contracts for work and services, 879.
time of, 875.
entire performance, condition precedent to payment, 876.
divisible and apportionable work, 876.
of building contracts, 877—887.
approval of work before payment, 877, 878.
security for, 884.
prevention of, 887, 914.
of charter-parties, 973.
See CHARTER-PARTY.
of conditions precedent in, 976.
mode of performance of, 978.
complete cargo, 978.
impossibility of performance of, 979.

PERILS OF THE SEA,
what are, as between consignor and carrier, 987, 988.
in insurance cases, 1174.

PERIODICAL PAYMENTS,
apportionment of, 170.

PERISHABLE COMMODITIES,
resale of, by vendor, 621.
bailments of, duty of bailee as to, 863.

PERSONAL CONTRACTS,
assignment of, 221.
liability of personal representatives upon, 241, 244, 249.

PERSONAL COVENANTS,
transfer of, by death, 241, 244.
to pay rent, liability of personal representatives on, 247.
to repair, 248.

PERSONAL INJURIES. *See* PASSENGERS.
damages for, 1075.

PERSONAL REPRESENTATIVES. *See* EXECUTORS.

PETROLEUM,
sale of, regulated by statute, 111.

PHYSIC,
unlawful practising of, 115.

PHYSICIANS. *See* SURGEON.
qualification of, 115.
services by, right to sue, 115, 873.

PILOT,
licensed, losses occasioned by negligence of, 991.
exemption of owner and master from liability, 991.

PLAINTIFFS. *See* PARTIES TO ACTIONS.
accord and satisfaction with one of several joint-plaintiffs, 188.

PLAY. *See* GAMING.

PLEDGE,
of husband's credit, extent of wife's authority, 425.
contract of, definition of, 817, 818.
what may be given in pledge, 820.
parties entitled to pledge, 820.
fraudulent pledge, lien of innocent pledgee, 821.
extent of pawnor's interest in pledge can be pledged, 821.
title deeds delivered as escrow, effect of, 821.
implied warranty of title on part of pledgor, 821.
duty of pledgee to return, 822.
of goods by factors, 822.
See FACTORS.
right of redemption of pledgor, 825.
wrongful detention of, action for, 825.
sale of pledgor's right of property and right of redemption, 825.
forfeiture of, 826.
relief against, when granted, 826.
foreclosure of right of redemption, 826.
pledgee's power of sale, 826.
accounts between pledgor and pledgee, 827.
custody and safe keeping of, 827.
use of, when allowed, 827.
statutory rights and liabilities of pawnbrokers, 828.
See PAWNBROKERS.
unredeemed, sale of, 829.
warranty on sale of, 829.
of certificate of registry of ship, illegal, 839.
unauthorised dealing with, giving right of action, 903.
stamp on contracts of, 1373.

POISON,
illegal sale of, 111.

POISONED GRAIN, MEAL, OR SEED,
sale of, prohibited, 111.

POISONED HERBAGE,
demise of, liability of lessee for rent, notwithstanding, 673.

POLICIES,
assignment of, 222.
of marine insurance, 1107, 1124.
contract to be embodied in, 1124.
what must be specified in, 1125.
signature of insurer, 1126.
designation of subject-matter, 1126.
voyage and time, 1131.
valued and open, 1132, 1203, 1204.
unvalued, 1132.
floating policy by ship or ships, 1132.
form and construction of, 1133.
rules for construction of, 1135.
stamp on, 1380.
See MARINE INSURANCE.
against fire, 1084.
stamp on, 1380.
See FIRE INSURANCE.
upon life, assignment of, 222, 1232.
stamp on, 1380, 1384.
See LIFE ASSURANCE.
against accident, stamp on, 1382.
alteration in marine policy, after stamping, 1381.
penalty for unstamped, 1382.

POLICY BROKERS. *See* AGENCY.
right of, on contracts made by them as agents, 346.
liability of, to their principals, 949.
right of, to commission, 116, 959.
lien of, 962.

POOR LAW GUARDIANS. *See* PARISH OFFICERS.

PORTIONS,
marriage, promises of, 1316.
authentication of, 34, 1316.
specific performance of, 296.
contracts in fraud of, 1317.

PORTS OF DISCHARGE,
when to be taken in order designated, 1172.
in geographical order, 1172.
limits of, regulated by usage, 1153.
arrival at, 1153.
mooring in safety, 1153.

POSSESSION,
of goods after sale, rights of person in, 595.
of land, recovery of, 735.

POST,
acceptance of offers by, 17.
miscarriage of letter sent by, 18.
postman not agent of Post Office to receive letters, 18.
notice to quit sent by, 731.

POST-DATING,
cheque, 1378.
stamp on, 1378.

POUND. *See* IMPOUNDING GOODS.

POUND-BREACH,
right of landlord to follow goods, 799.

POWER OF ATTORNEY,
to execute deeds, 43.
revocation of, 945.
when irrevocable, 946.

POWER OF REVOCATION,
and defeasance of contracts, 173.

POWER OF SALE,
of pledge, 826.
See PLEDGE.

POWERS,
of granting leases, exercise of, 664.

PRECEDENT CONDITIONS. *See* CONDITIONS PRECEDENT.

PRESENTATION,
sale of right of next, when legal, 93.

PRESENTMENT,
of bills of exchange for acceptance, 1261.
when necessary, 1262.
rules as to, 1262, 1263.
of bills payable at or after sight, 1262.
of bills of exchange for payment, 1268.

PRESENTS,
promises of, in return for services, evidence of contract to pay reasonable sum, 873.

PRESUMPTION,
of payment, 158.
of wages, 936.
of marriage, 1319.

PRETENCED TITLES,
sale of, by parties out of possession, 525.

PRETENDED AGENCY,
nature of, 351.

PREVENTION OF CORRUPTION ACT, 1906,
corrupt transactions with agents, 944.

PREVENTION OF PERFORMANCE. *See* PERFORMANCE.
of contracts, 146.
of building contracts, 887, 914.

PREVIOUS LEGAL PROCEEDINGS,
costs of, recovery of, as part of damages, 283.

PRICE,
of goods, how fixed, 540.
customs duty to be added to, 541.
unascertained, how fixed, 583, 584.
action for, of goods, 622.
bargained and sold, 622, 623.
sold and delivered, 623, 624.
sold on credit, 624.
abatement of, in building contracts, 882.

PRIMAGE AND AVERAGE,
customary charges payable by freighter of merchandise, 1008, 1201.

PRINCIPAL AND AGENT. *See* AGENCY—AGENT.

PRINCIPAL AND SURETY. *See* GUARANTEE.

PRINTERS,
contracts with, for printing of immoral or libellous books, 114.
when action for labour and materials lies, 114.

PRIORITY,
of maritime liens, 838.
See BOTTOMRY BOND.

PRISONERS OF WAR,
contracts by, legality of, 438.

PRIVITY OF CONTRACT,
in action of tort founded on contract, 291.
strangers to contract, 308.
in deeds, 311.
essential to maintenance of action upon deed *inter partes*, 313.
in covenants running with the land, 227.
privity of estate, 227, 228.
See PARTIES TO ACTIONS.

PRIVITY OF ESTATE,
enabling assignees of estates to maintain actions on covenants running with land, 227.
See COVENANTS RUNNING WITH LAND.

PROCURATION. *See* POWER OF ATTORNEY.

PROFESSIONAL SERVICES,
right of professional men to recover fees for, 873.
in case of useless or unskilful services, 890.

PROFITS,
insurance on, by valued or open policies, 1143.
an insurable interest, 1143, 1144.
charterer entering into sub-charter, 1144.
contracts to carry goods in ship, 1144.
commission on sale of merchandise, 1144.
commission of ship broker or ship's husband, 1144.
freight includes profit by shipowner from employment of ship, 1109.

PROJECTED COMPANIES,
contracts with, 369, 381, 387.
See PROVISIONAL COMMITTEES.

PROJECTORS. *See* PROMOTERS.
of companies, services by, 387.
contracts for payment of, 387.

PROMISE. *See* CONSIDERATION.
without consideration, 2, 7.
unilateral undertakings, 1, 2.
revocation of, 14, 15, 171, 173.
by death, 246.
mutual promises, 13.
acceptance of, 14.
by executor to answer damages out of his own estate, 29.
to answer for debt, default, or miscarriage of another, 29.
in consideration of marriage, 33.
See PORTIONS.
not to be performed within a year, authentication of, 34.
without consideration, authentication of, 42.
to pay debts barred by Statute of Limitations, 211.
See ACKNOWLEDGMENT OF DEBTS.
by implication of law, 449—453.
of present in return for service, 873.

PROMISE OF MARRIAGE. *See* MARRIAGE.
authentication of, 33, 1312.
time of performance, 1313.
excuses for non-performance, 1313.
conditional promises, 1314.
avoidance and dispensation of, 1314.
by misrepresentation and deceit, 1314.
by alteration in condition of parties, 1315.
by mutual consent, 1315.
damages for breach of, 1315.

PROMISSORY NOTE. *See* BILL OF EXCHANGE.
foreign, interpretation of, 60, 61, 62.
right of action on promissory notes payable to one man "for the use" or "on behalf" of another, 344.
acceptance of, by way of payment of rent, 777.
effect of, on right to distrain, 777.
nature of, 1284.
liability of maker, 1285.
transfer of, 1286.
payable on demand, 1287.
presentment of, for payment, 1287.
days of grace, 1271, 1288.
stamp duty on, 1374.
what are promissory notes within Stamp Acts, 1375, 1378.

PROMOTERS,
of companies, contracts with, 387.

PROOF OF PAYMENT,
what constitutes, as performance of contract, 156, 157.

PROPOSAL,
to guarantee, not amounting to concluded contract, 1083.
in writing not requiring stamp, 1370.
See OFFERS.

PROSECUTION,
criminal, contract to withdraw, invalidity of, 82.

PROSPECTIVE DAMAGES. *See* DAMAGES.

PROSPECTUS,
fraudulent, when voidable only, and not void, 128.

PROSTITUTION. *See* ILLEGAL CONTRACTS.
contracts tending to promote, void, 76.

PROTEST,
of foreign bill, 1276.

PROVIDENT SOCIETIES,
contracts with, statutory provisions regulating, 401.

PROVISIONAL COMMITTEES,
contracts with, 369, 393.
liabilities of, to third parties, 393.
powers and responsibilities of, 394, 395.

PROVISIONS,
implied warranties on sale of, 569.

PROVISO,
words of, amounting to express covenant, 51.

PUBLIC HOUSE. *See* BREWERS.
covenants in lease of, creating a monopoly, void, 102.

PUBLIC INCONVENIENCE,
no ground for refusing specific performance, 294.

PUBLIC JUSTICE,
illegality of contracts tending to obstruct, 81.

PUBLIC OFFICERS,
covenant by, on behalf of another, 315.
contracts by, 350.
notoriety of agency, 350.
exemption from liability, 336.
of companies, 388.
liability of, 389.
salaries of, fund responsible for payment of, 398.
implied contract for payment, 398, 874.
negligence of, 897.

PUBLIC OFFICES,
illegal sale of, 86, 91.

PUBLIC POLICY,
contracts against, 77.
See ILLEGAL CONTRACTS.

PUBLIC WORKS,
contracts with trustees of, 397.
funds subject to payment of claims, 397.
for salaries of officers, 398.

PUFFERS,
secret employment of, at sales by auction of land, 476.
at sales by auction of goods, 632.

PUR AUTRE VIE,
estates, transfer by death of covenants annexed to, 243.

PURCHASER. *See* SALE OF GOODS—SALE OF LANDS.

QUACKS,
liabilities of, 890, 898.

QUALITY,
of goods, implied warranty as to, 564.

QUANTITY,
delivery of wrong, of goods, 600.

QUANTUM MERUIT,
implied contract to pay on, 453, 868.
right to recover by way of, 876, 934.
for defective work accepted by employer, 880.

QUARANTINE,
detention in, is not "detention of princes and rulers," 995.

QUIET ENJOYMENT,
covenants for, as between landlord and tenant, 665.
breach of, what amounts to, 666.
damages for, 750.

RACES,
horse and foot, betting on, 108.
recovery of bets deposited with stakeholder, 107.

RAILWAY AND CANAL TRAFFIC ACT, 1854. *See* COMMON CARRIER.

RAILWAY BONDS,
assignment of, 222.

RAILWAY CARRIERS,
are common carriers of goods, 1020.
liability for injury to passengers, 1016, 1017.
railway accident, *primâ facie* proof of negligence, 1018.
implied undertakings by, to forward passengers or goods, 1024.
negligence by, involving injury to passengers, 1025.
contributory negligence by passenger, 1030.
limitation of liability of, by public notice under Carriers Act, 1030.
See COMMON CARRIER.
Railway and Canal Traffic Act, liabilities under, 1043.
See COMMON CARRIER.

RAILWAY COMPANIES,
contracts with, when void, 386, 387.
contracts with promoters of railway made before incorporation, when enforceable, 387.
bills of exchange, not generally authorised to draw, &c., 387.
contracts by directors and committees of directors, 387.
informal contracts by, for services, 388.
transfer of, and title to shares of, 638.
rolling stock of, when protected from distress, 789.
eviction by, under statutory powers, 676.
apportionment of rent on, 676.
liability of, for luggage deposited in cloakrooms, 865.
not common carriers of passengers, apart from statute, 1020.
authority of servants of, to bind by special contract, 1050.
injunction against, to enforce Traffic Act, 1063.

RAILWAY FARES,
right to alight at intermediate station, 1065.
season ticket, forfeiture of deposit, 1065, 1066.

RAILWAY NOTICES,
determination of tenancies by, 735.

RATES,
mandamus to local authority to levy, 440.
deduction of, from rent, 677.

RATIFICATION,
of acts of agents, 330.
by husband of wife's contracts, 426.
of promises made by infants, 44, 405, 411.
of marine insurance, after loss is known, 1122.

REALTY. *See* SALE OF LANDS.
title to. *See* TITLE.

RECEIPT,
obtained by misrepresentation, not a valid release, 129.
effect of receipt in full as payment, 158.
indorsed on bill, effect of, 158.
by agent on account of principal, 355, 954.
on account of stranger, 355.
by sub-agent, 995.
for money, stamp on, 1385.
of goods, 532.
See ACCEPTANCE AND ACTUAL RECEIPT.

RECEIVING ORDER. *See* BANKRUPTCY.

RECITALS,
in deeds, contradiction of, 72.
amounting to covenants, 51, 522.

RECOGNIZANCES,
when constituted contracts by matter of record, 22.

RECORD,
contracts by matter of, nature of, 21.
statutes merchant and staple, 22.
recognizances, 22.

RECOVERY,
of money, paid under illegal or void contracts, 136, 467.
on void sale of realty, 520, 521, 524.
of chattels, 555, 572.
See MONEY HAD AND RECEIVED—MONEY PAID.
of interest on money paid by surety, 1104.
of possession. *See* EJECTMENT—LANDLORD AND TENANT.

RECTIFICATION,
of contracts, 134.
See MISTAKE.

REDEMPTION. *See* MORTGAGE—PLEDGE.

REDUCTION OF DAMAGES,
rule as to, 284.

RE-ENTRY,
provisoes for, on breach of covenants in leases, 709.
effect of, on lessee's liability on covenants, 712.
right of, on forfeiture, waiver of, 713.
recovery of land under provisoes for, 736.
where no sufficient distress, 737.
See EJECTMENT.

REFUSAL. *See* REJECTION.

REGISTERED JOINT-STOCK COMPANIES. *See* JOINT-STOCK COMPANY.

REGISTERS,
stamp on certified copies of, or extracts from, 1340.

REGISTRATION,
of mortgages of sale of ships, 834.
of transfers of shares, 642.
of forged transfers, 648.

REGISTRY,
of shareholders. *See* REGISTRATION.

REJECTION,
of goods sold, 558, 606, 615.

RELEASE,
covenants and agreements to refer disputes and differences to arbitration, 81, 82.
of contracts by consent of parties, 171.
dispensation of performance, 171.
of simple contracts before breach, 171.
renunciation of contract by one party amounting to dispensation of performance to another party, 171.
powers of revocation and defeasance of contracts, 173.
of covenants before breach, 174.
of causes of action *ex contractu*, 174.
oral renunciation of claims on bills and notes, 175.
of one of several joint or joint and several contractors, 175.
general, operation of, 176.
conditional, 177.
fraudulent, to defeat action, 177.

RELEASE—*continued.*
by composition under Bankruptcy Acts, 177.
covenants not to sue, 177.
not to sue for limited time, 178.
by novation and substitution, 179.
substitution of new for original contract, 179, 180.
drafts and orders operating by way of novation, 180—182.
in case of life assurance companies, 182.
See NOVATION.
by alteration of contracts in writing, 189.
immaterial alterations, 190.
alteration of deeds, 191.
evidence to explain alterations, 191.
cancellation of contracts by mistake, 191.
merger of simple contract in contract under seal, 192.
judgment recovered, 192—194.
county court judgment, effect of, 192.
foreign and colonial judgments, effect of, 194, 454.
debtors made executors, 258.
appointment of debtor as administrator, 258.
appointment of creditor as executor, 258.
of surety, 1086.
by alteration of principal obligation, 1092.
by extension of time for payment, 1093.
reserving remedies against surety, 1095.
of principal debt, effect of, 1096.
of principal obligation, reserving remedies against surety, 1096.
of one of several co-sureties, 1097.
of surety by payment by principal debtor, 1097.
by death of principal, 1099.
by marriage, 1323.
stamp duty on, 1355.

RELIEF AGAINST FORFEITURE,
in case of lessee, 714.
when not granted, 714.
in case of sub-lessee, 714.
notice by lessor to remedy breach, 714, 715.
when not necessary, 715.
requisites of, 715.
effect of granting, 715.

REMEDIES FOR BREACH OF CONTRACT. *See* DAMAGES—MANDAMUS—SPECIFIC PERFORMANCE.

REMITTANCES BY POST,
operating as payment, 152.

RENEWED BILLS,
acceptance of, suspending remedy for debt, 154.

RENT,
limitation of suit for recovery of, 199, 202.
assignment of, nature of, 239.
liability of personal representative upon covenant to pay, 247.
covenant to pay, 667, 674.
exception of damage by fire, 674.
extinction and suspension of, by eviction, 674.
deduction of ground-rent, rates, and taxes from, 677.
distress for. *See* DISTRESS.
power of distress extinguished by assignment of reversion, 681.
apportionment of, 681.
forfeiture for breach of covenant to pay, 714.
relief against, 714.
See LANDLORD AND TENANT.

RENT-CHARGE,
tithe, illegal contract to pay, 90.

RENUNCIATION,
of contract, amounting to dispensation of performance, 171.
of claim on bill of exchange or promissory note, 175, 1283.
stamp duty on, 1355.
See RELEASE.

REPAIR,
liability of assignee of lessee, 230.
liability of personal representative upon covenants to, 248.
covenants to, between landlord and tenant, 685.
by lessor, to *keep* in repair, no breach before notice, 685.
run with the land, 697.
to *put* in repair, want of notice not necessary, 685.
not continuing covenants, 687.
by lessee, liability where demised premises destroyed, 686.
See COVENANTS RUNNING WITH THE LAND.
damages recoverable for breach of contract to repair, 751.
where buildings destroyed by fire or tempest, 752.

REPAIRS,
authentication of contract to make, 25.
hypothecation of vessel for, authority of master, 339.
gratuitous, duty of bailee as to, 861.
bailment of materials for, 899.

REPLEVIN BONDS,
assignment of, 222.

REPRESENTATIONS,
by agents, 334—336.
amounting to warranty, 334.
not amounting to warranty, 336.
forming no part of contract with principal, 336.
on sale of goods, amounting to warranty, 546.
not amounting to warranty, 549.
specific performance of, forming foundation of contract, 300.
injunction to compel parties to abide by, 300.
in charter-party, amounting to warranty, 975.
See MISREPRESENTATION—WARRANTY.

REPUDIATION,
of contract, on ground of fraud, 130.
right of, when to be exercised, ~~118, 119.~~ p. 130.
of agent by principal, 346.
by one party amounting to dispensation of performance by another, 171.
See AVOIDANCE.

REPUGNANT LIMITATIONS,
of liability, rejection of, 48.
See LIMITATION OF LIABILITY.

REPUTED MARRIAGE,
liabilities resulting from, 433.

REPUTED OWNERSHIP,
of stock and shares avoiding mortgage, 841.

REQUEST. *See* CONSIDERATION.

RE-SALE,
of realty by vendor, on non-performance by purchaser, 511, 512.
damages recoverable by vendor, 512.
of goods, unpaid seller's power of, 607.
effect of, where right of lien exercised, 620.
in cases of perishable goods, 621.
on notice of intention to re-sell, 621.
by purchaser, rights of sub-purchasers, 618.
with warranty, 631.
recovery of special damages, 281, 631.

RESCISSION OF CONTRACTS,
by mutual agreement, 171, 172.
by one party on refusal of other to fulfil contract, 171, 172.
under powers of revocation and defeasance, 173.
by vendor of land, 506.
by stoppage *in transitu*, 620.
See AVOIDANCE—RELEASE.

RESERVATION OF RIGHT OF DISPOSAL,
of specific goods, until certain conditions fulfilled, 588.

RESERVE OF REMEDIES,
in release of one of several joint contractors, 175.
of principal debtor, effect of, 1095, 1096.

RESIGNATION OF BENEFICE. *See* BENEFICE.

RESPONDENTIA,
insurable interest of lender on, 1110.
interest, when covered by policy, 1127.
loans, nature of, 1144, 1145.

RE-STAMPING,
of altered contracts, 1335.

RESTRAINT OF MARRIAGE,
contracts in, void as against public policy, 78, 1310.
restriction as to one specified person, 78.

RESTRAINT OF TRADE,
general, contracts in, are void, 95.
unless reasonably required for protection of covenantee, 95.
onus of proof of restraint being unnecessary and unreasonable, 96.
unlimited restraint, when valid, 96.
distinction between considerations invalidating, and partial restraint abolished, 96.
contracts between master manufacturers to close works, invalidity of, 96.
not to employ workmen of another master manufacturer, 96.
between workmen binding themselves to support men out of employment, 96.
trade unions, legality of, 96, 97.
partial, contracts in, when valid, 97.
as to particular locality, 97.
where reasonable, Court will prevent infringement, 98.
restraint must be confined within reasonable limits, 99.
limit in point of space, how measured, 99.
where limit as to space reasonable, indefinite limit as to time immaterial, 100.
question of reasonableness is for judge, 100.

RESTRAINT OF TRADE—*continued.*
partial, contracts in, when valid—*continued.*
restraint must be confined within reasonable limits—*continued.*
date for considering reasonableness is date of contract, 100.
adequacy of consideration, 100.
period to which restriction confined, 100.
covenantor bound although covenantee has ceased to carry on trade, 100.
covenant not to trade within certain reasonable limits, effect of, 101.
injunction to restrain breach of, 101, 301.
covenant by person "interested or concerned in" business sold, 101.
effect of, as regards vendor or assignor, 101.
pecuniary or proprietary interest, 101.
how far entitled to canvass old customers, 101, 102.
sale of good-will of business carried on under adopted name, 102.
trade carried on in different districts or towns, agreements not to interfere with, 102.
covenant by retiring partner, 102.

RESTRICTIVE COVENANTS,
as to user of premises, run with land, 305, 694.

RESTRICTIVE INDORSEMENT,
of bills and notes, 1251.

RETIRING OF BILLS,
by acceptor, as holder, at maturity, 1282.

RETIRING PARTNERS,
liabilities of, 365, 367.
dormant partners retiring, 369.

REVERSION,
assignment of, effect of, on accruing or accrued rent, 676.
extinguishing right to distrain for rent in arrear at time of, 681.
covenants real annexed to, 231.
position of assignee of reversion as to, 232.
position of lessee and his assigns as to, 232.

REVERSIONER,
covenants between lessee and, when running with land, 229.

REVOCATION,
of gratuitous promises, 16.
of authority of agents, 333, 945.
publication of, 333.
of contracts, power of, 171, 172.
stamp on, 1355.
See COUNTERMAND.
of licence to distrain and sell chattels, 831.
by act of bankruptcy, 831.

REWARD,
promise of, for conviction of felon, 6.
for recovery of lost property, 868.

RISK,
of loss, transfer of, on sale of land, 482.
on sale of goods, *primâ facie* passes with property, 591.
liability of buyer for, on refusal to take delivery, 666.
covered by policy of marine insurance, 1130.
fire insurance, 1216.
extraordinary risks, 1218.
life insurance, 1228.

ROAD SURVEYORS. *See* PARISH OFFICERS.

ROBBERY. *See* THEFT.

ROLLING STOCK,
of railway, when protected from distress, 789.

SALARIES,
of public officers, funds out of which to be paid, 398.
no implied promise of payment of, 874.
of officers of friendly societies, how provided for, 403.

SALE,
contract of, in general, 474.
distinction between, and agreement to sell goods, 527.
distinction between, and contract for letting and hiring of work, 587, 867.
implied contract for, of goods, 454.
of distress, statutory power of, 800, 802.
See SALE OF GOODS—SALE OF LANDS.

SALE BY AUCTION. *See* AUCTION.

SALE OF GOODS,
to married woman as husband's agent, 425.
specific performance of contract for, 292, 628.
conditions imposed on, do not run with goods, 310.
contracts for, 28, 526.
authentication of, 28, 528.
sale and agreement to sell, 527.
capacity to buy and sell, 528.
contract of sale, how made, 528.
for 10*l.* and upwards, 528.
requisites of written memorandum of, 36, 529.
brokers' bought and sold notes, 531.
liability of broker, 532.
signature of memorandum, 39—43.
signature by agents, 41.
acceptance and actual receipt of things sold, 28, 532.
receipt for inspection and approval, 534.
when goods have been purchased by bailee, 534.
constructive acceptance, 535.
constructive possession and extinction of right of lien, 535.
of bills of lading, delivery orders, and dock warrants, 536.
by carriers, forwarding agents, and agents for custody, 537.
part acceptance and actual receipt binding contract, 537.
acceptance taking whole contract out of statute, 538.
earnest and part payment, 539.
subject-matter of contract, existing or future goods, 539.

SALE OF GOODS—*continued.*
price, how fixed, 540.
if not fixed to be reasonable, 540.
reasonable, what is, a question of fact, 541.
adding customs duty to price, 541.
time, conditions and warranties as to, 542.
when of essence of contract, 542.
meaning of word "month," 542.
enlargement of time of performance, 544.
warranty, express, 545.
made pending negotiations, 545.
private representations prior to sale, 545.
representations amounting to, 546.
on sale of horses, 547.
breach of, what is evidence of, 548.
what is unsoundness, 548.
manifest defect not covered by warranty, 549.
proof of vice, 549.
representations not amounting to warranty, 549.
matters of opinion and belief, 550.
proof of warranties, 551.
that party relied on representation, 552.
construction of express warranty, 553.
warranty by agent, 554.
distinction between condition and warranty, 554.
when condition to be treated as warranty, 554.
effect of breach of warranty by vendor, 557.
conditional and defeasible sales, 555.
rejection and non-acceptance of goods, 558.
implied conditions and warranties, 559.
as to title, 559.
sale by description, 562.
quality or fitness, 564.
where nothing said as to quantity or quality, 565.
caveat emptor, 565.
article to be used for specific purpose, 566.
merchantable quality, 568.
on sale of provisions, 569.
that goods are vendor's own manufacture, 569.
as to genuineness of trade-mark, 569.
of trade description, 570.
sale by sample, 570.
sales, voidable for fraudulent misrepresentation, 572.
false representation through third party, 573.
fraudulent breach of warranty, 574.
counterfeit trade-marks, 574.
implied warranty of marked goods, 574.
fraudulent use of, with intent to deceive, 574.
fraudulent concealment, 575.
sale with all faults, 577.
purchaser electing to avoid contract, 578.
transfer of property, 579.
intention of parties, 579.
rules for ascertaining intention, 579.
imperfect sale, unascertained price, 583.
sale or return, 585.
unascertained chattels, 585.
contracts for manufacture and sale, 585.
selection and appropriation of goods to purchaser's use, 587.
reservation of right of disposal, 588.
by bill of lading, delivery under bill, 589.
risk passes *primâ facie* with property, 591.
undivided shares, 591.

SALE OF GOODS—*continued.*
transfer of property—*continued.*
sale by person not owner, 592.
market overt, 593.
sale under voidable title, 594.
revesting of property in stolen goods, 594.
possession after sale, 595.
purchaser having notice of *fi. fa.*, 596.
delivery of goods, 596.
duties of seller and buyer, 596.
actual and constructive delivery, 597.
proof of delivery, 597.
payment and delivery concurrent conditions, 598.
rules as to delivery, 599.
place of delivery, 599.
when time not fixed, 599.
when goods in third person's possession, 599.
hours for delivery, 599.
expenses of delivery, 600.
delivery of wrong quantity, 600.
delivery by instalments, 602.
delivery to carrier, effect of, 604.
seller's duty, 604.
where sea transit, 604.
deterioration in transit, 605.
buyer's right to examine, 605.
acceptance of, what constitutes, 606.
buyer need not return rejected goods, 606.
neglect or refusal to take delivery, 606.
unpaid seller's rights against goods, 607.
definition of unpaid seller, 607.
definition of seller, 607.
lien, 608.
insolvency of purchaser, 608.
countermand of delivery order, 609.
sale of undivided quantity, 611.
part delivery, effect of, on lien, 611.
termination of lien, 611.
lien not lost by judgment for price, 611.
rights of sub-purchasers, intervention of, 611.
stoppage *in transitu,* 612.
right of, 612.
application of doctrine, 612.
nature of, 612.
duration of transit, 613—618.
carriers and forwarding agents, 613.
when transitus at an end, 614.
before arrival at destination, 614.
after arrival at destination, 614.
goods in hands of agent for custody, 615.
goods rejected by buyer, 615.
delivery on buyer's ship, 616.
wrongful refusal of carrier to deliver, 617.
delivery of part of goods to buyer, 617.
mode of stoppage, 618.
re-sale by buyer, rights of sub-purchaser, 618.
transfer of bill of lading, 619, 620.
effect of, on sale of goods, 620.
sale not generally rescinded, 620.
re-sale by seller, title of buyer, 620.

SALE OF GOODS—*continued.*
transfer of property—*continued.*
delivery of goods—*continued.*
unpaid seller's rights against goods—*continued.*
when vendor may re-sell, 621.
goods of perishable nature, 621.
notice of intention to re-sell, 621.
remedies of seller, 622.
action for price, 622.
goods bargained and sold, 622.
damages, when recoverable, 623.
goods sold and delivered, 623.
goods sold on credit, 624.
damages for non-acceptance, 625.
measure of, 625.
where available market, 625, 626.
remedies of buyer, 626.
non-delivery, action for, 626.
measure of damages for, 626.
where available market, 626.
where no market, 627.
where goods re-sold in foreign market, 627.
anticipated profit, not recoverable as special damage, 627.
where shares not delivered by vendor, 628.
specific performance, 292, 628.
warranty, breach of, 629.
measure of damages, 629—631.
special damages, 631.
re-sale with warranty, 631.
costs of legal proceedings, 631, 632.
interest and special damages, right to recover, not affected by Sale of Goods Act, 632.
sale by auction, rules as to, 632.
in lots, 632.
when complete, 632.
right of seller to bid, 632.
subject to reserved price, 633.
sale of fixtures, tenant's and trade, 633.
authentication of contract, 28, 633.
of growing crops, &c., stamp on, 1358.

SALE OF INCORPOREAL HEREDITAMENTS.
See INCORPOREAL HEREDITAMENTS.

SALE OF LANDS AND TENEMENTS,
contracts for sale of interests in lands. *See* FRAUDS, STATUTE OF.
authentication of contract, 22—27.
contracts of sale in general, 474.
sale of lands, 474.
to infant, liability of infant, 411.
executory contracts for, 22, 23.
requisites of memorandum, 36.
signature to memorandum, 39, 475.
by agents, 41.
computation of time in legal documents, 57.
release of purchaser by bankruptcy, 197.
sales by auction, 476—479.
oral contracts for, 479.
part performance of, 480.
enforcement of, 480, 481.
transfer of estate before conveyance executed, 481.
equitable ownership, 482.
title under Land Transfer Act, 483.

SALE OF LANDS AND TENEMENTS—*continued.*
production and proof of vendor's title, 484.
abstract of title, delivery of, 485.
delivery of title-deeds is not delivery of, 485.
requisitions and objections to title, 486.
title to realty, 487.
period for which title ought to be shown, 488.
title to leaseholds, 489.
waiver of proof of, and of objections to, title, 491.
production of title-deeds, 493.
loss of title-deeds, after abstract delivered, 494.
effect of misdescription, 494—502.
obligation to disclose material defects, 494.
representation by vendor amounting to warranty of fact, 496.
alterations in condition of property, 502.
time and mode of performance, 502.
where time is of essence of contract, 504.
enlargement of time of performance, 505.
non-performance by vendor, 506.
non-performance by purchaser, 509.
forfeiture of deposit, 509.
deposits in hands of auctioneers, &c., 509.
rights of vendor, 510.
damages for breach of contract by purchaser, 512.
by vendor, 513.
specific performance of contract for, 514—519.
payment of purchase-money into court, 519.
assignment of contract to purchase land, 520.
invalid sales, 520.
failure of sale for want of title, 520.
eviction of purchaser, 520.
qualified covenants for title, 521.
breach of covenants for title, damages for, 523.
non-payment of purchase-money after conveyance executed, 524.
sale of pretenced titles, 525.
avoidance of sales, 525.
fraudulent concealment, 525.
sale subject to any defect or error, 526.
with all faults, 526.
stamp duty on, 1341.

SALE OF OFFICES,
illegality of, 86, 91.
See ILLEGAL CONTRACTS.

SALE OF PENSIONS,
illegality of, 92.

SALE OF SHARES OR STOCK,
authentication of contracts for, 29.
specific performance of, 293, 649.
in joint-stock companies, 639.
stamp on, 1350, 1351.

SALE WITH ALL FAULTS,
of land, 526.
of goods, 577.

SALES, ILLEGAL. *See* ILLEGAL CONTRACTS.

SALVAGE CHARGES,
meaning of, under maritime law, 1196, note (*u*).
when recoverable under suing and labouring clause, 1199.

SALVAGE SERVICES,
nature of, 869.
claim for, when payable, 869, 870.
services must be successful, 869.
misconduct of salvors when a bar to, 869.
rendered by passenger, 870.
by seamen of ship salved, 870.
by pilot, 870.
by crew of lifeboat, 870.
where salving and salved ship belong to same owner, 870, 871.
separate awards against cargo and freight, 871.
agreements for, 871.
must be reasonable at time made, 871.
by seamen to abandon right to salvage, invalidity of, 871.
exception, 871.
avoidance of, on ground of compulsion or fraud, 871.
forwarding of wrecked passengers by captain, 872.

SAMPLE,
sale by, 570.
not sale in market overt, 593.

SATISFACTION. *See* ACCORD AND SATISFACTION.

SCHOOL,
covenant not to keep, forfeiture on breach of, 711.

SCRIP,
sale of, 638.
executory contracts for, 639.
stamp on contract notes for, 1350.
transfer of foreign, 1289.
See SHARES.

SCRIPHOLDERS,
rights of, 645.

SEALING,
of deeds, 19.
acknowledgment of, when to be made, 19.
by corporations, by common seal, 373.
of lease, effect of non-sealing by lessee, 670.
by lessor, 671.

SEAMEN'S WAGES,
recovery of, under Merchant Shipping Act, 936.
effect of promise to pay, for increased exertions, 4.

SEA-RISKS,
covered by policy of insurance, 1176.

SEASON TICKET,
railway, forfeiture of deposit, 1065, 1066.

SEAWORTHINESS,
in insurance cases, 1162.
warranty of, implied in voyage policy, 1162.
where policy attaches on ship in port or on voyage, 1162.
where voyage in different stages, 1162.
when ship deemed to be seaworthy, 1162, 1164.
no implied warranty to continue seaworthy, 1162, 1163.
conditions precedent to insurer's right to recover, 1162.
warranty that ship fit to carry goods insured, 1163.
in case of insurance on deck cargo, 1163.
presumptions of unseaworthiness, 1163.
questions of fact for jury, 1165.
in case of goods, when not implied, 1165.

SECRETARY,
of railway company, contracts with, 378.
of joint-stock company, 389.
See PUBLIC OFFICERS.

SECURITIES. *See* BILL OF EXCHANGE.
for money won at play, not absolutely void, 108.
specialty or simple contract, accord and satisfaction by, 185.
for due performance of contracts, 884.

SEDUCTION. *See* ILLEGAL CONTRACTS.

SEPARATION,
of husband and wife, 427, 1324, 1325.
by reason of adultery, 427.
by desertion of husband by wife, 428.
of wife by husband, 428.
what amounts to expulsion, 430.
by mutual consent, 430.
judicial, effect of, 431.
costs of, liability of husband for, 429.
of husband and wife, illegality of contract providing for, 78, 1324.

SEPARATION DEEDS,
nature of, 1327.
subsequent reconciliation affecting covenants in, 1326.

SERVANT,
who is a, 916.
purchase by, liability of master for, 337.
theft by depositary's, 846, 900.
by mandatary's, 864.
liability of bailee for negligence of, 901.
master for negligence causing injury to, 921, 922.
injury to, by fellow-servant, non-liability of master, 926.
duties of, 929.
character, no legal obligation on master to give, 941.
false, offence of giving, 941, note (*x*).
title of, to clothes by hiring and service, 941.
theft by, of common carrier, 1041.
liabilities of common carrier's servants, 1042, 1043.
implied authority to bind railway company by special contract, 1050.
See MASTER AND SERVANT.

SERVICE AT WILL. *See* MASTER AND SERVANT.
what constitutes, 921.

SERVICES,
in connection with transfer of interest in land, 25, 26.
contracts for, prohibited, 114.
part payment by performance of, 216.
informal contracts for, by railway companies, 388.
See WORK AND SERVICES.

SET-OFF,
in bankruptcy, 275.

SETTLEMENT OF ACCOUNTS,
amounting to payment, 216.
See PAYMENT—ACCOUNT STATED.

SETTLEMENTS,
promises of, 1316.
contracts in fraud of, 1317.
marriage, 1318.
stamp duty on, 1353.

SEWERS RATE,
deduction of, from rent, 677.

SHAREBROKER,
duties and responsibilities of, 950, 951.
See AGENT—BROKERS.

SHAREHOLDERS,
in registered joint-stock companies, 379, 380.
in partnerships, authorised to sue and be sued in name of public officer, 388.
in mining companies, liabilities of, 389.
proof of parties being shareholders, 390.
in banking co-partnerships, 391, 392.

SHARES,
authentication of contracts for sale of, 28, 29.
not goods within Sale of Goods Act, 29.
not an interest in land within Statute of Frauds, 29.
application for, withdrawal before allotment, 15.
irregular allotment of, when voidable, 137.
purchase of shares by infants, when valid, 411.
actions for not replacing stock, 815.
specific performance, 292, 640, 649.
nature of, in limited companies, 636.
title to, 638, 647.
in mining companies, 637.
executory contracts for sale of, 639.
agreements for transfer of, 640.
mode of performance, 641.
time of performance, 644.
implied undertakings and indemnities, 644.
payment of calls, 644.
scripholders, rights of, 645.
transfer deeds, 647.
registration of forged transfers, 647.
transfer of foreign scrip, 1289.
mortgages of, 841.
void by reason of reputed ownership, 841, 842.
lien upon, 842.
equitable title, how effected, 842.
what constitutes valid charge, 842.

SHERIFF,
sale of goods by, no warranty of title on, 561.

SHERIFFS' OFFICERS,
expressly employed by solicitor to execute process, 953.
action against solicitor for fees, 953.

SHIP,
meaning of word, in marine policy, 1130.

SHIP-BROKERS,
authority of, to bind shipowner by warranty, 343.
right of, to commission, 958.
See AGENT.

SHIPBUILDING,
when general property in unfinished ship vests in employer, 885.

SHIPMASTER,
authority of, to hypothecate the ship for repairs and supplies, 339, 341, 835, 836.
by creating a lien on ship, 834.
to hypothecate cargo, 838.
to pledge credit of shipowners, 339.
to sign bills of lading, 907.

SHIPMASTER—*continued.*
limitation of authority of, 339.
general authority, when not revocable, 341.
where ship let to freight, 341.
where charter-party amounts merely to contract of carriage, 341, 616.
when servant of charterer, 341, 616.
liability of shipowner upon contracts made by, 340, 341.
lien of, 966.

SHIPOWNERS,
liability of, upon contracts made by shipmasters, 340, 341.
rights and liabilities of, upon charter-parties, 969—1014.
under bill of lading, 980.
limitation of liability of, by special contract, 985.
by statute, 990.
delivery of goods by, implied undertaking for, 992.
lien of, for freight, 998.
consignee primarily liable for freight, 999.
See CARRIERS—CHARTER-PARTY.

SHIP'S HUSBAND,
authority of, 343.
receipt of money by, 955.
lien of, 966.

"SHIP'S TACKLE AND FURNITURE,"
what is included in term, 1127.

SHIPS,
mortgage of and shares in, 831—833.
hypothecation of, by bottomry bond, 834.
repairs to, authority of master to pledge owner's credit for, 339, 340.
limitation of authority, 339—342.
illegal pledges of certificates of registry of, 839.
letting and hiring of, by charter-parties, 970.
parties to charter-parties, 971, 972.
payment of freight or hire, 993.
calculation of freight, 996.
time freight, 997.
lien for freight, 998.
See CHARTER-PARTY—CARRIER—FREIGHT—WORK AND SERVICES.

SHIPWRIGHTS,
lien of, 967.

SIGNATURE,
of deed, 19.
wife cannot bind husband by, 423.
what is sufficient, within Statute of Frauds, 39.
by agents, 41, 327, 528, 1301.
See FRAUDS, STATUTE OF.
obtained by fraud, 129.
of acknowledgments within Statute of Limitations, 211.

SIMONY,
contracts amounting to, invalidity of, 93.
statutes prohibiting, 93, 94.

SIMPLE CONTRACT. *See* CONSIDERATION—CONTRACT.
nature of, 2.
parties entitled to enforce, 308.
parties liable upon, 313.
See PARTIES TO CONTRACTS.

SIMPLE CONTRACT—*continued.*
limitation of actions upon, 202.
acknowledgment of, extending period of limitation for, 211.
transfer of, by death, 241.

SINGER,
undertaking by, to rehearse, prevention through illness, 55.

SKILLED WORKMEN,
want of skill in borrower of chattel, 812.
in gratuitous mandatary, 861.
liabilities of, 889.
dismissal of, for incompetency, 931.

SLEEPING PARTNER. *See* DORMANT PARTNER.

SLIP. *See* MARINE INSURANCE.
reference to, although unstamped, 1107, 1124.

SMALL TENEMENTS,
recovery of possession of, 739.
by summary process before justices, 739.
under County Courts Act, 739, 740.

SMUGGLING,
sale of goods for, right of vendor to recover on, 112.
when foreigner not entitled to recover on, 112.
adventure, insurance on, 1159.
premium, when recoverable, 1159.

SNOW,
blocking railway, duty of company to forward passengers, 1024.

SOCIETY. *See* BENEFIT BUILDING SOCIETY—FREEHOLD LAND SOCIETY—FRIENDLY SOCIETY—INDUSTRIAL AND PROVIDENT SOCIETY.

SOLICITOR,
uncertificated, non-recovery of costs, fees, &c., by, 116.
acts done by, binding his client, 116.
payment to, in legal proceedings, is payment to client, 159.
authority of, as agent, to bind client by compromise, 344, 891.
when retainer is at an end, 344, 891.
receipt of money by, on account of firm, 850, 851.
services by, as trustee, 872.
duty of, on acceptance of retainer, 891.
in respect of conduct of action, 891, 952.
to exercise reasonable skill and care, 890, 893, 952.
to act with fidelity to client, 891, 892.
on receipt of deposit as agent of vendor of real estate, 468, 953.
as to receipt of money for investment, 953.
to deliver up client's papers in good order, 953.
agreements by, with clients, under Solicitors Act, 894, 895.
under Solicitors' Remuneration Act. 895.
adjustment of accounts by, with client, effect of, 895.
gift by client to, when valid, 952.
town, relation between, and country solicitor, 953.
delivery of bill of costs by, one month before action, 953.
negligence of, 890.
in conduct of proceedings, 892, 893, 953.
in compromising action, 893.
money expended subsequent to, non-recovery of, 953.
negligence of agent, partner, or clerk, liability for, 891.

SOLICITOR—*continued.*
liability of, to sheriff's officers employed to execute process, 953.
receipt of money by, when acting as agent to country solicitor, 956.
lien of, extent of, 963, 964.
when it attaches, 963.
when it does not attach, 965.
under Solicitors Act, 1860...963.
property recovered or preserved, 963, 964.
as between London solicitor and country solicitor, 864.
London agent and country solicitor's client, 864.
when acting for mortgagor and mortgagee, 965.
for preparing marriage settlement, 965.
on client's documents and papers, 964—966.
where London agent employed, 964.
abandonment of, by taking security from client, 966.

SPECIAL DAMAGES,
when recoverable, 278, 281.
cost of legal proceedings, when recoverable, 283, 632.
for breach of warranty, 281, 629, 631.
re-sale with warranty, 632.

SPECIALTY DEBTS,
limitation of actions for recovery of, 202.
what are, 203.
acknowledgments of, extending period of limitation, 210.

SPECIFIC APPROPRIATION,
of securities, 1299.

SPECIFICATION,
in building contracts, performance of, 880, 881.
deviations from, recovery of extras, 884.

SPECIFIC DELIVERY OF CHATTELS,
orders for, when wrongfully detained, 300.

SPECIFIC PERFORMANCE,
of contracts, 292—307.
when granted, 292.
of sale of lands, 292, 293, 514.
of goods, 292, 628.
of article having *pretium affectionis*, 292, 300, 629.
of chattels of specific character, 292, 628.
of stocks and shares, 292, 649.
when not generally granted, 293.
matter of discretion for Court, 293, 299.
conditional contracts, not granted unless condition fulfilled, 293.
mutual relief to both parties, 293.
accessory agreement, not decreed if principal agreement cannot be enforced, 294.
inconvenience to public, no ground for refusing, 294.
trustee promising to leave money to *cestui que trust*, 293.
cases in which relief has been granted, 294.
sale of goodwill of business, &c., 294.
sale of patent, 294.
contract to insure against fire, 294.
agreements for annuities, 294.
for partition of joint property, 294.
to grant lease, 294.
evidenced by draft lease, 294.
to renew lease, 294.

SPECIFIC PERFORMANCE—*continued.*
cases in which relief has been granted—*continued.*
agreements for lease of undivided moiety of mineral property, 295.
for option to purchase property, 295.
to erect buildings where not yet planned, 295.
to execute mortgage, 295.
contracts of partnership in cases of part performance, 295.
contract to lend money, not granted, 295.
articles of apprenticeship, not granted, 295.
agreements to refer not granted, 295.
for purchase of lease, 296.
in cases of building contracts, 295.
of charter-parties, 296.
injunction against improper employment of ship, 296, 303.
agreements in consideration of marriage, 296.
promises of portions and settlements, 296.
deeds of separation, 297.
covenants of husband making provision for adulterous wife, 297.
of contracts under seal without consideration, 297.
of contracts between incompetent parties, 297.
illegal or immoral contracts, 297.
contracts founded on fraud, 297.
on clear mistake, 297.
contracts doubtful as to extent defendant intended to be charged, 297.
of contracts after rectification, 298.
proviso for penalties or liquidated damages, 298.
of uncompleted contract, 298.
agreements with auctioneers or agents for sale of goods, when granted, 299.
discretion of Court, how exercised, 299.
oral evidence not admissible to control, alter, or discharge original contract, 299.
performance *sub modo,* 300.
of statements and representations forming foundation of contract, 300.
orders for specific delivery of chattels wrongfully detained, 292, 300.
injunction to compel performance or restrain breach of contract, 300.
to restrain breach of covenants in lease, 301.
not to practise or trade within certain limits, 301.
breach of mutual covenant not to ring church bell, 302.
of distinct negative stipulations, 302.
of covenants not to build, plant, or inclose, &c., 303.
to compel parties to abide by their own statements, 306.
of foreign contracts, 307.
principle on which, granted, 302, 304.
in case of option to take liquidated damages, 307.
of contract for sale of goods, 628.
of purchase and sale of shares, &c., 649.
See INJUNCTION.

SPIRITUOUS LIQUORS,
sale of, when price not recoverable, 110.
regulation of, by statute, 111.
in emigrant ships, prohibited, 111.

STAKEHOLDERS,
recovery of money in hands of, 123, 849.
deposits by two persons jointly, 848.

STAKEHOLDERS—*continued.*
liabilities of, 849.
power of, to compel adverse claimants to interplead, 124, 850.
payment into court by, under Trustee Act, 850.
See DEPOSIT—BAILMENT WITHOUT REWARD.

STAMP,
sufficiency of, appeal against ruling as to, 1334.

STAMP DUTIES,
illegal contract as to, 90.
exemption of acknowledgment from, 214.
interpretation of terms in Stamp Act, 1327.
general principles with respect to stamps, 1327.
instruments relating to Crown property, 1328.
how instruments to be written and stamped, 1328.
stamping after execution, 1328.
instruments chargeable with more than one duty, 1330.
several deeds on one sheet, 1330.
appropriated stamps, 1333.
facts affecting duty to be set forth, 1333.
valuation of foreign money, 1333.
of stock and marketable securities, 1333.
effect of statement of value, 1333.
denoting stamp, 1333.
reception in evidence of unstamped instruments, 1334.
use of adhesive stamp, 1335.
cancellation of adhesive stamps, 1335.
re-stamping altered documents, 1335.
admissibility of unstamped documents for collateral purposes, 1337.
stamp duties on contracts executed abroad, 1338.
stamps on particular documents, 1339.
on deeds, 1339.
progressive duty, abolition of, 1339.
attested copies, 1339.
duplicates and counterparts, 1339.
purchases of property under statutory authority, 1340.
conveyances or transfers on sale, 1341.
contracts not operating as conveyances, &c., 1345.
mortgages, 1346.
marketable securities, 1349.
foreign share certificates, 1349.
contract notes, 1351.
sale or purchase of options, 1351.
covenants, 1353.
exchanges, partitions, &c., 1353.
settlements, 1353.
in case of alternative duties, 1354.
revocations of uses and trusts, 1355.
releases or renunciations, 1355.
lease or tack, 1355.
under Finance Act, 1910...1356.
sale of vesture, herbage, and growing grass, 1358.
agreements for leases, 1358.
assignments and surrenders, 1358.
agreements to surrender, 1358.
apprenticeship, 1358.
charter-parties, 1360.
transfers of ships, 1360.
agreements, 1360.
exemptions, 1362.
sale of goods and chattels, 1363.
guarantees and indemnities, 1365.
exemption of, for payment of goods, 1365.

STAMP DUTIES—*continued.*
stamps on particular documents—*continued.*
delivery orders, abolition of, 1365.
warrants for goods, 1365.
Government stock, transfer of, when exempt, 1366.
share warrants, 1366.
stock certificates, 1366.
orders or authorities for transfer of mining shares, 1367.
scrip certificates, 1367.
contracts for sale of land and interests in land, 1368.
for sale of fixtures, 1368.
of hiring and service, 1368.
for letting and hiring of taskwork, 1368.
calculation of value of agreement, 1369.
contracts of uncertain value, 1370.
bare offers and proposals, 1370.
bare admissions and acknowledgments, 1370.
acknowledgments of debts in writing, 1372.
bare licences and authorities, 1372.
contracts of deposit and pledge, 1373.
bank notes, 1373.
bills of exchange and promissory notes, 1374.
what term "bill" or "note" includes, 1375.
post-dated cheques, 1378.
what instruments are bills of exchange, 1378.
bills of lading, 1379.
contracts of insurance, 1380.
marine insurance, 1380.
against accidents, 1382.
against damage to property, 1382, 1383.
legal alterations in marine policy, 1381.
penalty if marine policy unstamped, 1381.
upon any life or lives, 1384.
receipts, 1385.

STANDING ROOM,
in factories, letting of, when amounting to a demise, 764.

STATUTE OF FRAUDS. *See* FRAUDS.

STATUTE OF LIMITATIONS. *See* LIMITATIONS.

STATUTES. *See* ACT OF PARLIAMENT.
contracts made illegal by, 88.
implied contract to pay money arising out of, 455.

STATUTES MERCHANT AND STAPLE,
contracts by, are contracts by record, 22.

STEVEDORE,
stowage of cargo by, duty of shipowner as to, 978, 979.
injury to goods by negligence of, 988.

STOCK. *See* SHARES.
transfer of, 647.
damages recoverable in actions for not replacing, 815.
mortgage of, 841.
lien on, 842.
stamp on certificates of, 1366.

STOCKBROKERS,
authority of, 343.
rights and liabilities of, 950, 951.
See BROKERS—AGENTS.

STOCK EXCHANGE,
custom of, undisclosed principal not affected by, 323.

STOCK EXCHANGE RULES,
authority of broker to deal according to, 343.
mode of transacting business according to, 639, 641.
executory contracts for sale of shares, effect of, 639, 643.
position of jobbers, 643.
time of performance, 644.
rights of scripholders, 645.
transfer deeds, validity of, 646.
share certificates, evidence of title, 647.
registration of forged transfers, effect of, 648.

STOLEN BANK-NOTE,
payment with, when valid, 156, 1308.

STOLEN GOODS,
sale of, in market overt, 593.
See MARKET OVERT.
re-vesting of property in, on conviction of thief, 594.

STOPPAGE *IN TRANSITU*,
unpaid seller's right of, 607, 612.
nature of right of, 612.
duration of, 613.
goods in hands of forwarding agents, 613.
goods in hands of purchaser's agents for custody, 615.
conversion of carrier into agent for custody on behalf of purchaser, 615.
delivery of goods on buyer's ship, 616.
stoppage of part of goods sold, 617.
mode of exercising right of, 618.
by taking actual possession of goods, 618.
by notice of stoppage, 618.
intervention of rights of sub-purchasers, 618.
effect of, on contract, 620.
when vendor may re-sell, 621.
extinguishment of right of stoppage, 617, 618.

STOWAGE,
letting and hiring of places of, 764.
of goods, liability of warehousemen, 864, 865.
of cargo by charterer or by stevedore, 978, 979.

STRANDING,
in marine insurance, 1201.
what constitutes, 1201, 1202.
liability of insurer for excepted losses, 1201.

STRANGER,
payment by, not necessarily a discharge of debtor, 157.
payment by or to, barring Statute of Limitations, 219.
to contract, no action maintainable by, 308.
receipt of money by agent to be paid to, 355, 769.
transfer of deposit to, 847.
remedy of depositor, 847.

STRAW,
covenant to consume, on the farm, 746.
damages for breach of, 753.
See HAY AND STRAW.

SUB-AGENTS,
receipt of money by, liability for money, 955.

SUB-PURCHASE,
of goods, nature and effect of, 611, 618.

SUBSCRIBERS,
to clubs, liabilities of, 395, 396.

SUBSTITUTION. *See* ACCORD AND SATISFACTION—NOVATION AND SUBSTITUTION.

SUFFERANCE,
tenancy by, what constitutes, 663.

SUING AND LABOURING CLAUSE,
expenses recoverable under, 1203.
particular charges recoverable under, 1196.
salvage charges, when recoverable under, 1196, 1199.

SUNDAY SALES,
and trading, illegality of contracts made in exercise of trade, 113.

SURETYSHIP,
contract of, 1079—1105.
See GUARANTEE.

SURGEON,
disabilities of, when unregistered, 115.
right of, to remuneration, 873, 890.
negligence and want of skill of, 890, 897.

SURRENDER OF LEASES. *See* LANDLORD.
how made and authenticated, 43, 716.
deeds and agreements of, 716.
by act and operation of law, acting as estoppel, 717.
acceptance of new lease or of new tenant, 718.
by joint tenant, effect of, 719.
non-extinguishment of derivative estates by, 720.
effect of, on existing breaches of covenant, 720.
stamp duty on, 1358.

SURVEYORS,
approval of work by, payment dependent on, 878.
relief against corrupt decisions of, 878.
negligence of, 890, 896.

SURVIVORSHIP,
of executors and administrators, liability on, 257.
of joint contractors, liability on, 260.
of wife, rights on death of husband, 432.
of husband, rights on death of wife, 433.

TACK,
stamp duty on, 1355, 1356.

TASKWORK,
executory contracts for, 868.
implied promise of remuneration for, 868.
honorary services, employment by custom, 873.
rights of employer and workman, 874.
time of performance, 875.
See TIME OF PERFORMANCE.
entire performance of, condition precedent to payment, 876.
divisible and apportionable work, 876.
approval of work before payment, 877, 878.
acceptance of defective work by employer, 879, 880.
See CONDITIONS PRECEDENT—PART PERFORMANCE.
abatement of contract price for work partly executed, 882.

TASKWORK—*continued.*
destruction of materials and of work before payment, 884.
loss of material and of price of work, 884.
deviations from contract, liability for extras, 886.
prevention of completion of work by employer, 887.
damages recoverable for, 914.
lien for work done, 887.
liabilities of workmen, 874, 888.
useless, defective, and unskilful work, 889, 890.
re-delivery of materials furnished by employer, 912.
See BUILDING CONTRACTS—MASTER AND SERVANT—WORK AND SERVICES.

TAXES,
deduction of, from rent, 677.

TECHNICAL TERMS,
use of, in contracts, explanation of, 70, 71.

TELEGRAM,
acceptance of offers by, 18.
contracts by, Post Office only agent for transmitter, 18.

TELEGRAPH CLERKS,
authority of, extent of, 339.
sender of telegram not bound by mistakes of, 339.

TENANCY,
how proved, 653.
at will, definition of, 661.
creation of, 661.
determination of, 662.
by sufferance, definition of, 663.
difference between, and tenancy at will, 663.
right of entry by landlord, when barred, 664.
See LANDLORD AND TENANT.

TENANT,
duty of, not to fell timber trees, 691.
to preserve landmarks and boundaries, 693.
See LANDLORD AND TENANT.

TENANT RIGHT,
as to away-going crops, &c., 740.

TENANTS IN COMMON. *See* JOINT TENANTS.

TENDER,
of performance of conditions and contracts, 146.
of money, 167.
what amounts to valid tender, 167, 168.
offers of payment not amounting to, 169.
conditional, 169.
of conveyance for execution before action for non-execution, 507.
waiver of, 145.
of rent before distress, effect of, 781.
before sale of distress, 801.
to whom to be made, 801.
of debt extinguishing lien, 910.

TERMS OF ART,
interpretation of, 71.
trade acceptations, 71.

TERMS OF YEARS. *See* LANDLORD—SURRENDER.

THEFT,
of goods of guest at inn, 766.
of things let to hire by servants of bailee, 900.
distinction between theft and robbery, 900.
of things lent, 807.
restoration, or its equivalent, 813.
of deposits by servant of depositary, 846.
in cases of gratuitous commission, by servant of bailee, 864, 900.
from carriers by water, 984.
by servants of common carriers, 1041.

THIRD PARTY,
services to, at request of promisor, good consideration, 7.
payment by, when a discharge of debtor, 157.
rights of, on contract, 308.
fraudulent representation through, 573.

TILLAGES,
rights of outgoing and incoming tenants, 740—746.

TIMBER TREES,
sale of, when contract for, an interest in land, 26.
preservation of, by tenants, 691.
right of landlord to cut, 693.
right of property in, 707.

TIME,
computation of, in legal documents and contracts, 57.
covenants not to sue for limited time, 177.
when of essence of contract on sale of realty, 502.
on sale of goods, 141, 542.

TIME FREIGHT,
nature of, 997.
how calculated, 997.

TIME OF PERFORMANCE,
of contracts, 140.
for sale of lands, 502.
enlargement, 505.
for sale of goods, 141, 542.
enlargement of time, 544.
for sale of shares, 644.
for works and services, 875.
for buildings, 883.
of charter-parties, 976.
of conditions precedent in charter-parties, 976.
effect of extending, on surety, 1093.
of promises to marry, 1313.

TIME POLICY. *See* MARINE INSURANCE.

TIME TABLES,
representations by railway company by, 1023.

TITHE RENT-CHARGE,
illegal contract to pay, 90.
liability of landlord for, 677.
non-payment of, by out-going tenant, 747.

TITLE,
to realty, 483—494.
registration of, under Land Transfer Act, 483.
production and proof of vendor's, 484, 487.
abstract of title, 485.
period for which title ought to be shown, 488.
waiver of proof of title, 491.
to leaseholds, 489.

TITLE—*continued.*
waiver of objections to, 491.
production of title deeds, 493.
loss of title deeds after delivery of abstract, 494.
want of, in vendor, 520.
recovery of purchase-money on eviction, 520.
covenants for, qualified, 521.
under Land Transfer Act, 521.
damages for breach of, 523.
sale of pretenced, 525.
to chattels, conditions and warranties as to, 559—562, 592.
implied undertaking as to, 559.
sale by person not the owner, 592.
buyer only acquires seller's title, 592.
sale in market overt, 593.
sale under voidable title, 594.
to scrip, shares, &c., 638.
implied warranty of, by pledgor, 821.
to clothes by hiring and service, 941.

TITLE DEEDS,
production of, 487, 493.
loss of, after delivery of abstract, 494.

TORT,
actions of, founded on contract, parties to, 290.

TOTAL LOSS,
abandonment by insurer on, 1190.
See MARINE INSURANCE.

TRADE,
contracts in restraint of, 95—103.
See RESTRAINT OF TRADE.

TRADE ACCEPTATIONS,
interpretation of, 71.

TRADE DESCRIPTION,
warranty of genuineness of, 570.

TRADE MARK,
warranty of genuineness of, 569.
counterfeiting, 574.
implied warranty on sale of marked goods, 574.
fraudulent use of, with intent to deceive, 574.

TRADE USAGES. *See* CUSTOM.

TRADES UNIONS,
agreements by, not void or voidable, 96.
agreements between members of, enforcement of, 97.
recovery of money payable under rules of, 97.
contracts with, statutory provision for regulating, 404.

TRADING COMPANIES,
under management of trustees or directors, 369, 378, 387, 388.
See BANKING CO-PARTNERSHIP—JOINT-STOCK COMPANY.

TRADING CORPORATIONS. *See* CORPORATION.

TRANSFER,
of interest in land, 22.
of contracts by assignment, 221.
See ASSIGNMENT.
of covenants. *See* COVENANTS RUNNING WITH THE LAND.
transfer by death, 241.
See HEIR AT LAW—EXECUTORS AND ADMINISTRATORS.

TRANSFER—*continued.*
transfer by marriage, 261.
See MARRIED WOMEN.
transfer by bankruptcy, 267.
See BANKRUPTCY.
of property in chattels, 579.
See SALE OF GOODS.
by bill of lading, 589.
of deposit to stranger, 847.
remedy of depositor, 847.
of bailment, 910.
of bill of lading, 1013.
of ship, exemption from stamp duty of, 1360.

TRANSFER DEED. *See* TRANSFER OF SHARES.

TRANSFER OF SHARES,
agreements for, 640.
mode of performance, 641.
time of performance, 644.
implied undertakings and indemnities annexed to contracts for sale of shares, 644.
payment of calls, 644.
rights of scripholders, 645.
transfer deeds, 647.
title of holder evidenced by certificates, 638, 647.
registration of forged transfers, 648.
specific performance of contracts for purchase and sale of stock and shares, 649.

TRANSITUS. See STOPPAGE IN TRANSITU.

TRAVELLERS,
who are, at inns, 769.
right of, to commission for orders, 959.

TREASURER,
of joint stock companies, contracts with. *See* PUBLIC OFFICERS.

TREES. *See* TIMBER TREES.
landlord's right of property in, 707.

TRUCK ACT,
illegality of truck system, 117.
wages to be paid in coin under, 117.
application of, to certain trades and manufactures, 117.
contract for medical attendance to artificer allowed, 119.
extension of, to hosiery manufacture, 119.
to workmen, under Employers' Liability Act, 118.
allowances in addition to wages to servants in husbandry, 120.
deductions for fines, damaged goods or materials, provisions as to, 120.

TRUST DEEDS,
in fraud of creditors, 87.

TRUST ESTATES,
transfer of, on death, 243.

TRUST MONEY,
in hands of bankrupt, does not pass to trustee, 270.
deposit of, with bankers, 855.
constructive notice of trust, 856.
loss of, in hands of bankers, 856.

TRUSTEE ACT, 1893.
payment into court by stakeholder under, 850.

TRUSTEES,
cannot purchase trust estate, 131, 132.
parties to contracts under seal, 312.
contracts by, on behalf of *cestui que trust*, 312.
partners acting as, 358.
for partnerships, contracts with, 358.
of trading associations, restriction of shareholders' liability, 369.
of public works, contracts with, 397.
liability of, for constructive fraud, 131, 132.
payment to one of two, effect of, 163.
payment of interest by, effect of, 219.
payment by, by mistake, 462.
specific performance against, when refused, 294.
services by, remuneration for, 872.
bills and notes by, 1306.
account stated by, with *cestui que trust*, effect of, 471.
no limitation in cases of express trust, 220.
See DIRECTORS.

TRUSTEES IN BANKRUPTCY. *See* BANKRUPTCY.

TRUSTEES OF PUBLIC WORKS,
contracts with, when trustees personally liable, 397.

ULTRA VIRES,
contracts made, by corporations, 374, 377, 382.
by promoters of company, before incorporation, 387.

UNDERLESSEE,
payment of ground rent by, deduction from rent, 676.
holding over by, liability of lessee for, 732.

UNDERTAKING. *See* GUARANTEE.

UNDERWRITERS,
of policies, liabilities of, 1204.
See MARINE INSURANCE.

UNDISCHARGED BANKRUPTS,
rights of, in respect of contracts made after bankruptcy, 274.

UNDISCLOSED PRINCIPALS. *See* AGENTS.

UNDISCOVERED BREACHES,
of contract, time when limitation begins to run, 209.

UNDUE INFLUENCE OVER YOUNG PERSONS,
contracts avoided by, 413, 414.

UNILATERAL PROMISES,
and undertakings, what are, 1, 2.

UNIONS. *See* TRADES UNIONS.

UNPAID SELLER,
of goods, rights of, 607.
See SALE OF GOODS.

UNREASONABLE CONDITIONS,
in special contracts by railway companies, 1046.

UNSOUNDNESS,
in horses, what is, 548.

UNSTAMPED DOCUMENTS,
admissibility of, in evidence, on payment of penalty, 1334.
for collateral purposes, 1337.

UPON,
meaning of word, in contract, 54.

USAGE. *See* CUSTOM AND USAGE.

USE AND OCCUPATION,
actions for, 681.
measure of damages in, 750.
constructive, 682.
by under-tenant or under-lessee, 682, 683.
liability of corporations for, 683.
conversion of tortious holding into permissive occupation, 684.
by one of several joint tenants or tenants in common, 684.
See LANDLORD AND TENANT.

USUAL COVENANTS. *See* COVENANTS.
meaning of, in agreement for lease, 57.

VALUATION AND ADJUSTMENT,
of losses under policies of insurance, 1203, 1208.
See MARINE INSURANCE.

VALUERS,
liability of, for negligence or want of skill, 896.

VENDORS. *See* SALE OF GOODS—SALE OF LANDS.
implied warranties by. *See* WARRANTY.

VESSELS. *See* CHARTER-PARTY—MARINE INSURANCE—SHIPS—SHIPMASTER—SHIPOWNERS.

VIADUCTS,
dangerous, liability of railway company for, 1018, 1066.

VICE,
in horses, proof of, 549.

VIS MAJOR. *See* ACT OF GOD.

VOID CONTRACTS,
at common law, 75—88.
by statute, 88—97, 103—120.
See ILLEGAL CONTRACTS.

VOID LIMITATION OF LIABILITY,
in deeds, 48.
by common carriers, 1035.

VOID MARRIAGES,
what constitute, 1319, 1320.

VOID SALES,
of realty, 520—526.
See SALE OF LANDS.
of goods, 572—578.
See SALE OF GOODS.
recovery of purchase-money on, of realty, 526.

VOIDABLE CONTRACTS. *See* ILLEGAL CONTRACTS.

VOLUNTARY CONVEYANCE,
defrauding creditors, illegality of, 87.

WAGERING POLICIES,
of marine assurance, 1109.
of life assurance, 1223.

WAGERS. *See* GAMING.

WAGES. *See* TRUCK ACT.
payment of, amount recoverable, 935.
deductions not allowed, 117, 835.
presumption of payment of, 936.
See PAYMENT.
summary remedy for recovery of, 936.
under Merchant Shipping Act, 936.
See MASTER AND SERVANT—WORK AND SERVICES.

WAIVER,
of performance of conditions precedent, 55, 145.
of demand of performance of contracts, 144.
of performance of contracts, release by, 171.
of proof of, and objections to, title to realty, 491, 492.
of forfeiture of lease, 713.
lessor's right of election, 713.
of notice to quit, 731.
of forfeiture of policy of life insurance, 1231.
of bills of exchange, 1283.

WAREHOUSEMEN,
contracts with, 310.
acceptance and receipt by, binding contract of sale, 537.
delivery by, 600.
stoppage *in transitu* of goods in hands of, 615.
safe keeping of goods intrusted to, to be kept, 864, 865.
railway companies acting as, with regard to passengers' luggage, 865, 1035.
lien of, 908.
goods in warehouse by carriers, 1050, 1051.
insurance by, against fire, 1220.
See WHARFINGERS.

WARNING,
and notice to leave, 931.
See MASTER AND SERVANT.

WARRANTY,
oral, when evidence of, is admissible, 65, 66.
by agent, 334, 554.
representations, not amounting to, 336.
express, definition of, 545.
pending negotiations, 545.
private representations prior to sale by auction, 545.
representations amounting to warranty, 548.
on sale of horse, 547.
unsoundness, what constitutes, 548.
manifest defects, proof of, 549.
vice, proof of, 549.
representations not amounting to warranty, 549.
opinion and belief, 550.
proof of warranties, 551.
that party relied on representation, 552.
construction of, 553, 554.
by agents, 554.
distinction between condition and warranty, 545, 554.
when condition to be treated as warranty, 554.
effect of breach by vendor, 557.
implied, on sale of goods, 559.
title, 559.
description, 562.
quality, 558, 564.
quantity, where nothing said as to quality or, 565.
where article sold for specific purpose, 566.

WARRANTY—*continued.*
implied—*continued.*
merchantable quality, 568.
on sale of provisions, 569.
that goods are seller's own make, 569.
genuineness of trade-mark, 569.
of trade description as to quantity or country, 570.
on sale by sample, 570.
on sale of marked goods, 574.
fraudulent breach of, 574.
remedy for breach, 629.
damages, measure of, 629, 630.
special damage, 631.
resale with warranty, 632.
cost of legal proceedings, 631, 632.
by letters of furnished houses, implied, 760.
implied, of title, by pledgor, 821.
of authority by agents, 968.
damages for breach of, 968.
representation in charter-party amounting to, 975.
in marine assurance, 1128, 1162, 1165, 1166.
See MARINE INSURANCE.
in fire assurance, 1214.
See FIRE INSURANCE.
in life assurance, 1226.
See LIFE INSURANCE.

WASTE,
liability of tenants and lessees for, extent of, 689.
permissive, liability of tenant for life or for years for, 689.
extent of liability, 690.
non-liability of tenant from year to year for, 692.
commissive, liability of tenant at will for, 689.
of tenant from year to year, 689.
of tenant for years, 691.
extent of liability, 691.
licence to commit, 704.
right of reversioners to enter lands to inspect, 704.
injuries to lands and tenements from fire, amounting to permissive, 704.
damages for, 705.
improvement by tenant no defence to action, 705.
breach of duty by neglect to re-build, 705.
measure of damages, 705.
breach of covenant not to commit waste, 706.
measure of damages, 706.
obstructing reversioner entering on land to inspect waste, 706.
injunction to restrain, 706.
acquiescence in commission of, effect of, 707.
See LANDLORD AND TENANT—FIXTURES.

WASTE LANDS,
inclosure of, by tenants, rights of landlord, 748.

WATER,
wilful breach of contract to supply, 936.
penalty for, 936.

WEEKLY LETTING,
what constitutes, 661.

WEEKLY WAGES,
payment of, presumption as to hiring, 920.

WEIGHTS AND MEASURES,
illegal, sale by, void, 108.

WHARFINGERS,
contracts with, by acceptance of delivery orders, 310.
acceptance of goods by, when acceptance of purchaser, 537.
delivery of goods by, holding for safe custody, 600.
goods in hands of, as agents for custody, 537, 615.
when *transitus* is determined, 615.
liability of, for loss of chattels, 865.
lien of, general, by custom of trade, 908.
extinguishment of, by abandonment of possession, 908, 909.
See DELIVERY ORDER—WAREHOUSEMEN.

WIDOW,
rights of, by survivorship, 432.
on contracts made during coverture, 432, 433.
liability of, on contracts made before marriage, 267.
See MARRIED WOMEN.

WIDOWER,
rights and liabilities of, by survivorship, 433.
See MARRIED WOMEN.

WIFE. *See* MARRIED WOMEN.

WILL,
tenancy at, definition of, 661.
creation of, 661.
who is a tenant at will, 662.
how determined, 662, 663.
service at, what constitutes, 921.

WINDING-UP,
of limited partnership, 372.
voluntary, effect of winding-up order in case of companies, 385.
power of liquidator to accept shares on sale of company's property, 386.
of insurance companies, 1235.

WORDS,
control figures, 48.
customary meaning of particular, 70.

WORK AND SERVICES,
sufficient consideration to support a promise, 5.
contracts for prohibited services, not enforceable, 114.
implied promise of employer to pay for, 452.
contract by employer to provide, 915.
deposit or simple bailment, 844.
See BAILMENT WITHOUT REWARD.
mandate or gratuitous commission, 860.
payment of expenses necessarily incurred by mandatary, 864.
See MANDATE.
warehousing of chattels for reward, 864.
See WAREHOUSEMEN.
negligent keeping of goods by warehousemen, &c., 865.
loss of chattels by wharfingers, 865.
of cattle by agisters, 866.
distinction between contracts for work and services and contracts of sale, 867.
executory and executed contracts for work, how perfected, 868.
work and services in preserving lost chattel, and restoring it to owner, 868.

WORK AND SERVICES—*continued.*
salvage services, 869—872.
See SALVAGE SERVICES.
services by trustees, 872.
promises of presents in return for services, 873.
honorary and gratuitous services, 873.
rights and liabilities of employer and workman, 874.
defeasible contracts for work and services, 874.
time of performance, 875.
stipulations as to, under Judicature Act, 875.
entire performance of contract for, condition precedent to payment, 876.
divisible and apportionable work, 876.
building contracts, 876—887.
See BUILDING CONTRACTS.
lien of workmen and artificers for, 887.
liabilities of task-workmen, 888.
implied obligation to do work well, 889.
skilled workmen, 889.
work rendered useless by negligence or incompetence of workmen, 889.
useless and unskilful professional services, 890.
negligence of solicitors, 890—895.
See SOLICITOR.
of barristers, 895.
of surveyors or valuers, 896.
of bankers, 896.
of public officers, 897.
of medical men, 897.
of arbitrators, 899.
wilful selection of unqualified persons, 898.
bailment of materials to be manufactured or repaired, 899.
theft by servants, 900.
distinction between robbery and theft, 900.
loss from negligence of servant of bailee, 901.
loss from negligence of bailor, 901.
concealment of dangerous nature of article bailed, 901.
deposit under special contract, 902.
lien of bailee, 902.
See LIEN.
transfer of bailment, 910.
right of action of joint owners, 913.
re-delivery of materials furnished by employers, 913.
contracts for performance of work, 913.
damages recoverable for breach of, 914.
prevention of performance, 914.
implied promises resulting from, 449—453.
stamp on contracts for, 1368.
See MANUFACTURE—MASTER AND SERVANT.

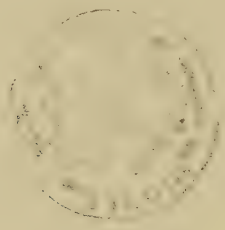
WORKMEN. *See* EMPLOYER.

WORKMEN'S COMPENSATION ACT, 1906,
recovery of compensation under, 928.

WRONGFUL DISMISSAL,
actions for, 933.
damages recoverable for, 934, 940.
measure of, 934, 940.
deductions allowed, 935.

YEAR,
authentication of promises not to be performed within, 34.
tenancy from year to, presumption of, 659.
half-yearly tenancy, what constitutes, 661.
waste by tenant from year to, 689, 692.
current year of tenancy, how calculated, 728.
yearly hiring of lodgings, no presumption of, 762.
yearly hirings of servants, when presumed, 918.

YOUNG PERSONS. *See* INFANT.



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